

Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search

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Eight years after the Lawrence Inquiry, the question of police powers to stop and search people in public places remains at the forefront of debate about police community relations. Police are empowered to stop and search citizens under a wide range of legislative acts and the power is employed daily across Britain. Far from laying the debate to rest, the Lawrence Inquiry prompted new research studies and fresh theories to explain the official statistics. We argue that the statistics show that the use of the powers against black people is disproportionate and that this is an indication of unlawful racial discrimination. If stop and search powers cannot be effectively regulated – and it seems that they cannot – then their continued use is unjustified and should be curtailed.

Nothing has been more damaging to the relationship between the police and the black community than the ill-judged use of stop and search powers. For young black men in particular, the humiliating experience of being repeatedly stopped and searched is a sad fact of life, in some parts of London at least. It is hardly surprising that those on the receiving end of this treatment should develop hostile attitudes towards the police. The right to walk the streets is a fundamental one, and one that is quite rightly jealously guarded.¹

INTRODUCTION

Police powers to stop and search individuals in public remain amongst the most contentious aspects of British policing. The issue was highlighted by both the Scarman² and Stephen Lawrence³ inquiries into particular policing incidents. It became particularly controversial at the turn of the millennium when prominent people of African Caribbean origin – including the late Bernie Grant MP, Lord Taylor of Warwick, Lord Herman Ouseley and the Most Revd and Rt Hon Dr John Sentamu Archbishop of York – disclosed their personal experiences of being unjustifiably stopped and searched. Following the Home Office *Action Plan*,⁴ published in response to the Lawrence Inquiry report, a number of new studies have been conducted to examine police use of the power. Far from laying the argument to rest, each successive report has fuelled further argument, with

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1 The late Bernie Grant MP, quoted in NACRO, *Policing Local Communities: The Tottenham Experiment* (London: NACRO, 2002) 3.

2 Lord Scarman, *The Brixton Disorders April 10–12 1981: Report of an Enquiry* (London: HMSO, 1981).

3 W. Macpherson, *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny* (London: Home Office, 1999).

4 Home Office, *Home Secretary's Action Plan* (London: Home Office, 1999).

the debate sharply divided between apologists and abolitionists. After a brief consideration of the legal basis for stop and search powers, this paper re-analyses the perennial question of whether the practice can be described as disproportionate and discriminatory in relation to ethnic minority communities. A thorough analysis of the research shows that despite some innovative arguments from the apologists, the disproportionate use of police powers cannot easily be explained away.

THE POWER TO STOP AND SEARCH

According to the Police and Criminal Evidence (PACE) Code of Practice for the exercise of statutory powers of stop/search, the primary purpose of the power is 'to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest'.⁵ The police are empowered to stop and search by many legislative instruments too numerous to detail in full here.⁶ The most frequently used powers are those under section 1 of the Police and Criminal Evidence Act 1984, section 23 of the Misuse of Drugs Act 1971, section 60 of the Criminal Justice and Public Order Act 1994, section 47 of the Firearms Act 1968 and sections 44(1) and (2) of the Terrorism Act 2000. Additionally, vehicles may be stopped under section 163 of the Road Traffic Act 1988 and searched under section 4 of the Police and Criminal Evidence Act 1984.

In relation to section 1 of the Police and Criminal Evidence Act 1984, section 23 Misuse of Drugs Act 1971 and section 47 Firearms Act 1968, police officers must have 'reasonable grounds to suspect' that a person is in possession of stolen or prohibited articles. Under section 43 of the Terrorism Act 2000, the requirement is a reasonable suspicion that the person is a terrorist. The PACE codes of practice states that while 'reasonable grounds for suspicion depend on the circumstances of each case',

[t]here must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind, or in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors alone without reliable or supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.⁷

... reasonable suspicion should normally be linked to accurate or current intelligence or information, such as information describing an article being carried, a

5 Home Office, *Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*, Code A (London: Home Office, 2005). (Hereafter, 'Pace Code A') at [1.4].

6 PACE Code A, Annex A.

7 PACE Code A at [2.2].

suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area.⁸

Stop/searches under section 60 of the Criminal Justice and Public Order Act 1994 differ from section 1 PACE searches in that they do not require suspicion in individual cases. These stop/searches can be authorised by a senior police officer (of the rank of Inspector or above) based upon

a reasonable belief that incidents involving serious violence may take place or that people are carrying dangerous instruments or offensive weapons within any locality in the police area.⁹

These powers were intended to prevent violent offences at sporting and other large-scale events and specifically, football matches.¹⁰

Under section 163 of the Road Traffic Act 1988 (RTA), a person driving a vehicle or cycle must stop when asked to do so by a constable in uniform. The use of this power has no minimum requirement of suspicion. Section 4 PACE authorises the police to search vehicles where there is reasonable suspicion that the vehicle is carrying a person who has committed, or is about to commit, an offence other than a road traffic offence. Vehicles can also be detained to search for witnesses or persons 'unlawfully at large'. Once a vehicle has been stopped, section 1 PACE powers of search on reasonable suspicion that there are stolen or prohibited articles in the vehicle come into play, as does the power to conduct a breath test on reasonable suspicion of excess blood alcohol levels. The combination of the section 163 RTA power, the section 4 PACE power (aimed at preventing the commission of crimes or escape from the scene of a crime), and the common law power of a police officer to stop a vehicle in order to prevent an imminent breach of the peace, gives the police the power to stop vehicles at random and without suspicion.

It is important to remember that the power to stop and search is an *investigative* power used for the purposes of crime detection or prevention in relation to an individual suspected of a specific offence at a specific time.¹¹ In practice however, police officers frequently use stop and search powers for other purposes such as 'gaining intelligence' on people who are 'known' to the police, to break up and move on groups of people, and for the purposes of 'social control' more generally.¹² Although there is no basis in law for the police to use the power to stop and search for these purposes, the practice is widespread.

Research evidence indicates that the concept of reasonable suspicion is interpreted widely by police officers in practice and that there are marked differences in interpretation within and between police forces. Studies show that 'reasonable

8 PACE Code A at [2.4].

9 PACE Code A at [2.1(b)].

10 P. Quinton, N. Bland, and J. Miller, *Police Stops, Decision-making and Practice. Police Research Series* (London: Home Office, Policing and Reducing Crime Unit, 2000) 11.

11 L. Lustgarten, 'The Future of Stop and Search' (2002) CLR 603.

12 M. Fitzgerald, *Report into Stop and Search* (London: Metropolitan Police Service, 1999). See also S. Choongh, 'Policing the Dross: A Social Disciplinary Model of Policing' (1998) 38 *British Journal of Criminology* 623–634.

suspicion' is frequently absent in many instances of the use of police stop/search powers that require it.¹³ Such stops damage the relationship between police and community, and undermine the legitimacy of, and respect for, the police.¹⁴ Many stop/searches are based – in direct contradiction to the PACE code of practice – on generalisations and stereotypes particularly where levels of discretion are highest.¹⁵

In our view searches based on stereotype rather than suspicion are unlawful.¹⁶ As Lustgarten argues, 'a very large number of searches do not satisfy the precondition of "reasonable suspicion" and are therefore illegal under PACE.' Does this mean that the police are acting illegally in such circumstances? PACE gives the police powers to stop and search, but does not criminalise actions taken without those powers (ie a stop *without* reasonable suspicion). Therefore, while a person who refuses to submit to a police search commits a criminal offence,¹⁷ the legislation does not penalise police who act without lawful basis. Such unlawful stops by the police may give rise to liability under tort or common law. Stone, for example, states that if 'a police officer steps outside the provisions of the Act in carrying out a search, this may well lead to a charge of assault'.¹⁸ A person unlawfully searched may also seek remedy under the Human Rights Act 1998 for an unjustifiable breach of their rights to liberty, respect for private life or to be free from discrimination.¹⁹ However, the absence of a clear statutory penalty for unlawful stops and searches allows the police discretion to act without adequate accountability.

Of course, a police officer, like a private citizen, may strike up a conversation with whomever he or she chooses. PACE codes of practice note that an officer should be able to 'speak to or question a person in the ordinary course of the officer's duty without detaining the person or exercising any element of compulsion'.²⁰ A police officer may also *request* a person in a public place to 'account for themselves' (ie their actions, behaviour, presence in an area or possession of

13 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); D. Dixon, *Law in Policing* (Oxford: Oxford University Press, 1997); Quinton *et al*, n 10 above; Lustgarten, n 11 above.

14 On this point we concur with Lustgarten, *ibid*. The negative impact of the inappropriate use of stop and search powers is acknowledged in Home Office/Association of Chief Police Officers, *Stop and Search Manual* (London: Home Office, 2005). See also R. Delsol and M. Shiner, 'Regulating stop and search: a challenge for police and community relations in England and Wales' (2006) 14 *Critical Criminology* 241–263.

15 Quinton *et al*, n 10 above, 16.

16 Lustgarten, n 11 above, 616.

17 For example, obstruction of a police officer in the course of his duty is an offence punishable by one month's imprisonment or a fine of £1,000 under Police Act 1996, s 89(2).

18 R. Stone, *Textbook on Civil Liberties and Human Rights* (Oxford: Oxford University Press, 2006). A person may recover substantial damages for injury to his personal dignity from a battery which does him no physical harm *Stenant v Stonehouse* (1926) 2 DLR 683.

19 *ibid*; see also R. Clayton, H. Tomlinson, E. Buckett and A. Davies, *Civil Actions Against the Police* (London: Sweet & Maxwell 2005). As Sedley LJ said in *Chief Constable of Thames Valley Police v Hepburn* [2002] EWCA Civ 1841 at [14], '[i]t is a bedrock of our liberties that a citizen's freedom of the person and freedom of movement is inviolable except where the law unequivocally gives the state power to restrict . . . Nobody is required in this country to satisfy a police officer that he or she is not committing a criminal offence'. *R v Williams (Gladstone)* (1983) 78 Cr App Rep 276, 279.

20 Home Office/Association of Chief Police Officers, n 14 above, Notes for Guidance at [1].

anything).²¹ The ACPO/Home Office *Stop and Search Manual* states that such inquiries should be done with the cooperation of the person concerned and notes that citizens have a 'civic rather than a legal duty' to help police officers prevent crime.²² Without a prior reasonable suspicion that a person may be in possession of prohibited articles, a police officer cannot require a person to answer questions, nor to account for themselves, nor detain a person for the purposes of these inquiries, nor to subject them to a search. The *Manual* states that 'in the absence of a power to arrest, or to detain in order to search, the person is free to leave at will and cannot be compelled to remain with the officer'.²³ This is obviously problematic: the act by a police officer of stopping a member of the public for the purposes of a search or to ask questions or check their credentials does amount to detention, however temporary. There can scarcely be any meaning to the word 'stop' if it does not indicate an attempt to detain someone from continuing his or her free passage on foot or in a vehicle. Although PACE makes a distinction between the power of arrest and that to 'detain a person or vehicle for the purpose of such a search',²⁴ in our opinion both amount to a deprivation of liberty consistent with the notion of a detention.²⁵

In many cases, acquiescence to being stopped by the police to be asked questions could be described as 'voluntary' in which case no power of compulsion is required. This argument is harder to sustain in relation to the conduct of a search since it is unlikely that a person confronted by a uniformed constable requesting permission to conduct a search of their person, bag or vehicle can, if they comply, truly be said to have volunteered.²⁶ In the event that a police officer attempts to compel a person to remain with the officer or impede the citizen's freedom to exit from the encounter, the detention is unlawful.²⁷ This presents difficulties in

21 See PACE Code A, [4.11]–[4.15] on recording such encounters.

22 Home Office/Association of Chief Police Officers, n 14 above, Notes for Guidance at [1]. This guidance draws on *Rice v Connolly* [1966] QB 414, 419: 'though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.'

23 Home Office/Association of Chief Police Officers, n 14 above.

24 Police And Criminal Evidence Act, s 1(2)(b) and s 2(1).

25 This is more controversial than it seems. In *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, it was concluded that detention for the purposes of a search that lasted 20 minutes, 'involve[d] a temporary restriction of movement and not anything which could sensibly be called a deprivation of liberty' – Bingham LJ at [22]. At [25] Lord Bingham declared that '[he did] not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting. There is no deprivation of liberty.'

26 PACE Code A at [1.5] states that '[a]n officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and provisions of this Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent as a condition of entry.' The current version of PACE Code A, in force since 31 December 2005, prohibits the police practice of non-recording 'voluntary' searches.

27 On the other hand, PACE empowers police to use reasonable force in the exercise of any powers conferred by the Act (s 117). The Criminal Justice and Public Order Act, s 8, is much more

practice as unwillingness to converse with the police or to answer preliminary questions may be interpreted by the constable as evidence of guilt and would almost certainly invite restraint or even arrest.²⁸

For many years, the British police service has been concerned about discrimination and keen to meet their duty to provide a fair service. Both the Scarman and Lawrence Inquiries brought the issues of racism, fairness and justice to the surface and each led to a major programme of reform. More recently, the Race Relations (Amendment) Act 2000 brought the police service within the ambit of UK anti-discrimination legislation for the first time. Under the Act, it is unlawful for a police officer to discriminate in carrying out any of his or her functions including conducting stop and searches or arresting suspects. If a person believes they have been stopped and searched on the grounds of their race or ethnicity or that they have been treated less favourably than someone else would have been during the encounter, they can complain of racial discrimination. Chief Constables are liable for all acts of discrimination by officers under their command unless they can show that they have taken all reasonable steps to prevent this.

Two concluding observations may be made about the legislative framework. First, the plethora of powers available to the police allows them to use intrusion and coercive force that infringes on the rights of citizens such as privacy, personal liberty and freedom of association in a variety of situations in ways that would be 'exceptional, exceptionable or downright illegal' if undertaken by anyone else.²⁹ Of course, the justification for these powers is that they are used for good ends (specifically to prevent and detect crime) and, to this extent, they are legitimate.³⁰ It is self evident that their use *in practice* must be consistent with this justification in order for them to be legitimate. Secondly, these powers are not adequately regulated by the (sometimes absent, always vague) requirement of 'reasonable suspicion'. It is therefore necessary to examine how the powers are used in practice.

RESEARCH AND STATISTICS

A review of the available research and statistical information on police stop/search powers provides some food for thought. Section 95 of the Criminal Justice Act 1991 (CJA) requires the Home Secretary to publish information to facilitate the performance of persons engaged in the administration of justice of their duty to avoid discrimination. Since April 1996, the Home Office has required police forces to monitor the ethnic origin of suspects and offenders and this has led to the

draconian: 'A person who fails to stop or (as the case may be) to stop the vehicle when required to do so by a constable in the exercise of his powers under this section shall be liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale or both.'

28 Whilst, in practice, a failure to answer questions in this situation might lead police to be suspicious, it does not in law convert an unreasonable suspicion into a reasonable one. A. Marks, 'Drug Detection Dogs and the Growth of Olfactory Surveillance: Beyond the Rule of Law?' (2007) 4 *Surveillance and Society* 257–71.

29 P. A. J. Waddington, *Policing Citizens* (London: UCL Press, 2000) 156.

30 J. Kleinig, *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996).

annual publication of reports on 'Statistics on race and the criminal justice system'.³¹ Unless otherwise stated, the statistics referred to herein are drawn from these publications.

Statistics collated by the Home Office under section 95 CJA *exclude* stops of vehicles under section 163 RTA and therefore no statistics are available for the Metropolitan Police Area, or for England and Wales, on either the extent of RTA stops, or the ethnicity of drivers stopped. This is an unfortunate lacuna; as the Lawrence Inquiry noted:

[t]he minority communities' views and perceptions are formed by their experiences of all 'stops' by the police. They do not perceive any difference between a 'stop' under the Police and Criminal Evidence Act from one under the Road Traffic Act whilst driving a vehicle.³²

The Inquiry reached the view that it is essential to obtain a true picture of the interactions between the police and minority ethnic communities in this context, and recommended that all 'stops' should be recorded. The British Crime Survey estimates that approximately 8.5 million car stops and 2.6 million foot stops are carried out annually in England and Wales.³³

Although statistics on vehicle stops carried out under section 163 RTA are not routinely collected, it is nonetheless possible to draw inferences from available research and statistics on the following grounds: (a) Searches arising from section 163 RTA stops are regulated by section 1 PACE, and it may therefore be assumed that these are recorded within the general statistics on section 1 PACE stop/searches, except where these are judged to have been 'by consent'; (b) Evidence produced by the British Crime Survey³⁴ sheds light on the experience of vehicle stop/searches from the perspective of the person stopped and therefore includes both PACE and RTA stops. If ethnic patterns in the 'consumer's experience' of stops reflect section 95 data, then it can reasonably be inferred that unrecorded RTA stops reflect recorded PACE stop/searches; (c) since stop/searches with a 'reasonable suspicion' requirement (such as section 1 PACE) and those that can be conducted without suspicion (such as section 60 CJPOA) follow a similar pattern in terms of ethnic disproportionality, it seems likely that section 163 RTA stops will follow the same pattern as other stops. The data collected under section 95 1991 CJA for the year 2004–5 for England and Wales shows that of the approximately 840,000 people (rounded to the nearest thousand) for whom a record was made of

31 Home Office, *Race and the Criminal Justice System 1995: a publication under section 95 of the Criminal Justice Act 1991* (London: Home Office Research and Statistics Directorate, 1996). Subsequent reports have the same or title or similar.

32 Macpherson, n 3 above.

33 A. Clancy, M. Hough, R. Aust and C. Kershaw, *Crime, Policing and Justice: the Experience of Ethnic Minorities Findings from the 2000 British Crime Survey. Home Office Research Study 223* (London: Home Office, 2001) 68.

34 W. G. Skogan, *The Police and the Public in England and Wales: A British Crime Survey Report. Home Office Research Study 117* (London: HMSO, 1990); W. G. Skogan, *Contacts Between Police and Public: Findings from the 1992 British Crime Survey. Home Office Research Study 134* (London: HMSO, 1994); T. Bucke, *Ethnicity and Contacts with the Police: Latest Findings from the British Crime Survey. Home Office Research Findings No 59* (London: Home Office, 1997); Clancy *et al*, n 33 above.

a 'stop and search', 628,000 were 'white', 118,000 were 'black', 60,000 were 'Asian', 12,000 were of 'other' ethnic origin. Section 95 data for previous years show a broadly similar pattern.

There are a number of conceptual and methodological problems relating to the collection and collation of these figures. Until 1 April 2005, the ethnic origin of the person stopped was only recorded by the police officer concerned.³⁵ The ascription of an individual's ethnic origin is a delicate and complex matter and prone to inaccurate or false attribution.³⁶ It is safest to describe these statistics as indicating the 'ethnic appearance' of suspects, *as ascribed* by a police officer. Until recently, stop/searches conducted with the 'consent' of the suspected person have not required formal police powers to be invoked and therefore no record is required under PACE and frequently no record was made.³⁷ It is possible that there are ethnic differences in the likelihood that a stop will be recorded. Specifically, it is possible that stop/searches involving black people may be more likely to be recorded than those involving white people due to police officers' perceived need to 'cover their backs' or because stop/searches involving black people are more often confrontational and less likely to be 'voluntary'.³⁸ Where formal police powers to stop/search are invoked, police recording practices are not uniform and vary widely geographically (from force to force and between areas within forces), and temporally.³⁹ Only a minority of stops/searches are recorded. In a Home Office observational study of 138 encounters 'that should have been recorded by the police' a record was made in 27 per cent of encounters.⁴⁰ Pressures to record stops more accurately following Lawrence Inquiry recommendation 61, may have had an impact on improved record keeping.⁴¹ Despite these methodological problems, police records of stop and search powers can be taken as a reasonably valid and reliable *indicator* of the extent of their use and variations between different ethnic groups and in changes in the extent of their use over time. Assuming this is the case, it is possible to examine whether the use of the powers against different ethnic groups can be regarded as proportionate or disproportionate.

DISPROPORTIONATE USE OF STOP AND SEARCH POWERS

The common usage of the term 'disproportionate' refers to the extent or degree to which something appears to be inappropriate or 'out of proportion' to something

35 After April 1 2005, the reporting officer must make a note of the person's self-defined ethnic origin (see Home Office/Association of Chief Police Officers, n 14 above), as well as their own perception of the person's ethnic background using the PNC/Phoenix System.

36 M. Banton, *The International Politics of Race* (London: Polity, 2002).

37 M. FitzGerald and R. Sibbitt, *Ethnic Monitoring in Police Forces: a Beginning. Home Office Research Study 173* (London: Home Office Research and Statistics Directorate, 1997); FitzGerald, n 12 above.

38 FitzGerald and Sibbitt, n 37 above, 62–63.

39 *ibid* at vii; N. Bland, J. Miller and P. Quinton, *Upping the PACE? An evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches. Police Research Series Paper 128* (London: Home Office, 2000).

40 Bland *et al*, n 39 above, vii.

41 FitzGerald and Sibbitt, n 37 above.

else. Specifically in relation to the police power to stop and search, the term has been used to describe a disparity, or imbalance in the application of the power to different ethnic groups in comparison with a neutral criterion.

The immediate problem encountered in attempting to establish the extent of disproportionality, if any, stems from deciding on the appropriate criterion against which to compare stop and search statistics. In other words, what is the appropriate comparator population? In assessing the contention that the use of police stop/search powers unlawfully discriminates against black people (the example which has been most contentious and on which we focus in this paper), the question becomes: discriminated against as compared with whom or what? Studies to address this question have considered the use of four criteria: (i) resident populations, (ii) 'available' populations, (iii) crime statistics and (iv) stop and search 'hit rates'. We examine each of these in turn.

The resident population

Using the 'general population' or 'resident population' of a geographical area enables the calculation of the number of stops and searches conducted per capita, or per 1,000 head of population within each ethnic group. In England and Wales for 2005–6 the figures were 15 for white people, 90 for black people, 27 for Asian people and 23 for people of other ethnic origins. These figures show that black people in England and Wales were six times as likely to be stopped and searched by the police in comparison with their white counterparts. The figures on the use of stop/search powers are broadly consistent with survey research in this area. Surveys have shown markedly higher per capita rates of stop and search of black people, especially young black men.⁴² A recent sweep of the British Crime Survey found that that 39 per cent of black males aged 16–29 were stopped in the previous year in comparison with 25 per cent of white males in the same age group.⁴³

The British Crime Survey has also found wide ethnic differences in the extent to which a reason was given for vehicle stops and whether the reasons given were thought to be acceptable. Of those stopped in a car, 93 per cent of white respondents stopped were given a reason for the stop, compared with 86 per cent of black respondents.⁴⁴ While 80 per cent of white respondents felt that the reasons given for the stop were adequate, this was true of 61 per cent of black respondents.⁴⁵ This evidence is consistent with earlier research than indicated that stop/searches involving black people were more likely to be speculative.⁴⁶ The British Crime Survey found wide variation in the extent of *multiple stops*. Of those stopped in a car, 77 per cent of white respondents were stopped only once com-

42 C. F. Willis, *The Use, Effectiveness and Impact of Police Stop and Search Powers. Home Office Research and Planning Unit Paper 15* (London: Home Office, 1983); D. J. Smith and J. Gray, *Police and People in London* (London: Gower/Policy Studies Institute, 1985); Skogan n 34 above; Bucke n 34 above; Clancy *et al*, n 33 above, 59.

43 Clancy *et al*, *ibid* 59.

44 *ibid*.

45 *ibid*.

46 C. Norris N. Fielding C. Kemp and J. Fielding, 'Black and Blue: an Analysis of the Influence of Race on Being Stopped by the Police' (1992) 43 *British Journal of Sociology* 207–223.

pared with 53 per cent of black respondents.⁴⁷ Black people were the group most likely to be stopped on multiple occasions with 14 per cent stopped five or more times compared with four per cent of white respondents.⁴⁸

These per capita measures can be taken as a reasonable estimate of different ethnic groups' overall experience of the use of the power to stop/search. As a Home Office study put it, 'when they are based on a wide enough geographical area, they [statistics based on resident populations] still give us an important indication of how often members of different ethnic communities are actually stopped or searched within that area'.⁴⁹

Because statistics on stop and search under section 163 RTA are not published, per capita rates cannot be calculated specifically for this power. It is reasonable to infer, based on data for other stop/search powers and survey evidence, that section 163 RTA stops follow a similar pattern of per capita disparity.

This measure can be criticised on two grounds, however. First, estimates of the number of people of different ethnic origin within the general population may be inaccurate. Both Labour Force Survey data and 2001 Census data (used by the Home Office to calculate per capita rates) are known to have some inaccuracies and under-estimate the size of some ethnic minority populations. If the resident population figures used as the denominator to calculate per capita stop and search rates underestimate the size of the ethnic minority population, then these rates will exaggerate the extent of ethnic disproportionality. This problem does not affect survey data – such as the British Crime Survey – which are based on the experiences of randomly sampled respondents. Secondly, it can be objected that resident populations do not take account of (a) the time spent in the streets and other public places when they could be described as 'available' to be stopped, nor (b) any empirical evidence concerning the extent to which different ethnic groups are involved in crime. We examine each of these comparators in turn.

The 'available population'

A second criterion against which to compare numbers of stop and searches is the population among different ethnic groups 'available' to be stopped.⁵⁰ The advantage of this measure is that it recognises that some demographic groups – distinguished on the basis of age, ethnic origin, gender, etc – are more likely than others to spend their time at home, at work or are otherwise in private space where they are 'unavailable' to be stopped by the police, while others, conversely, are more likely to be 'available' by virtue of their demographic characteristics and lifestyle. The Home Office research study exploring this comparator concluded that resident populations give a poor indication of the populations available to be searched. Within 'available populations', white people tend to be stopped and searched at a higher rate, Asian people tend to be under-represented and black

47 Clancy *et al*, n 33 above.

48 *ibid* 60.

49 MVA and J. Miller, *Profiling Populations Available for Stops and Searches. Police Research Series Paper 131* (London: Home Office, 2000) 84.

50 FitzGerald and Sibbitt, n 37 above; HM Inspectorate of Constabulary, *Winning the Race: Embracing Diversity* (London: HMIC, 2000); MVA and Miller, *ibid*.

people are sometimes under- and sometimes over-represented.⁵¹ Similarly mixed results have been produced more recently by Waddington *et al* in Reading and Slough⁵² and in the City of London by Hallsworth *et al*.⁵³

The argument is best illustrated by looking at a specific location such as an outer London borough with a low ethnic minority population, but with a day-time 'street population' of people drawn from more ethnically diverse neighbouring boroughs by shopping centres, schools and colleges. Police commanders have long argued that the proportion of the population stopped and searched in such locations should not be compared with the resident population but with the population 'out and about' in the area. When this argument is applied in the most local context, it has some force. As Waddington *et al* put it

[t]he explanation for why the proportions of racial and ethnic minorities appear high in stop and search figures is because they are compared to the resident population. However, there is no a priori reason why the resident population will be reflected in the 'available population', and research evidence presented here, supporting the Home Office research, is that the 'available population' has a very different racial profile.⁵⁴

Although 'some have interpreted research on "availability" to mean that the disproportionate effect of police activities is no longer a problem',⁵⁵ there are problems with this approach. First, 'availability', however defined, is not a neutral criterion against which to compare stop/search rates. The extent to which a social group is 'available' to be stop/searched depends on such structural factors as unemployment, exclusion from school, homelessness, employment in occupations that involve evening and night work, all of which are known to be associated with ethnic origin.⁵⁶ While these factors are beyond the control of the police, it remains the case that the apparently neutral criterion of 'availability' is, in practice, biased against some ethnic groups.⁵⁷ As Waddington *et al* put it, 'even if police proportionately select from amongst this "available population", it remains the case that racial minorities may be more exposed to stop and search'.⁵⁸ Secondly, in studies exploring this issue, a person is considered 'available' not in relation to the time spent in public space in general (which, as argued above, would not be without problems), but in relation to time spent *in the times and places where stop and*

51 MVA and Miller, *ibid*.

52 P. A. J. Waddington K. Stenson and D. Don, 'In Proportion: Race and Police Stop and Search' (2004) 44 *British Journal of Criminology* 889.

53 S. Hallsworth and M. Maguire, *Assessing the Impact of the City of London Police Exercise of Stop and Search Report for City of London Police* (unpublished, 2004).

54 Waddington *et al*, n 52 above.

55 Home Office/Association of Chief Police Officers, n 14 above, 33.

56 For example, interviews conducted by Stone and Pettigrew found that some of the black and Asian people in their study tended to work in jobs with unsociable hours, such as in fast food outlets, mini-cab drivers, shift work at factories and postal workers. V. Stone and N. Pettigrew, *The Views of the Public on Stops and Searches. Police Research Series Paper 129* (London: Home Office, 2000).

57 L. Bridges, 'Race, Law and the State' (2001) 42 *Race and Class* 61–73.

58 Waddington *et al*, n 52 above, 910.

*search powers are most extensively used.*⁵⁹ Specifically, the Home Office research was targeted at 'stop zones', or those areas where 70–80 per cent of police stop and searches occur. Therefore, established police practice sets the parameters of 'availability' and is self-referential and self-reinforcing. As Home Office researchers put it, 'because people can only be available if they are in places where and when police carry out stops and searches, police decisions about where and when to target stops and searches will also structure available population characteristics'.⁶⁰ As many of the places in which police stop and search powers are concentrated are those with large ethnic minority populations (or where they socialise), those same populations are more likely to be defined as 'available'. In other words, those people who do not live in, or travel through a 'stop zone' are judged to be 'unavailable' for stopping. This problem thus fundamentally undermines the neutrality of the concept of 'available populations' as a criterion against which to compare the extent of police powers.

This raises the question of why specific areas are the focus for particularly extensive use of police stop/search powers. In particular, can the locations in which stop and search is used most frequently can be justified by the differing levels of crime within these places? The only study to examine this to date is that of MVA and Miller in the wake of the Lawrence Inquiry.⁶¹ Based on an analysis from Cheltenham district of Bristol and central Leicester, they found that there was 'a fair degree of consistency between the patterns of crime in general and patterns of both stops and searches',⁶² but 'not a perfect fit'.⁶³ There were some disparities: in some places stop/searches were either higher or lower than expected from recorded crime levels. Critically for the present argument, 'there was evidence that stops and searches were targeted at areas where there were disproportionate numbers of those from minority ethnic backgrounds, yet where the local crime rates did not appear [to] justify this attention'.⁶⁴

Controlling for the factors that place an individual at greater 'risk' of being stopped or being 'available' to be stopped can be achieved using survey data by employing a statistical technique known as 'logistic regression'. In the British Crime Survey, for example, a large sample of interviewees are asked whether they have been stopped by the police in the previous year as well as a range of demographic, socio-economic and lifestyle questions. This enables researchers to examine the proportion of the population stopped by the police while taking other factors into account. The results of this analysis for British Crime Survey data showed that the likelihood of being stopped in a vehicle was still higher for black respondents even once age, sex, academic qualifications, owning a car, unemployment, occupation, earnings, living in an inner city, being a student, living in London, and going out after dark more than three times a week were accounted for.⁶⁵ The persistence of racial disproportionality once these factors have been controlled for suggests that based on a national random sample, being black

59 MVA and Miller 2000, n 49 above, emphasis added.

60 *ibid.*

61 *ibid.*

62 *ibid* 63.

63 *ibid* 86.

64 *ibid* 87.

65 Clancy *et al*, n 33 above, 66.

increases the likelihood that a person will be stopped regardless of the demographic and lifestyle variables that make them 'available' to be stopped.

Crime rates

A third criterion that can be used for comparison with police stop and search statistics is the extent of criminal offending among specific ethnic groups. This accepts that offending may not be uniformly distributed across the population in terms of age, gender and ethnic origin. Assuming that any differences in patterns of crime are reflected in differences in patterns of suspicious behaviour, it might then be argued that any differences in patterns of stop and search are simply a product of differences in involvement in crime. Seen from this point of view, crime statistics could be seen as a 'shield' with which to defend the disproportionate use of stop search. Crime statistics have also been used as a 'sword'; that is it has been argued that in attempting to be efficient, police officers might select suspects from within those groups most likely to be involved in crime. A full analysis of attempts to estimate ethnic differences in involvement in crime is beyond the scope of this paper.⁶⁶ What follows is a brief discussion of most commonly used measures: (a) arrest rates, (b) victims' descriptions of offenders and (c) self-reported offending surveys.

Arrest rates

Police officers frequently cite patterns of arrests as evidence that black people are more likely to be involved in crime than their white counterparts and use this as both an explanation for and justification of the targeting of stop and search. In England and Wales, 85 per cent of arrests for criminal offences are white, six per cent black and three per cent per cent Asian.⁶⁷ Black people are therefore about three times as likely to be arrested as would be expected from their numbers in the general population. It is also the case that black people are much more likely to be arrested for specific kinds of offences including street robbery and drugs offences. The strengths of arrest data, in comparison to other measures of criminal involvement, are that the arresting officer must have grounds for the arrest sufficient to convince a supervisor that they acted correctly in taking the person into custody and the fact that most arrests (about 90 per cent) follow the reporting of an offence by a member of the public.⁶⁸ On the other hand, there are several problems in using arrest data to make ethnic comparisons in involvement in crime.

First, Home Office statistics suggest that an offender is identified in fewer than six per cent of all offences committed.⁶⁹ We cannot, therefore, rely on arrest

66 This question continues to be the subject of extensive debate (see B. Bowling and C. Phillips, *Racism, Crime and Justice* (London: Longman, 2002); C. Phillips and B. Bowling 'Racism, ethnicity, crime and criminal justice' in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 4th ed, 2007); House of Commons Home Affairs Committee, *Young Black People and the Criminal Justice System. Second Report of Session 2006–07. Volume 1* (London: TSO, 2007).

67 Clancy *et al*, n 33 above.

68 Home Office, *Digest of Criminal Justice Statistics, Digest 4* (London: Home Office, 1999).

69 *ibid* 29.

statistics to inform us about the overwhelming majority of crimes where no suspect is identified. Second, the fact that someone has been arrested does not mean that they are guilty of an offence. About 20 per cent of arrestees have no further action taken against them by the police⁷⁰ and after accounting for cases disposed of in other ways (such as cautions), terminations by the Crown Prosecution Service (CPS) and acquittals, about 40 per cent of arrestees will be found guilty at court.⁷¹ This problem is germane to making comparisons among different ethnic groups because cases involving black and Asian suspects are more likely to be terminated by the CPS.⁷² Third, the power to arrest (and *not to arrest*), like the power to stop and search, depends on police officers' discretion and the nature of the encounter.⁷³ The decision to arrest relies on a police officer's 'reasonable suspicion' that a person has committed, or is about to commit, an offence and – as with stop/search – this judgement may be based on personal factors as much as objective evidence. This problem is germane to the attempt to use arrest rates as a basis for ethnic comparisons of stop and search rates. Because the proportion of all arrests that arise from the use of stop and search powers for black people is about twice that for the white majority population,⁷⁴ arrest rates may significantly exaggerate the extent to which black people are involved in crime.

Victims' reports

An alternative to using arrest statistics is to use victims' descriptions of the offenders involved in criminal offences. This has the advantage of being unlikely to be affected by bias in the use of police discretion, since the information comes directly from the person who has experienced the offence. British Crime Survey indicated that 44 per cent of victims were able to say something about the offender who was involved in offences against them. Among these, 85 per cent of offenders were said by victims to be 'white', 5 per cent 'black', 3 per cent 'Asian' and 4 per cent 'mixed'.⁷⁵ The main disadvantage of this measure is that in only a small minority of offences does the victim have any information about who was involved. Specifically, it is principally 'contact' offences such as assault and personal thefts where the victim sees who was involved. Many fewer people have any idea who was involved in the most common offences such as vehicle crime and burglary. Therefore, in the vast majority of offences no reliable information is available from victims.

Self-reported offending surveys

Home Office researchers have argued that if the use of stop and search powers is to be compared against the involvement of different ethnic groups in crime, 'this

⁷⁰ C. Phillips and D. Brown, *Entry into the Criminal Justice System: a Survey of Police Arrests and Their Outcomes. Home Office Research Study 185* (London: Home Office, 1998) 173.

⁷¹ *ibid* 173.

⁷² *ibid* 148.

⁷³ Lustgarten, n 11 above.

⁷⁴ Home Office, n 68 above, 23 (Table 5.3).

⁷⁵ Clancy *et al*, n 33 above.

would need to be based on self-reported crime as official statistics are likely to reflect the working practices of officers.⁷⁶ Self-report studies involve asking a sample of respondents whether in the past year they have committed any from a list of criminal offences. These studies have shown consistently that rates of involvement in offending are similar among white and black respondents and significantly lower among Asian respondents.⁷⁷ Using the same methodology, self-reported drug use data from five Home Office studies conducted during the 1990s and 2000s all found that rates of drug use are highest among white respondents (particularly among social groups ABC1) followed closely by black respondents and lowest among Asian respondents.⁷⁸ The main disadvantage of self-report studies is that they are only as reliable as the honesty of the people interviewed.⁷⁹ Although there is no evidence of ethnic differences in the validity of self-report studies in the UK, the method is open to the charge that willingness to admit involvement in crime is lower among minority communities.

Pulling the foregoing discussion on crime rates together, the empirical problem with using a measure of criminal involvement as a benchmark against which to compare stop and search rates statistics relates to the validity and reliability of established estimates of criminal involvement among different ethnic groups. While it is perhaps understandable that police officers might point to local patterns of arrests, victims' descriptions and other forms of 'intelligence' as justification for the pattern of stop/search, there exists no robust measure of general 'crime rates' that can be used for the purposes of comparison. The generalised belief that black people are more likely to be involved in crime and even the evidence that they are more likely to be arrested for certain specific offences provides no shield against the charge of discrimination.

The conceptual problem arises from what is sometimes known as 'statistical discrimination'.⁸⁰ Statistical discrimination occurs when recorded crime statistics are used, in themselves, as a basis for decisions about whom to stop and search. According to PACE Codes of Practice, stop and search should not be based on generalisation or stereotypes about which groups are most likely to be involved in crime, but rather on objective information relating to the specific individual suspected of involvement in a specific offence at a specific time.⁸¹ Using ethnic differences in (for example) arrest rates might, therefore, encourage police officers to target stop and search powers on the basis of generalisations based on ethnic origin, rather than objective evidence of criminal involvement in a specific case. This would amount to what is referred to (originally in the US but increasingly in

⁷⁶ Quinton *et al.*, n 10 above, 36.

⁷⁷ J. Graham and B. Bowling, *Young People and Crime: Home Office Research. Study 145* (London: Home Office, 1995); C. Flood Page, S. Campbell, V. Harrington, and J. Miller, *Youth Crime: Findings from the 1998/9 Youth Lifestyles Survey. Home Office Research Study 209* (London: Home Office, 2000); C. Sharp, and T. Budd, *Minority ethnic groups and crime: the findings from the Offending, Crime and Justice Survey 2003. Home Office Online Report 33/05* (London: Home Office, 2005); D. Armstrong, J. Hine, S. Hacking, R. Armaos, R. Jones, N. Klessinger, A. France, *Children, risk and crime: the On Track Youth Lifestyles Surveys Home Office Research Study 278* (London: Home Office, 2005).

⁷⁸ Bowling and Phillips, n 66 above, 100–101.

⁷⁹ Bowling and Phillips, *ibid* 101 for a full discussion of the strengths and weaknesses of these studies.

⁸⁰ R. Reiner, *The Politics of the Police* (Oxford: Oxford University Press, 3rd ed, 2000).

⁸¹ Lustgarten, n 11 above.

the UK) as 'racial profiling', in which stop and search is used either explicitly or implicitly as a 'sword' to target specific groups on the basis of patterns of arrests for particular types of crime.⁸²

Stop and search 'hit rates'

A fourth measure of disproportionality is based on analysis of the proportion of stop/searches that result in the arrest of a suspected person, frequently referred to as the stop/search 'hit rate'. It can be argued that if people from ethnic minorities are unfairly targeted, then we would expect the 'hit rate' to be lower for black and Asian people searched in comparison with white people. The percentage of searches resulting in an arrest for England and Wales show that the 'hit rate' for black and white populations is identical with 11 per cent of 'stop searches' for each.⁸³ From these data, we might infer that since the 'product' of the search – an arrest – is the same for each group that the suspicion is therefore equally well-founded and that the charge of discrimination can be rejected.⁸⁴

However, using stop and search 'hit rates' as a means to establish proportionality is problematic for a number of reasons. First, arrests for a criminal offence do not provide conclusive evidence of criminal involvement and frequently result in no further action by the police. The power to arrest, like stop and search is based on 'reasonable suspicion', involves a significant degree of discretion by police officers and may also be discriminatory. Second, there is evidence that black suspects arrested following a stop/search are less likely to be charged or cautioned for an offence and more likely to result in no further action.⁸⁵ While there are a number of possible explanations for this observation, it raises the possibility that arrests of black people are based on weaker evidence.⁸⁶ Third, there is wide variation in what constitutes a stop/search. Not all PACE and RTA stops involve a search at all and there is evidence that this varies according to the ethnic origin of the suspected person. For example, the British Crime Survey showed that while nine per cent of traffic stops involving white people involved a search, this was true of 34 per cent of those involving black people.⁸⁷ While some searches involve a cursory examination of the suspected person's outer clothing, others involve the detention of suspects in a police vehicle or other place out of public view where the suspect can be asked to strip to their underclothing. Whether or not a suspect is searched, and how thoroughly that search is conducted, will make a significant

82 A useful comparison between the US and UK can be found in R. Delsol, *Institutional Racism, the Police and Stop and Search* (University of Warwick: unpublished PhD thesis, 2006).

83 Home Office Home Office, *Race and the Criminal Justice System 2005: a publication under section 95 of the Criminal Justice Act 1991* (London: Home Office Research and Statistics Directorate, 2006) Table 4.4.30.

84 There are no statistics relating to the 'hit rate' of RTA stops. However, it seems reasonable to assume that the number of arrests arising from RTA stops will be smaller than PACE stops (given that the former have no 'reasonable suspicion' requirement).

85 Phillips and Brown, n 70 above, 187.

86 Phillips and Brown, *ibid*; Gus John Partnership, *Race for Justice: A Review of CPS Decision Making for Possible Racial Bias at Each Stage of the Prosecution Process* (London: Gus John Partnership, 2003).

87 Skogan, n 34 above, 34; Clancy *et al*, n 33 above, 71.

difference to the likelihood of discovering prohibited items and therefore the likelihood that an arrest will follow a stop and search. Fourthly, some arrests arise as a direct result of the circumstances of the stop itself.⁸⁸ Members of the public are not necessarily either passive or cooperative when they are stopped. For example, if a person who is stopped refuses to answer police officers' questions or to submit to a search (known as 'contempt of cop'), this may be interpreted by the police officer as an indication of guilt (even where it is simply an indication of annoyance) and may result in the arrest of the suspected person. A Home Office research study concluded that black people are less likely to receive the benefits of police exercise of their discretion through *under-enforcement*, because they and the police are influenced by their long-standing suspicion of each other, a fact that increases the likelihood of the encounter being confrontational.⁸⁹ There is evidence that where officers feel that the person stopped 'fails the attitude test', this could lead to an escalation of the encounter and a subsequent arrest arising from the stop.⁹⁰ While this would appear to be a 'good result' from the point of view of improving the 'hit rate', it could be seen as the epitome of a bad stop.⁹¹ Finally, in some instances, a stop carried out for one particular reason results in an arrest for an unrelated offence. For example, if an encounter is confrontational, this may result in the behaviour of the suspected person being defined as disorderly and lead to an arrest under section 5 of the Public Order Act.⁹² Another increasingly common example is someone who is stopped and searched on suspicion of being in possession of an offensive weapon, but is arrested for the simple possession of cannabis.⁹³

Comparing the comparators

Having examined the four comparators, it is our view that the most robust measure of disproportionality in the use of the police stop/search powers, and which relies on the fewest assumptions, is the per capita stop/search rate. This conclusion must be qualified somewhat as per capita rates cannot account for ethnic differences in 'availability' in local areas. However, patterns of 'availability' are likely to differ markedly between localities for highly complex demographic reasons. Street populations also fluctuate during the day and it is unlikely that an accurate and cost effective means of measuring this can be devised.⁹⁴ The issue of 'availability' provides no defence against the charge that routine practices are having a disproportionate impact on people from minority groups; thus prompting the

88 Smith and Gray, n 42 above; D. Brown and T. Ellis, *Policing low-level disorder: Police use of Section 5 of the Public Order Act 1986. Home Office Research Study No 135* (London: Home Office, 1994).

89 FitzGerald and Sibbitt, n 37 above.

90 FitzGerald, n 12 above, Quinton *et al*, n 10 above, 9.

91 Quinton *et al*, *ibid*.

92 Brown and Ellis, n 88 above.

93 Quinton *et al*, n 10 above, 53–54. In 2006, the Metropolitan Police arrested or warned more than 36,000 people for cannabis possession among whom 35 per cent were black. Professor Rod Morgan, former Chair of the Youth Justice Board describes this practice as 'picking low-hanging fruit' in order to meet enforcement targets (*The Guardian*, 19 February 2007).

94 Home Office/Association of Chief Police Officers, n 14 above, 35.

Lawrence Inquiry label of ‘institutional racism’.⁹⁵ The observations made above about structural disadvantage point to the impact of stop and search as a force that is likely to ‘compound and exacerbate disadvantage in other areas of social life’.⁹⁶ The most important point is that the per capita rate provides, by definition, an estimate of the population group experience. Thus, in a large geographical context such as the London Metropolitan Police Area or England and Wales as a whole, statistics based on resident populations provide an important indicator of how often members of different ethnic communities are actually stopped or searched within that area. As Home Office researchers bluntly put it, per capita stop/search rates show clearly that ‘being black means that you get stopped more often’.⁹⁷

The per capita rate also helps to identify the broader community impact in two further ways. First, since the per capita rate of stop and search in England and Wales is six times as great for black ‘suspects’ in comparison with their white counterparts, while the ‘hit rate’ is about the same for all groups, approximately six times as many innocent black Britons are unnecessarily stopped and searched in comparison with their white compatriots. The second point arises from the fact that stop and search produces a much larger proportion of all arrests for black people than for other groups. While 6.2 per cent of all arrests of white people result from stop and searches, this is true of 11.3 per cent of all arrests of black people.⁹⁸ Therefore, in comparison with their white counterparts, black people are almost twice as likely to enter the criminal justice process as a result of being stopped and searched by the police. These two points underline the importance of the disproportionate impact of stop and search on the communities of African Caribbean origin in Britain. It is perhaps for these reasons that the ‘availability’ argument has failed to increase community confidence in the use of the power.⁹⁹ It is certainly the case that the issue of disproportionality in stop and search is more complex than the headline figures suggest. However, none of the foregoing discussion rules out the possibility that discrimination is a significant cause of this disparity, a subject to which we now turn.

EXPLAINING DISPROPORTIONALITY

Having set out the research and statistical evidence on disproportionality in the use of stop and search powers, we now turn to research explaining the evidence. This analysis has two stages that are important for understanding disparity in police use of stop and search powers: (i) the existence of racism and racial prejudice in the police service, and (ii) the relationship between stereotyping, suspicion and discrimination in the use of discretionary powers.

⁹⁵ *ibid* 33.

⁹⁶ *ibid*.

⁹⁷ MVA and Miller, n 49 above, 84.

⁹⁸ Home Office, *Race and the Criminal Justice System: An overview to the complete statistics, 2003–2004* (London: Home Office, 2005) table 5.3.

⁹⁹ Home Office/Association of Chief Police Officers, n 14 above, 35.

Racism and racial prejudice in the police service

Research evidence shows that while the extent to which ethnic minorities are accepted and represented in British society has transformed over the past three decades, racist beliefs, xenophobic attitudes and racial prejudices remain widespread in British society.¹⁰⁰ If police officers serving in the Metropolitan Police Service represent a cross-section of society, then it can be expected that some will be racially prejudiced. However, empirical research on policing conducted between the 1970s and the 1990s indicated that racism and racial prejudice in police culture was more widespread and more extreme than in wider society. Studies published in this period found the use of racist language, widespread negative views of black and Asian people and support for extreme right-wing political parties.¹⁰¹ One study of police culture in 1980s London found that 'racial prejudice and racialist talk . . . [were] pervasive . . . expected, accepted and even fashionable'.¹⁰² Research evidence over the past three decades has found that specific stereotypes are commonly used by police officers to classify people on the basis of their ethnic origin. Studies found that black people were believed to be prone to violent crime and drug abuse, incomprehensible, suspicious, hard to handle, naturally excitable, aggressive, lacking brainpower, troublesome and 'tooled up'.¹⁰³

These findings on racial prejudice and stereotyping have not been restricted to constables, but have been found throughout the ranks. Robert Reiner's study of Chief Constables found that race was spontaneously mentioned more often than any other social division and was frequently brought up in other contexts.¹⁰⁴ Although some chiefs discussed ethnicity without invoking negative stereotypes, most spoke prejudicially. The predominant view was to regard the presence of black people as problematic for the police. They tended to be seen as crime-prone, disorderly, argumentative, irrational, 'likely to be carrying drugs or dangerous implements, noisy, and responsible for the antipathy held towards them'.¹⁰⁵ This prejudice was most evident in the words of Sir Kenneth Newman (Metropolitan Police Commissioner 1982–7), who commented that 'Jamaicans . . . are constitutionally disposed to be anti-authority'.¹⁰⁶

100 See Bowling and Phillips, n 66 above, 20–23, 36–38 for a summary of the research evidence. See also L. Dowds and J. Young, *British Social Attitudes Survey* (London: Dartmouth, 1996) 47; S. Hall, G. Lewis and E. McLaughlin *The Report on Racial Stereotyping* (Milton Keynes: Open University, 1998); B. Bowling, *Violent Racism* (Oxford: Oxford University Press, 1999).

101 See Reiner, n 80 above, 98–100, 115–121 for a review of the evidence. Among the most important studies are Smith and Gray, n 42 above; S. Holdaway, *Inside the British Police* (Oxford: Blackwell Publishing, 1983); S. Holdaway, *The Racialisation of British Policing* (London: Macmillan 1996) 78.

102 Smith and Gray, n 42 above.

103 Reiner, n 80 above; R. Graef, *Talking Blues: The Police in their own words* (London: Collins Harvill, 1989).

104 R. Reiner, *Chief Constables* (Oxford: Oxford University Press, 1991) 204–10.

105 *ibid* 205.

106 J. Clare, 'Eyewitness in Brixton' in J. Benyon (ed), *Scarman and After* (London: Pergamon, 1984). Newman is a former Commissioner of the Metropolitan Police. Though the former Commissioner later denied the remarks, the journalist was quite emphatic that he had correctly quoted the former Commissioner. *Daily Mirror* 30 June 1982.

The evidence suggests that prejudice is not limited by rank; nor is it a mere artefact of the past. A 1997 inspection of community and race relations policies and practices within the police service conducted by Her Majesty's Chief Inspector of Constabulary concluded that

racial discrimination, both direct and indirect, and harassment are endemic within our society and the police service is no exception . . . There was continuing evidence during the Inspection of inappropriate language and behaviour by police officers, but even more worrying was the lack of intervention by sergeants and inspectors. This was reinforced during the observation of assessment panels for promotion to sergeant and inspector where potential supervisors demonstrated a reluctance to challenge colleagues who indulge in racist 'banter' and racist behaviour . . . [e]ven if the majority of the accounts are dismissed as either the products of third party articulation or even exaggeration, a picture still emerges of pockets of wholly unacceptable racist policing.¹⁰⁷

In 1998, John Newing, then President of ACPO and Chief Constable of Derbyshire, in his evidence to the Lawrence Inquiry stated that,

institutional racism [is] the racism which is inherent in wider society which shapes our attitudes and behaviour. Those attitudes and behaviour are then reinforced or reshaped by the culture of the organisation a person works for. In the police service there is a distinct tendency for officers to stereotype people. That creates problems in a number of areas, but particularly in the way officers deal with black people. Discrimination and unfairness are the result. I know because as a young police officer I was guilty of such behaviour.¹⁰⁸

The Lawrence Inquiry did not end the debate on institutional racism, if anything it may have obfuscated it.¹⁰⁹ In addition, some commentators have argued that there is a disjunction between police banter and professional action.¹¹⁰ However, as we will argue in the next section, the evidence of a link between prejudiced beliefs and discriminatory action is clear. In 2003, after four years of reform following the Lawrence Inquiry, the issues of racial prejudice within the British police service were again brought to public view by a BBC documentary, entitled *The Secret Policeman*. This film, based on covert recordings made by Mark Daly, a journalist who had joined the police service, uncovered extreme racism among recruits at the National Police Training Centre in Warrington. This included officers exhibiting intense racial hatred and expressing admiration for the murderers of Stephen Lawrence, the use of extreme racist language to describe black and Asian people, declaring an intention to stop and search people from ethnic minorities out of spite. Daly also recorded a serving police officer boasting about the abuse of discretion in the use of stop/search powers against people from ethnic

107 Her Majesty's Inspectorate of Constabulary, *Winning the Race: Policing Plural Communities*. HMIC *Thematic Inspection Report on Police Community and Race Relations* (London: Home Office, 1997).

108 Macpherson, n 3 above, 32.

109 Bridges, n 57 above; Bowling and Phillips, n 78 above.

110 P. A. J. Waddington, 'Police (Canteen) Sub-Culture: An Appreciation' (1999) 39 *British Journal of Criminology* 287–309.

minority communities.¹¹¹ The officers in question claimed frequently that their views and behaviour were shared by the colleagues with whom they worked.

Police stereotypes, suspicion and the use of discretion

The pattern of disproportionate use of police stop/search powers is consistent with patterns of selective enforcement based on cultural stereotyping and the 'heightened suspicion' of black people. In 1981, Lord Scarman noted that 'some officers . . . lapse into an unthinking assumption that all young black people are potential criminals'.¹¹² In Smith and Gray's 1983 study, one interviewee commented that they stopped black people because 'nine times out of ten they would have drugs'.¹¹³ In fact, the evidence of that study showed that fewer than one in ten stops of black people on suspicion of drugs actually uncovered illicit substances.¹¹⁴ HMCIC's report concluded that there was 'a direct and vital link between internal culture in the way people are treated and external performance'.¹¹⁵

Over-generalisations and stereotypes have also been documented in more recent studies. In one Home Office study a police constable commented that

[i]f 99 per cent of people committing robberies are black – and in an area like this they are – then you would expect to find 99 per cent of the stop/searches to be of black people.¹¹⁶

This view was shared by an inspector.¹¹⁷ A similarly extreme over-generalisation was reported in Quinton *et al*'s study of police stops, decision-making and practice. One officer remarked that '[w]henver a robbery comes in [over the radio] . . . 90 per cent you'll be thinking it's a black man because of the description and because you know who does robberies in the past'.¹¹⁸ Graef quoted a retired constable who commented that '[y]oung PCs tend to think that West Indians *normally* have drugs, give trouble and are tooled up'.¹¹⁹

Graef cites another case study based on an interview with a PC. The officer describes being asked by a colleague to stop a vehicle that was 'suspected of being involved in drugs'. On stopping the car he found four West Indians inside. Although he had doubts about the validity of the grounds for the search he

111 One officer said: 'Like around here if there's a car full of black people or a car full of Asians you pull it because we have got no, we have got no really ethnic minorities round here, you can guarantee it will be full of shit coming across to rob or doing something'.

112 Scarman, n 2 above at [4.63]; see also J. Bourne, 'The Life and Times of Institutional Racism' (2001) 43 *Race and Class* 7–22.

113 Smith and Gray, n 42 above.

114 The failure rate of drugs searches reached a low point in 1997 in the London Metropolitan Police area when drugs were found in only one out of every seventeen black people searched on suspicion (Commissioner of Police for the Metropolis, *Annual Report* 1998).

115 Her Majesty's Inspectorate of Constabulary, n 107 above, 18.

116 FitzGerald and Sibbitt, n 37 above, 36.

117 *ibid.*

118 Quinton *et al*, note 10 above, 38.

119 Graef, n 103 above, 122; emphasis added. It is also worth bearing in mind the point made at n 78 above that surveys show no significant differences in the prevalence of drug use between black and white respondents.

'check[ed] driver's licence and things like that'. It transpired that the 'the original PC had "made up some kind of story about drugs . . . they were searched and the car was turned over and there were no drugs . . . Basically, he had asked me to stop that car because it was four coons driving along at three in the morning"'. The officer concludes his account by describing later meeting one of the passengers, a medical doctor, on a visit to St Thomas' hospital. The man told the officer how the evening continued: 'They had gone through Trafalgar Square and down Whitehall and were stopped! Four coons in a car. They were stopped three times in less than four hours!'¹²⁰

These examples illustrate the link between a specific stereotype (eg black people are potential criminals), the formation of suspicion (any given black person is likely to be involved in crime of some sort) and a course of action (any given black person should be stopped and searched). In a recent civil action against the police for racial discrimination, false imprisonment, trespass to property and harassment arising from 18 separate stops (none of which resulted in arrest or the discovery of prohibited items),¹²¹ an officer stated that some of the stops were attributable to intelligence which identified black males as the main suspects for drug dealing.¹²² On this basis, he said, people 'whose appearance resembles, *however loosely*, that of the suspects flagged by the Borough Intelligence Unit, are more likely to be stopped and spoken to by police in well-known crime hotspots'. This illustrates that, in this borough at least, stop/search is carried out not on the basis of objective information relating to a specific suspect, but on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity, directly in contravention of PACE. As one Home Office study put it,

the police contribute to the large ethnic differences in the PACE data by virtue of their heightened suspiciousness of black people. This is pervasive and deeply entrenched; and it may significantly increase the chances of black people coming to the attention of the police relative to other groups.¹²³

In the 1980s, the link between skin colour and police action was freely admitted and police officers were unapologetic about their targeting of black people.¹²⁴ Smith and Gray cite an example of an experienced officer preparing to give a talk to the probationers on a 'street duties' course designed to improve police practice in stopping, searching and questioning people:

How does an experienced policeman decide who to stop? Well, the one that you stop is often wearing a woolly hat, he is dark in complexion, he has thick lips and he usually has dark fuzzy hair.¹²⁵

¹²⁰ *ibid* 128–129.

¹²¹ *Smith v the Commissioner of Police for the Metropolis*, Central London County Court, Claim no 5CL107102, Settled through mediation, 5 April 2007.

¹²² There are separate questions about the quality and strength of police intelligence. It has been acknowledged by senior police officers in London that criminal intelligence is often inaccurate or too imprecise to be of operational value. Metropolitan Police Authority, *Report of the Scrutiny Panel on MPS Stop and Search Practice* (London: MPA, 2004).

¹²³ FitzGerald and Sibbitt, n 37 above, 66.

¹²⁴ Smith and Gray, n 42 above.

¹²⁵ *ibid*, 129.

Studies in this period also found extensive use of extreme racist language to describe people from black and other ethnic minorities. Research in the 1990s suggested that overt targeting was ongoing; though police officers were more reluctant to admit it.¹²⁶ A Home Office funded study conducted by Janet Foster and colleagues found that *explicit* racist language was no longer tolerated and reached the view that it is gradually disappearing.¹²⁷ Feeling under greater scrutiny after the Lawrence Inquiry, the authors argued that, in general, officers felt less able to carry out unjustified stop and search or 'fishing trips' without proper grounds for searching.¹²⁸ However, the authors point to the possibility that racist attitudes and behaviour may simply have gone 'underground'.¹²⁹

Although the links are complex, racially prejudiced attitudes do affect the way in which people behave. Hall *et al* argue that

while there is no automatic or straightforward link between racially prejudiced attitudes and language and discriminatory or differential behaviour . . . there is a consistency in the pervasive nature and expression of racial stereotypes and their influence on police expectations and behaviours.¹³⁰

There is clear evidence that police officers routinely use skin colour as a criterion for 'stop and search' based on stereotyping and over-generalisations about the involvement of black people in crime. Evidence of this was apparent even when being observed by Home Office researchers.¹³¹ Furthermore, the use of colour as a criterion is particularly marked in relation to 'stop and search' for drug offences.

CONCLUSION: DISPROPORTIONATE AND DISCRIMINATORY

Statistical evidence shows that black people in England and Wales are six times more likely to be stop/searched than would be expected based on their numbers in the general population. This per capita racial disparity applies to all stop and search powers for which information is available and is most extensive where discretion is widest. Data on section 163 RTA stops are not routinely collected by the Home Office, so it is not possible to draw definitive conclusions about the extent to which this power is used disproportionately against black people. However, data on section 1 PACE stop/searches¹³² and British Crime Survey data indicate that black respondents are disproportionately subject to vehicle stop/searches. We can reasonably infer that the pattern of section 163 stops will reflect the use of

126 Quinton *et al.*, n 10 above, 24; FitzGerald, n 12 above.

127 J. Foster, T. Newburn and A. Souhami, *Assessing the Impact of the Stephen Lawrence Inquiry. Home Office Research Study 294* (London: Home Office, 2005).

128 *ibid* 30.

129 *ibid*.

130 Hall *et al*, n 100 above, 9; M. FitzGerald, *Ethnic Minorities in the Criminal Justice System. Home Office Research and Statistics Department. Royal Commission on Criminal Justice Research Study No 20* (London: HMSO, 1993) 11; L. Lustgarten, *The Governance of the Police* (London: Sweet & Maxwell, 1986); Quinton *et al*, n 10 above, 16–17.

131 Quinton *et al*, n 10 above, 36.

132 Subsuming RTA, s 163 stops that result in a search.

other police powers and that the extent of disparity will be at least as extensive as the use of section 1 PACE that requires 'reasonable suspicion'. The widest per capita racial disparity has been found in the use of section 60 of the Criminal Justice and Public Order Act which hit a peak in 2003 when black people were 27 times more likely to be stopped compared with their white counterparts.¹³³

In our opinion the most informative measure of disproportionality is the per capita rate of stop and search. This figure is the most statistically robust, relies on the fewest assumptions and provides a clear and simple measure of the impact of stop/search on the general population from different ethnic groups. The 'post-Lawrence' research indicating that the disparity between the population stop/searched and the resident population is accounted for in some specific localities by systematic differences in the 'street population' available to be searched adds a caveat to the per capita figures but does not diminish their value in assessing the experience of being subjected to stop and search within the population as a whole. Exploring the extent to which stop/search rates can be explained by reference to geographical crime patterns, the extent of offending among different ethnic groups and the stop/search 'hit rates' adds further nuances to a complex picture, but does not detract from the figures that reflect the experience of stop/search across the general population. National per capita figures also provide an estimate of the impact of stop and search on the 'law abiding majority' (who make up about nine out of ten of the people stop/searched) and on the role of stop/search in drawing people from ethnic minority communities disproportionately into the criminal process.

Therefore the statistics indicative of disproportionality, taken in isolation, provide a *prima facie* case that discrimination is at work in the use of stop/search powers. The view that this indicates unlawful racial discrimination in the use of stop/search powers can be supported in two ways. First, as a matter of principle, the fact that a police practice is having an unfavourable *impact* on a specific section of the public (eg the population of African Caribbean origin), can be taken as evidence of discrimination, intentional or otherwise. This could only conceivably be permissible if there exists adequate justification; for example, if the harm prevented outweighs the harmful impact of the practice itself and if there is no less intrusive or coercive alternative. In our opinion, there is no compelling 'business case' for the present level of stop and search. Its yield, in terms of arrests, is low and it has a very limited contribution to the prevention and detection of crime (or community safety more generally).¹³⁴ On the other hand, it has a deeply damaging effect on society; it impacts negatively on the law-abiding population and is the cause of a loss of public support for and de-legitimation of the police. It increases the frequency of adversarial encounters – some of which have the

133 Home Office section 95 statistics. See also *The Guardian*, 21 April 2003.

134 An extensive account of the effectiveness of stop and search in crime control is beyond the scope of this paper. See Reiner, n 80 above; B. Bowling and J. Foster 'Policing and the Police' in M. Maguire *et al.* (eds), n 78 above. The key Home Office study on this subject was carried out in the wake of the Lawrence Inquiry: J. Miller, N. Bland and P. Quinton, *The Impact of Stops and Searches on Crime and the Community. Police Research Series Paper 127* (London: Home Office, 2000).

potential to trigger public disorder – and contributes to accelerating the flow of young black people disproportionately into the criminal justice system.

Secondly, the opinion that disproportionality is indicative of unlawful discrimination is based on the research evidence showing that racial prejudice and stereotyping are widespread within the British police and that this has an effect on policing practice. The strong research evidence of stereotyping in policework considered alongside the unfettered discretion in the use of stop and search powers would lead to the prediction that the use of those powers would be targeted at individuals from those communities stereotyped as most likely to be involved in crime. The statistical evidence on the use of police powers, taken together with the research evidence on police prejudice and stereotyping, and on discretion in the use of police powers, is consistent with the contention that the racial disproportionality in the use of police powers to ‘stop and search’ results from unlawful racial discrimination.

It is now widely accepted by the government, the Home Office and the police service itself that racial disproportionality and discrimination in policing are unjustified, inefficient, ineffective and damaging to police–community relationships. Recognising this, steps have been taken to remedy the situation through, for example, the creation of the Home Office Stop and Search Action Team that has the specific goal of ensuring fairness and reducing disproportionality.¹³⁵ Unfortunately, so far, these positive measures have failed to make any noticeable improvements. If anything, disproportionality and the damaging impact on ethnic minority communities have worsened in recent years.

We could have said more about the *manner* in which stop and search is carried out based on the evidence of disrespectful and abusive language and oppressive behaviour that sometimes accompanies stop and search.¹³⁶ It has been argued that if stop and search is carried out with courtesy and with reasons given, the power can be used without problems and will command public support even among those groups who are most frequently its targets.¹³⁷ Despite the importance that we would attach to the need for courtesy and respect in the use of police powers, we feel that this point is at a distance from the main issues of discrimination in the use of the power and that no improvement in the manner in which the power is used will compensate for the more fundamental issues at stake.

In our view, it is time to look more fundamentally at the regulation of police coercive powers. If, as appears to be the case, the broad power to stop and search citizens in public places is still not being used fairly after eight years of reform ‘post-Lawrence’, then there is a very strong case for a fresh approach. Laws permitting searches on the merest pretext (such as section 1 PACE) and ‘suspicionless’ stops (such as section 60 of the Criminal Justice and Public Order Act, section 44 of the Terrorism Act and section 163 of the Road Traffic Act), are used unfairly, have enormous community impact and yield little in crime detection or

135 Home Office, *Stop/Search Action Team Strategy 2004/05* (London: Home Office, 2004).

136 M. FitzGerald n 12 above; M. FitzGerald, M. Hough, I. Joseph, and T. Qureshi, *Policing for London* (Cullompton: Willan Publishing, 2002).

137 M. FitzGerald n 12 above.

prevention.¹³⁸ These powers should be repealed if they cannot be more closely regulated. More generally, we question whether the police in a democracy should *ever* have the power to stop and search citizens without any suspicion of wrongdoing and urge legal scholars, human rights organisations and the government to look more closely at these powers in both principle and practice.

Police powers have expanded massively since the power to stop and search was first established in PACE. The power in question was originally intended to allow a police officer to detain a person briefly to confirm or allay genuine and well-founded suspicions without having to use the power of arrest. We think that this is an important principle and would wish neither to return to the 'pre-Scarman' situation where people could be arrested on the slightest suspicion nor to move to one where allegations of crime cannot be investigated. In our view, the police power to detain a person on the street for the purpose of a search should be restricted to situations where a constable has a genuine and reasonable belief that wrongdoing is afoot, rather than the merest of suspicions, since it is these speculative intrusions into fundamental human rights and civil liberties that are so frequently unreasonable, unfair and unlawful.

138 See n 134 above.