International Journal of the Sociology of Law
30 (2002) 1–16

International Journal of the Sociology of Law

www.elsevier.com/locate/ijsl

Reasonable suspicion: time for a re-evaluation?

Graham Smith

Department of Social Sciences, Nottingham Trent University, UK

Never far from controversy, reasonable suspicion is again under scrutiny in the wake of Macpherson's (1999) findings on stop and search, research conducted for the Metropolitan Police Service (Fitzgerald, 1999) and the Home Office (Quinton et al., 2000), and revision of Code A of the Police Codes of Practice (Home Office, 2001). Taking a broad sweep of history—since the late 18th century, when 'reasonable probable grounds for suspicion' was introduced into common law,[1] the courts displayed a marked reluctance to extend police powers for close to 200 years, yet in the latter half of the 20th century this area of law developed significantly. Giving judgment in the Court of Appeal in an action for false imprisonment, Diplock LJ postulated on the need for the law to keep abreast of changing conditions:

> What was reasonable in connection with arrest and detention in the days of the parish constable, the stocks and lock-up, and the justice sitting in his own justice room before there was an organised police force, prison system or courts of summary jurisdiction, is not the same as what is reasonable today. Eighteenth and early nineteenth century authorities are illustrative of what was reasonable in the social conditions then existing. They lay down no detailed rules of law as to what is reasonable conduct in the very different social conditions of today.[2]

These sentiments were used to justify increasing the police's powers to detain a suspect for the purpose of criminal investigation, and were developed further on the recommendation of the Royal Commission on Criminal Procedure (RCCP, 1981) so that reasonable suspicion now provides grounds for an officer to stop and search under s.1(3) of the Police and Criminal Evidence Act 1984 (PACE). The RCCP adopted a three-point rationale to coercive police powers. Firstly, they can only be exercised on grounds of reasonable suspicion; secondly, they may only be resorted to when necessary in all the circumstances; and thirdly, in order to ensure adherence to

[1] *Samuel v. Payne* (1780) 1 Dougl. 39.
[2] *Dallison v. Caffery* [1964] 2 All E.R. 610, at 619.

PII: S0194-6595(02)00015-1

the first two criteria, the existence of safeguards to allow immediate challenge or subsequent review of police use of their powers.

The Royal Commission emphasized that reasonable suspicion serves as a safeguard for suspects (a view endorsed by Home Secretary Leon Brittan (1985)), although it acknowledged that this might be undermined as a consequence of the considerable number of variables that may be taken into account. Rather than recommend standardization the RCCP preferred to rely on other safeguards — that the police provide information to suspects and maintain records which are monitored by supervisory officers — and left it to the courts to rule on reasonable suspicion. Thus, after codification of police powers under PACE, reasonable suspicion survives as an awkwardly elusive notion despite the fact that its existence is required in virtually all instances when an officer resorts to force (Lidstone and Palmer, 1996).

This paper re-considers reasonable suspicion as it developed at common law, commencing with its introduction as a protection for the constable who interfered with the constitutional right to liberty. Scott LJ's Court of Appeal judgment in *Dumbell v. Roberts*,[3] when it was described as a protection for the suspect, is considered as a significant moment before the heady days of the 1980s, which saw the RCCP redefine the balance at the heart of the criminal process, definition of the police power of arrest as an 'executive discretion'[4] and the current leading judgment on reasonable suspicion.[5] As the discussion unfolds, due emphasis is placed on the key importance of reasonable suspicion as a non-formulaic concept which captures the dilemmas at the heart of criminal justice. Given Macpherson's concerns with stop and search, combined with incorporation of the European Convention on Human Rights (ECHR) into UK law under the Human Rights Act 1998 (HRA), it is contended that, in much the same manner as argued by Lord Justice Diplock in the 1960s, reasonable suspicion requires re-evaluation in the light of general concerns with police legitimacy.

1. Protection for the constable or the suspect?

The right to liberty, property and the presumption of innocence were at the core of the common law in 18th century England such that any interference had to have prior lawful justification.[6] Before modern police forces were formed the courts were regularly called upon to interpret the Constables Protection Act 1752, which protected constables from liability in tort when exercising faulty magistrates' warrants. Reasonable probable grounds for suspicion was considered sufficient justification in *Samuel v. Payne*[7] for the action of a constable who arrested a suspect accused of a felony in order to take him before a Justice of the Peace. At a time when

[3] [1944] All E.R. 326.
[4] *Holgate-Mohammed v. Duke* [1984] 1 A.C. 437.
[5] *Castorina v. Chief Constable of Surrey* (1988) 138 New L.J. 180.
[6] *Entick v. Carrington* (1765) 2 Wils. K.B. 275
[7] 7. (1780) 1 Dougl. 39.

prosecutions were brought privately and questioning was the responsibility of justices, the Court ruled it would be 'mischievous' if, in a case in which it transpired that a felony had not been committed, the constable had to determine the truth of the facts before making an arrest.[8] It was nearly 50 years before the law was developed to allow a constable to act on his own volition and arrive at the conclusion that he had sufficient grounds to arrest independently of an allegation by the victim prosecutor.[9]

In *Hogg v. Ward*,[10] the Court of Appeal upheld the jury's award of damages for false imprisonment against the Superintendent of York Police. In this case it was ruled that the word of a third party was insufficient for establishing reasonable suspicion. This was after the officer acted on information given by a person alleging theft of horse traces where the accused openly used the traces and gave a full account of how he had acquired them. Here, it can be observed that the courts were at pains to protect the right to liberty and allowed the jury to play a full part by requiring it to determine whether the facts supported the reasonableness of the officer's suspicion. *Hogg v. Ward* appears to be the first recorded case involving the modern police and should be considered in the context of widespread opposition to a civil force entrusted with coercive powers (Emsley, 1996). This might explain why the judge at the trial in the first instance felt it necessary for the jury to play a prominent part, and why the Court of Appeal declined to do no more than comment on the idiosyncrasies of the proceedings in the court below.[11] Over 75 years later Lord Chief Justice Hewart sitting at the Court of Appeal was to reach a quite different conclusion on the responsibilities of judge and jury with his unequivocal statement that reasonable suspicion is a matter of law for the judge alone.[12] By this time the police had overcome much of the opposition that was to greet their formation, and had established a reputation for law enforcement (Reiner, 2000). Although the court recognized the importance attached to the right to liberty, it did so in diluted fashion by stating that this had been secured by the withdrawal of the criminal charge before going on to reiterate the common law orthodoxy:

> it is very important that police officers should be protected in the reasonable and proper execution of their duty: they should not be hampered or terrified by being unfairly criticised if they act on a reasonable suspicion ...[13]

---

[8] Here lies the origin of the distinction between the citizen's power to arrest which is only lawful if an arrestable offence has been committed under s.24(5) of PACE and the police power to arrest on suspicion that an arrestable offence has been committed under s.24(6).

[9] *Beckwith v. Philby* (1827) 6 B.&C. 635.

[10] 10. (1858) 3 H. & N. 417.

[11] The state of the law in the mid-nineteenth century with regard to false imprisonment and malicious prosecution cases was not clear cut. The standard set in *Beckwith v. Philby* (1827) 6 B. & C. 635, maintained in *Davis v. Russell* (1829) 5 Bing. 354, was that determination of reasonable and probable cause is a mixture of law and fact, and the jury assists the judge with the law by finding on complex facts. Subsequently, the opinion of Lord Chelmsford in *Lister v. Perryman* (1870) 4 L.R.H.L. 521, at 535, cited Tindall CJ in *Panton v. Williams* (1841) 2 Q.B. 167, at 175 (both malicious prosecution actions), as authority that determination of reasonable grounds for suspicion is a matter for the judge alone where the facts are straightforward; cf *McArdle v. Egan* (1934) 150 L.T. 412, per Slesser LJ at 413.

[12] *McArdle v. Egan* (1934) 150 L.T. 412.

[13] *Ibid*, at 413 per Lord Wright.

Dumbell v. Roberts,[14] appears to be the first recorded case in which reasonable suspicion is explained, *obiter*, as a safeguard for citizens' rights. Police officers who arrested a person suspected of theft of soap flakes had failed to ask for the suspect's name and address, as required by the Liverpool Corporation by law under which they purported to be acting, and therefore relied on their common law power of arrest on grounds of reasonable suspicion to justify their conduct. Ruling that the arrest had been unlawful solely due to failure to comply with the law, Scott LJ went on to contemplate the constitutional importance of reasonable suspicion as a 'valuable protection to the community'. His concern was that the limited requirement to establish the reasonableness of suspicion is nowhere near the *prima facie* standard, although it could not be used to justify the officer who shut his eyes to the obvious. In language that shares much with contemporary human rights' discourse Scott asserted:

> The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the function of arrest — in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstances which points either way, either to innocence or guilt.... They should act on the assumption that their prima facie suspicion is ill founded. That duty attaches I think, simply because of the double-sided interest of the public in the liberty of the individual as well as in the detection of crime.[15]

In the 18th and the 19th century case law on reasonable suspicion, the liberty of the subject was assumed a priori and it was the power of the police officer to interfere with the right which required justification. Constitutional rights in English common law, now acknowledged as fundamental rights at international human rights law, were secured by awards of damages to citizens whose rights were unlawfully interfered with. Thus, it was not the individual who was considered needful of protection, more the lowly public servant (the constable) who was doing the bidding of the magistrate, or working on her own initiative to enforce the law, if she was not to be found liable for the tort of false imprisonment. In *Dumbell v. Roberts* Scott LJ signalled a shift in juridical thinking when he postulated on the importance of reasonable suspicion as a protection for the community. No longer was such primacy to attach to the individual's right to liberty that violation requires justification, the right was placed in the balance with the general public interest. However, the change was not seismic, it was presented in terms of the conflict between the public interests of securing the individual's right to liberty on the one hand, and the more general need to detect (and, one can safely assume, prevent) crime, on the other. Lord Justice Scott developed his ideas on reasonable suspicion further, and in considerable academic detail with references to Sir James Fitzjames Stephen (1883), Dicey (1929) and prominent 20th century academic lawyers when delivering the principal Court of

[14] [1944] All E.R. 326.
[15] *Ibid.*, at 329.

Appeal judgment in *Christie v. Leachinsky*[16], which involved an arrest under the same Liverpool by law. In the later case, after defining arrest as a moment in the criminal process, Scott LJ emphasized the need for a clear separation between the functions of the executive and the judiciary, and the role of the courts as the guardians of liberty with responsibility for curbing executive excess.

In support of Scott's hypothesis it is apparent that reasonable suspicion affords concurrent protection to the police officer and the citizen. It is also clear that his remarks were not presented in a manner which pitted the right to liberty against the power of the police to interfere with it, as warned against by Lord Simonds in his opinion in the House of Lords on *Christie v. Leachinsky*:

> ..the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other... a man is not to be deprived of his liberty except in due course and process of law.[17]

2. Reasonable suspicion and developing police discretion

By the time the RCCP came to consider police powers, *Hussein v. Çam Chook Fam*[18] was the leading case on the police officer's power to arrest on grounds of reasonable suspicion. Relying on Scott LJ in *Dumbell v. Roberts*, the Privy Council determined that as suspicion arises at an early stage of a criminal investigation, and is not to be confused with the existence of *prima facie* proof, this allows for a less rigorous test to establish whether a police officer lawfully exercises her discretion to arrest.[19]

There was some confusion as to the state of the law in the 1970s (Dixon, 1997). Much has been written of Metropolitan Commissioner Sir David McNee's evidence to the RCCP that his officers regularly "resorted to methods bordering on trickery or stealth" in criminal investigations (McNee, 1983, p. 180; Kettle, 1980; RCCP, 1981; Christian, 1983; McConville et al., 1991; Reiner, 1992). By the end of the decade the Police Complaints Board (PCB) was questioning the police's readiness to resort to arrest. Recently created with responsibility for scrutinizing the outcomes of complaints investigations (Leigh, 1977) the PCB was in a unique position to assess police practice. Its concerns were founded on complaints by persons that they had been arrested without good and sufficient cause, or unnecessarily detained in custody while officers sought to confirm their suspicions, and a failure on the part of the police to understand the dismay caused (Police Complaints Board, 1980).[20] This

[16] [1944] 2 All E.R. 395, at 399–404.

[17] [1947] 1 All E.R. 567, at 576. In Lord du Parcq's opinion: the power to arrest on reasonable suspicion for a felony that had not been committed was a privilege the courts gradually and grudgingly granted the police, and if such grounds were relied on to deprive a person of their liberty s/he must be given the reason; at 577–578.

[18] 18. [1970] A.C. 942.

[19] *Ibid.*, at 948 *per* Lord Devlin.

[20] The PCB reiterated its concerns in its *Second Triennial Report* (Police Complaints Board 1983) and it was not until the House of Lords ruled in *Holgate-Mohammed v. Duke* [1984] 1 A.C. 437, that it relaxed its stance (Police Complaints Board 1985).

uncertainty as to the state of the law got the better of the RCCP which went further than the authorities when summarizing the law of arrest. The Commissioners acknowledged the PCB's concerns and the disparity between police practice and the law, but preferred, nevertheless, to focus on how the police resorted to the power of arrest in practice. The *Report* concludes, rather emphatically, "detention may be used to dispel or confirm.. reasonable suspicion by questioning the suspect" and then seeks to support this statement by citing Lord Devlin in *Hussein v. Cam Chook Fam* (RCCP, 1981, pp. 3.66–7). Lord Devlin, however, stopped short of stating that arrest could serve the purpose of confirming or dispelling a suspicion and only went so far as to advise against the danger of a hasty arrest on insufficient grounds or delaying, which might present a suspect with the opportunity to destroy evidence.

At the core of the RCCP's considerations was the need to establish a fundamental balance in the criminal justice system, as required by its terms of reference (Zander, 1985). Whereas discussion commenced in similar terms to those presented by Scott LJ in *Dumbell v. Roberts* (RCCP, 1981, p. 1.11) the Royal Commission went on to examine the idea that rights are negotiable as developed by the Criminal Law Revision Committee (1971) in its controversial *Eleventh Report*[21] and its recommendation for reform of the right to silence (RCCP, 1981, pp. 1.23–1.35). Although the RCCP did not go as far as the Criminal Law Revision Committee, and forthrightly challenge the rationale for individual rights, it did contribute to a further shift in the balance at the heart of the criminal process by weighing police powers against suspects' rights in a fashion similar to that cautioned against by Lord Simonds in *Christie v. Leachinsky*. There are two issues here. Firstly, the RCCP's justification for detention as an opportunity for the police to confirm or dispel a reasonable suspicion in itself represented an extension of the police's power to arrest. This formulation moved significantly away from Scott LJ's assertion in *Dumbell v Roberts* that the police should assume their *prima facie* suspicion is ill founded, and the inference that further evidence might be necessary prior to arrest. The RCCP's formulation, in contrast, allows the police some latitude to arrest and then proceed with their enquiries. Secondly, the RCCP's general principle that the police could only resort to their coercive powers on grounds of reasonable suspicion, necessity and subject to appropriate safeguards, also transformed the character of the criminal process. It is suggested that this occurred in part because the RCCP chose not to consider that a fundamental balance is inherent within reasonable suspicion (after Scott LJ) and preferred to emphasize its value solely as a safeguard for suspects. Without reference to the development of reasonable suspicion at common law to justify police interference with the right to liberty, no longer does the need for balance go to the conflict between competing public interests but goes directly to the need to achieve a balance between police powers and individual rights (cf. Ashworth, 1996, 1998). Under this schema the right to liberty is devalued by weighing it against the police powers to stop and search, arrest, and detain in custody, and the proposal

[21] Discussing the right of silence the Criminal Law Revision Committee considered the principle in terms of the need for balance between crime control and due process values before offering a third way—the negotiability of rights in exchange for safeguards.

for a necessity principle serves as a mechanism to restrict the police from exercising their discretionary powers too readily. Thus, the fundamental balance is not maintained as essential counteracting elements of reasonable suspicion, it is separately allowed for by introduction of a necessity principle in the first instance, followed by prescribed safeguards.

Having declared its support for a necessity principle in general terms, the RCCP went on to assert that the first practical moment it could be applied was not when the police officer first interferes with the right to liberty, when stopping a suspect for the purpose of a search or the point of arrest, but when the suspect is presented to the custody officer on arrival at a designated police station (RCCP, 1981, p. 3.77). The government of the day duly obliged and express provision for the necessity of detention is statutorily provided for under s.37 of PACE. Subsection 1(b) limits the time a custody officer may detain a suspect in the police station where there is sufficient evidence to charge to the necessary time it takes to complete the procedure. Under subsection 2 detention without charge is allowed if the custody officer has reasonable grounds for believing it is 'necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence to question him'.

The RCCP *Report* attaches major importance to restricting the exercise of coercive police powers to where necessary and is particularly coherent when discussing the need for such a principle in connection with arrest (RCCP, 1981, pp. 3.75–3.76) and then abruptly dismisses codification of such a measure as impractical. Zander (1985) details how the RCCP's ideas were used by the government as the basis for general arrest conditions under s.25 of PACE, and questions have been asked of the efficacy of the necessity principle as introduced under s.37 (McKenzie et al. 1990; Cape, 1999). The argument pursued in this paper is that regardless of the practicability or efficacy of a necessity principle, its very existence undermines the essence of reasonable suspicion as a measure which places a fundamental balance at the heart of the criminal justice process.

Another important development arising from the Privy Council's decision in *Hussein v. Chong Fook Cam* was definition of the power to arrest as an executive discretion.[22] In the light of the RCCP's reiteration of the PCB's concerns with the police's apparent eagerness to resort to arrest without the required grounds, the Commissioners' intention when proposing a necessity principle may have been in order to prevent the police's discretion to arrest developing with the minimum of judicial control. If this was the case, the RCCP did not succeed. Within a couple of years of publication of the RCCP's *Report,* its interpretation of *Hussein v. Chong Fook Cam* was cited as authority for the police's power to arrest a suspect for the purpose of questioning by the Court of Appeal in *Holgate-Mohammed v. Duke.*[23] The House of Lords [24] subsequently established that in private law actions for false imprisonment the lawfulness of a police officer's executive discretion to arrest is

[22] [1970] A.C. 942 at 948 *per* Lord Devlin.
[23] [1983] 3 All E.R. 526.
[24] *Holgate-Mohammed v. Duke* [1984] 1 A.C. 437.

governed by established public law principles as outlined in *Associated Picture Houses v. Wednesbury Corporation*[25]. This decision prompted practitioners and scholars alike to warn of the threat to democracy posed by a police force wielding discretionary powers which are not subject to political or judicial control (Sedley, 1985; Lustgarten, 1986; Ryan and Williams, 1986).

Later in the 1980s Woolf LJ (as he then was) spelled out what serves as the current state of the law of arrest on grounds of reasonable suspicion in three distinct stages in *Castorina v. Chief Constable of Surrey*.[26] The facts of the case were that detectives concluded that someone with inside information was responsible for a burglary at business premises. When informed that an employee had recently been dismissed, they arrested and detained her for nearly 4 h before release without charge. The suspect subsequently sued for false imprisonment and was awarded damages. Allowing the Chief Constable's appeal, Woolf LJ based his three-pronged approach on Lord Diplock's opinion in *Holgate-Mohammed*. Firstly, a subjective question is required to establish whether the arresting officer honestly suspected that the arrested person committed an offence. That is followed by an objective question, which serves to ascertain the material factors relied upon for the reasonableness of the suspicion. The threshold remains low, after Lord Diplock's tautological formulation in *Dallison v. Caffery* — "whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the [arresting officer], would believe that there was reasonable and probable cause".[27] Finally, if both of these questions are answered in the affirmative, the officer's discretion to arrest can only be tested according to the *Wednesbury* principles (for more detailed treatment of *Castorina* see Clayton and Tomlinson, 1988, 1992).

Reiner has written that the late 1970s and 1980s are distinguishable in police history for being "racked by political conflict and popular suspicion" (Reiner, 2000, p. 80). Following the appointment of the RCCP in 1977, and the replacement of a Labour government by an ideologically driven Conservative administration under the leadership of Margaret Thatcher in 1979, police powers were to increase significantly during the 1980s, both in their extent through legislative reform, most notably under PACE and the Public Order Act 1986, and in their scope after *Holgate-Mohammed and Castorina*. Events which were to impact on public opinion included inner city riots in 1980, 1981 and 1985 (and against the poll tax in 1990); the 1984–1985 Miners Strike and the News International dispute at Wapping, London; release from prison of a significant number of persons who had suffered serious miscarriages of justice commencing with the Guildford Four in 1989 and disbandment of the West Midlands Serious Crime Squad after revelations that evidence had been systematically fabricated against suspects. With police legitimacy apparently in freefall, and much debate on the need for accountability (Baldwin and Kinsey, 1982; Baxter and Koffman, 1985; Spencer, 1985; Lustgarten, 1986), the government and senior members of the judiciary seemed oblivious to the chorus of

[25] [1948] 1 K.B. 223.
[26] (1988) 138 New Law Journal 180.
[27] [1964] 2 All E.R. 610, at 619.

concern expressed at that moment in time. It was the early 1990s before the Major government took steps to deal with the deteriorating situation, and three government reports were published within two weeks of each other in the summer of 1993 (Home Office, 1993; Royal Commission on Criminal Justice, 1993; Sheehy, 1993), with major reforms being introduced the following year under the Police and Magistrates' Courts Act 1994. However, it was not until the return of a Labour administration in 1997 that two important developments made a full re-evaluation of policing possible. Firstly, Sir William Macpherson was appointed almost immediately to chair a judicial inquiry into the murder of Steven Lawrence and, then, the HRA incorporated the ECHR into UK law. It is contended that the seeds were sown for Macpherson's findings on police incompetence and racism in the aloofness of the 1980s Thatcher governments, whose disregard for widespread disquiet was mirrored by a remote judiciary. It is hoped that human rights legislation, if it manages to influence the political, legal and cultural fabric of the UK polity as intended (Home Office, 1997), will provide important opportunities to address the police's loss of consent in some communities, on which it depends if it is to perform its statutory duties (cf. Crawshaw et al., 1998; Neyroud and Beckley, 2001).

3. Into the 21st Century

Macpherson's main concern with reasonable suspicion was that the senior officers responsible for the Lawrence murder investigation failed to arrest suspects when they had the grounds to do so. However, it is in connection with his finding that stop and search is the primary cause for the loss of trust and confidence by ethnic minority communities in the police, irrespective of whether exercised on grounds of reasonable suspicion or with the consent of the suspect, that has been responsible for re-examination of the notion (Fitzgerald, 1999; Quinton et al., 2000).

It was, perhaps, inevitable that Macpherson should single out stop and search (over and above concern with the police complaints process) as responsible for declining public confidence in the police in some quarters. As detailed above, the law on reasonable suspicion developed at common law largely in connection with the power to arrest, and most significantly in cases where claimants sought damages for false imprisonment following an unlawful arrest. With codification of the police's power to stop and search on the same grounds of reasonable suspicion as previously existed for arrest (Christian, 1983) the first legal interaction between a police officer and a suspect is now more likely to occur at an 'earlier' and more 'informal' level. The informality of stops and searches is apparent on several counts and assists explain why this power has achieved a similar notoriety to the discredited, and repealed, 'sus' law (s.4 of the Vagrancy Act, 1924; Demuth, 1978). In the first instance, an officer can seek the consent of a person stopped to conduct a search and thereby bypass the PACE safeguards (Dixon, 1997, Chapter 3; Macpherson, 1999). Moreover, irrespective of the PACE requirements governing stops and searches, where the officer lacks the necessary grounds it is unlikely that the subject of the unlawful police action will bother to do anything about it unless she is arrested and

subjected to further violation of her rights.[28] This is likely to be due to her eagerness to proceed with her daily business with the minimum of disruption, or a reluctance to devote time and expense to a minor complaint and/or legal action. It is when suspects have been arrested and taken to a police station that they are most likely to come into contact with a solicitor and will be advised on their rights and the lawfulness of the police officer's conduct (Smith, 1998). It is only after arrest that the full weight of a legal interaction between police officer and suspect fully materializes. Not only because the officer has to take the suspect to a police station where the custody officer formally opens a custody record, but also because the suspect has an improved prospect of achieving a legal remedy—in the form of a complaint or action for damages—to any wrong they have suffered. It is suggested that, despite the fact that the police discretion to arrest developed considerably in the last half-a-century, the existence of opportunities for individuals to challenge the legality, or propriety, of their detention served as a check on police resort to this power. With regard to unlawful stops and searches, in contrast, the manner in which the police exercise their powers, combined with the attitudes of individuals adversely affected, has contrived to remove this power from the law's domain with the consequence that it has had a major effect on deteriorating police community relations.

There are two major approaches that can be adopted to secure community acceptance for stop and search and improving public confidence with the police—law reform and/or improve administrative procedures. With Macpherson's (1999, rec.60) recommendation that the law on stop and search should remain unchanged the former option is currently being pursued (Fitzgerald, 1999; Quinton et al., 2000; Home Office, 2001). This approach is consistent with the overwhelming research evidence on the limited value of the law for regulating police conduct (McBarnet, 1981; Smith and Gray, 1985; Bottomley et al., 1991; McConville et al., 1991; Dixon, 1997). Although Dixon (1997, 1999) departs from this trend by arguing that PACE achieved contradictory goals by managing to both extend and regulate police powers, his conclusion that the legislation has been markedly unsuccessful with regard to stop and search deserves of further examination. MPS and Home Office research has obliged by paying some attention to the lawfulness of stops and searches and the nature of reasonable suspicion.

It is argued here that appraisal of the law has not gone deep enough and the unique manner in which reasonable suspicion captures the dilemmas at the heart of criminal justice has been neglected. Whereas the RCCP argued for a necessity principle and monitoring as safeguards for the exercise of coercive police powers in addition to reasonable suspicion, recent Home Office research uses the language of fairness and efficiency as compliments to legality as a means of legitimizing stop and search (Quinton et al., 2000). The drive for efficiency is an important element of the

[28] Somewhat anecdotal evidence that lends support to this assertion can be found in a damages action for assault, false imprisonment and malicious prosecution attended by the author as research for his doctoral thesis. The trial judge surprised the court by ruling, in the absence of argument by either counsel, that a stop and search conducted prior to the contested arrest was unlawful on account of the failure of the officer responsible to demonstrate that he had the necessary grounds of reasonable suspicion.

managerialist trend in the *criminal process* which initially focussed on policing objectives and performance indicators[29], and has increasingly encroached on the law's domain by undermining due process values (Cape and Bridges, 2001). While it is acknowledged that the law is rather a blunt instrument for the purpose of regulating police conduct, to ignore its relevance altogether would be to nullify Parliament's intention when codifying police powers under PACE, and cause further damage to the need for a balanced *criminal justice process*. Essential as fairness and efficiency are to the administration of justice, both of these values are integral to legality, which remains the most important factor for establishing police legitimacy. If the legitimacy of the law is predicated on the institution's capacity to accurately represent the moral and ethical principles underpinning social cohesion, which is self-evidently a desirable state of affairs for social democracy, then it is imperative that attention should focus on the law when considering the legitimacy of the police, or the powers that they wield. At this juncture it is appropriate to refer back to Lord Diplock's justification (cited above in *Dallison v. Caffery*) for extending the police's power to detain a suspect in order to pursue their enquiries on grounds of improvements to the efficiency of criminal justice institutions. In the same vein, it follows that the reasonableness of the suspicion upon which a police officer relies when exercising their powers requires re-evaluation given current concerns with police legitimacy, fairness and efficiency. Or, to put it in the context of the *Castorina* stages—a more rigorous test should be required to establish that material factors support the reasonableness of the officer's suspicion at Stage 2 and, at Stage 3, the officer's readiness to resort to her discretionary powers should be subject to more careful judicial scrutiny.

Opportunities for greater judicial control over the exercise of police powers may arise under the recently introduced human rights legislation. Some 15 years after the PACE debate raged, the connection between police powers and individual rights has been re-visited as a consequence of the HRA and incorporation of much of the ECHR into English law (Ashworth, 1998; Crawshaw, et al., 1998; Palmer, 2000; Neyroud and Beckley, 2001). It has been remarked that PACE affords suspects greater protection than the ECHR (Ashworth, 2000) and that ss.24 and 25 of PACE comply with the right to liberty under Article 5(1)(c) of the ECHR[30] (Starmer, 1999; Cheney et al., 2001). A fundamental difference between PACE and the ECHR is the opposite standpoints taken on the relation between individual rights and police powers. Whereas PACE commences with definitions of the powers available to the police followed by itemization of safeguards, the ECHR, in contradistinction, sets out in principle the rights of the individual, and then details how they may be restricted. As demonstrated above in the brief examination of eighteenth and

[29] Searches ceased as a performance indicator in 1997, although continue to serve as an informal guide (Fitzgerald, 1999).

[30] Article 5. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

nineteenth century cases on reasonable suspicion this was not always the case, and comparison can be made between Dicey's (1929) constitutional principles of English common law[31] and ECtHR jurisprudence. Most importantly for the current discussion, it is suggested that the manner in which the courts have interpreted statutory powers to arrest, and accorded the police wide discretion, make this area of police law liable to challenge as a consequence of provision under s.2 of the HRA for the courts to take ECtHR jurisprudence into account when considering ECHR rights.

On its face, Article 5(1)(c) does not appear to present difficulties for interpreting ss.24 and 25 of PACE compatibly.[32] It is the intrusion of the public law *Wednesbury* principles into the police arsenal of coercive powers which may prove to be more problematic if the courts are to give due consideration to the jurisprudence of the ECtHR when considering a reasonable suspicion case. Proportionality rests at the core of ECHR case law and has been described as a 'search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[33] Debate on the tautological weaknesses of *Wednesbury* unreasonableness in public law preceded the HRA (Jowell & Lester, 1987, 1988) and has been unfavourably contrasted with the rigour of European Law's preferred proportionality principle (Wong, 2000). By coincidence, the House of Lords took a significant step towards incorporating this alternative test of the lawfulness of executive discretion into English law when ruling on police operational discretion and the allocation of resources in *R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*[34] Although there is a distinction between the law on the exercise of particular police powers and a chief officer's general law enforcement duties (Dixon and Smith, 1998), it is suggested that a consequence of Lord Diplock's assertion under English common law that public law principles apply to the exercise of police powers at private law, similarly allows for the transfer of the proportionality principle under European human rights law. The practical effect of such a development may only be the same as applying a more rigorous *Castorina* test, as suggested above, but it would also go a long way towards reinforcing positive rights as a major factor influencing police practice. Armed with the ECHR proportionality principle, the courts are in a position to more stringently examine whether the police's interference with individual rights, whether in the act of stopping, searching, arresting or detaining a suspect, requires more than what a

[31] Most particularly, his 'equality before the law' principle protected against creeping executive discretion (Jowell, 1973) which was eventually to envelop the police at statute (PACE) and common law (*Holgate-Mohammed v. Duke*) in the 1980s (Sedley, 1985; Dixon, 1997).

[32] The only reasonable suspicion cases against the UK have been concerned with anti-terrorist legislation: *Brogan and Others v.* UK (1989) 11 E.H.R.R. 117; *Fox, Campbell and Hartley v.* UK (1990) 13 *E.H.R.R.* 157; *Murray and Others v.* UK (1995) 19 E.H.R.R. 193 and *O'Hara v.* UK (2001) unreported (all ECtHR judgments available on www.echr.coe.int). It is interesting to note that the same form of words as introduced by the RCCP on arrest as a means of confirming or dispelling suspicion has also been adopted by the ECtHR in all of these cases.

[33] *Spering v.* UK (1989) 11 E.H.R.R. 439.

[34] [1999] 1 All E.R. 129 (Baker, 2000).

reasonable man may find reasonable in the circumstances: The court will be able to ask whether a less restrictive alternative, the serving of a summons in preference to arrest, for example, was available to the officer, or require the officer to demonstrate that, as a matter of procedural fairness, she properly considered the rights of the suspect before interfering with her right to liberty (Starmer, 1999).

4. Conclusion

Following presentation of the Macpherson Report to the House of Commons, Home Secretary Jack Straw published an action plan (Home Office, 1999) detailing the government's response to each of the 70 recommendations and declared his intention to implement all reforms within 3 years (Hansard Parliamentary Debates, 29 March 1999, col. 760). He went on to draw comparison between Macpherson's findings and some of the conclusions reached by Scarman (1981) some 18 years earlier into the inner city disturbances. He ascribed the failure of Scarman's reforms to perceptions of them as 'add-ons' and announced his determination to introduce systemic reform which would embrace police culture as well as practice (Scarman, 1981, col. 769). Writing nearly 3 years on, in anticipation of the third annual report on progress of the Home Secretary's Stephen Lawrence Inquiry Action Plan, David Blunkett's first, there is a real danger that history will repeat itself. However, there is cause for some optimism and it is unlikely that the haemorrhaging in public support that consumed the police through the 1980s into the early 1990s will return in the near future.

Several key points can be extracted from the brief examination of how reasonable suspicion and police discretion have developed at common law. Firstly, the notion of reasonable suspicion originally served to protect the police officer from liability for the intentional tort of false imprisonment; it was not until the mid-twentieth century that it was recognized as a safeguard for the suspect. Secondly, pivotal to the recent development of police powers was Lord Justice Scott's reasoning in *Dumbell v. Roberts* on the importance of achieving a balance between competing public interests when assessing the reasonableness of suspicion. Although careful not to weigh police powers in the balance against individual rights, and his principled pronouncements on the separation of powers in *Christie v. Leachinsky*, Scott paved the way for the encroachment of executive power. Thirdly, an important factor contributing to the decline in police legitimacy in the 1990s was the pattern of law reform in the 1980s commencing with the recommendations of the RCCP. Taken together, PACE, *Holgate-Mohammed v. Duke* and *Castorina v. Chief Constable of Surrey* were responsible for extending the police's power to interfere with the right to liberty without adequate regulation as intended under the PACE reforms. For arrest and detention, the complaints process and civil proceedings can serve as an important safety valve and manage to relieve some of the pressure where police community relations are tense. The impracticability of seeking and obtaining legal redress for unlawful stops militates against legal regulation and hence Macpherson's

identification of this power as the primary cause for the decline in public confidence with the police.

There are two principal means by which the stop and search problematic can be tackled—tightening administrative procedures and legal reform. Whereas a focus of debate in the 1980s was whether or not it was in the interest of effective law enforcement for the police to stop and search suspects (Christian, 1983, Brogden, 1985), the issue today is how the power is exercised on grounds of fairness and effectiveness in addition to legality. In consultation with the police and other interested parties, the government has embarked on the former course of action and revised guidelines on reasonable suspicion, part of the code of practice on stop and search, will become available to police officers in due course.

A central argument of this paper is that the Human Rights Act 1998 allows the judges to take into account the jurisprudence of the ECtHR to reform English common law and more effectively regulate police powers which interfere with the right to liberty. As before, it may well be that the courts will only be called upon to rule on reasonable suspicion as grounds for an arrest, but by applying a proportionality test they will be able to scrutinize use of the power more carefully, and any developments in the law will automatically apply to stop and search. It is suggested that the government and police working together to improve the effective use of stop and search and the judiciary ruling to regulate police powers will make for a positive contribution to the development of a human rights culture, improved administration of justice and the restoration of some balance to the relations between the executive and judiciary.

Acknowledgements

The author wishes to thank Bill Dixon for his comments on the first draft of this paper.

References

Ashworth, A., 1996. Crime, community and creeping consequentialism. Criminal Law Review 43, 220–230.

Ashworth, A., 1998. The Criminal Process: an evaluative study, 2nd edition. Clarendon Press, Oxford.

Ashworth, A., 2000. The human rights act and the substantive Criminal law: a non-minimalist view. Criminal Law Review 47, 564–567.

Baker, E., 2000. Policing, protest and free trade: challenging police discretion under community law. Criminal Law Review 47, 95–107.

Baldwin, R., Kinsey, R., 1982. Police Powers and Politics. Quartet Books, London.

Baxter, J., Koffman, L. (Eds.), 1985. Police: The Constitution and the Community. Professional Books: Abingdon.

Bottomley, A.E., Coleman, C.A., Dixon, D., Gill, M., Wall, D., 1991. The Impact of PACE: Policing in a Northern Force. Centre for Criminology and Criminal Justice: Hull.

Brittan, L., 1985. A broad overview. Public Law, 389–393.

Brogden, M., 1985. Stopping the people—crime control versus social control. In: Baxter, J., Koffman, L. (Eds.), Police: the Constitution and the Community. Professional Books, Abingdon, pp. 91–110.
Cape, E., 1999. Detention without charge: what does 'sufficient evidence to charge' mean? Criminal Law Review 46, 874–885.
Cape, E., Bridges, L., 2001. Criminal justice or social exclusion? Legal Action, September.
Cheney, D., Dickson, L.Skilbeck, R., Uglow, S., Fitzpatrick, J., 2001. Criminal Justice and the Human Rights Act 1998, (2nd Edition), Jordans, Bristol.
Christian, L. (1983) Policing by Coercion, Greater London Council: London.
Clayton, R., Tomlinson, H., 1988. Arrest and reasonable grounds for suspicion. Law Society Gazette 32, 22–26.
Clayton, R., Tomlinson, H., 1992. Civil Actions Against the Police. Sweet and Maxwell, London.
Crawshaw, R., Devlin, B., Williamson, T., 1998. Human Rights and Policing: Standards for Good Behaviour and a Strategy for Change. Kluwer Law International, The Hague.
Criminal Law Revision Committee, 1971. Eleventh Report of the Criminal Law Revision Committee, Cmnd. 4491. HMSO, London.
Demuth, C., 1978. 'Sus': A Report on the Vagrancy Act 1824. Runnymede Trust, London.
Dicey, A.V., 1929. The Law of the Constitution. Macmillan, London.
Dixon, D., 1997. Law in Policing. Clarendon, Oxford.
Dixon, D., 1999. Police investigative procedures: changing legal and political contexts of policing practices. In: Walker, C., Starmer, K. (Eds.), Miscarriages of Justice: A Review of Justice in Error. Blackstone, London.
Dixon, B., Smith, G., 1998. Laying down the law: the police, the courts and legal accountability. International Journal of the Sociology of Law 26, 419–435.
Emsley, C., 1996. The English Police: A Political and Social History 2nd Edition. Longman, London.
Fitzgerald, M., 1999. Searches in London: Under s1 of the Police and Criminal Evidence Act. Metropolitan Police Service, London.
Home Office, 1993. Police Reform: A Police Service for the Twenty First Century, White Paper, Cm. 2281. HMSO: London.
Home Office, 1997. Rights Brought Home: the Human Rights Bill, Cm. 3782. HMSO, London.
Home Office, 1999. Stephen Lawrence Inquiry: Home Secretary's Action Plan. HMSO, London.
Home Office, 2001. Stephen Lawrence Inquiry: Home Secretary's Action Plan Second Annual Report on Progress. HMSO, London.
Jowell, J., 1973. The legal control of administrative discretion. Public Law, 178–220.
Jowell, J., Lester, A., 1987. Beyond wednesbury: substantive principles of administrative law. Public Law, 368–382.
Jowell, J., Lester, A., 1988. Proportionality: neither novel nor dangerous. In: Jowell, J., Oliver, D. (Eds.), New Directions in Judicial Review. Stevens, London.
Kettle, M., 1980. The politics of policing and the policing of politics. In: Hain, P. (Ed.), Policing the Police, Vol. 2. John Calder, London, pp. 9-62.
Leigh, L., 1997. The police Act 1976. British Journal of Law and Society 4, 115–124.
Lidstone, K., Palmer, C., 1996. Bevan and Lidstone's The Investigation of Crime: a guide to police powers. Butterworths, London.
Lustgarten, L., 1986. The Governance of the Police. Sweet and Maxwell, London.
Macpherson, Sir William, 1999. The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny, Cmd 4262-I. HMSO, London.
McBarnet, D., 1981. Conviction. Macmillan, London.
McConville, M., Sanders, A., Leng, R., 1991. The Case for the Prosecution. Routledge, London.
McKenzie, I., Morgan, R., Reiner, R., 1990. Helping the police with their inquiries: the necessity principle and voluntary attendance at the police station. Criminal Law Review 40, 22–33.
McNee, D., 1983. McNee's Law. Collins, London.
Neyroud, P., Beckley, A., 2001. Policing, Ethics and Human Rights. Willan, Cullompton.
Palmer, P., 2000. Human rights and British Policing. Police Journal 73, 54–60.
Police Complaints Board, 1980. Triennial Review Report, Cmnd. 7966. HMSO, London.

Police Complaints Board, 1983. Second Triennial Review Report, Cmnd. 8853. HMSO, London.
Police Complaints Board, 1985. Final Triennial Review Report, Cmnd. 9584. HMSO, London.
Quinton, P., Bland, N., Miller, J., 2000. Police Stops, Decision-making and Practice. Home Office Policing and Reducing Crime Unit, Police Research Series Paper 130. HMSO, London.
Reiner, R., 1992. The Politics of the Police, 2nd Edition. Harvester Wheatsheaf, Hemel Hempstead.
Reiner, R., 2000. The Politics of the Police, 3rd Edition. Oxford University Press, Oxford.
Royal Commission on Criminal Justice, 1993. Report of the Royal Commission on Criminal Justice, Cm. 2263. HMSO, London.
RCCP, 1981. Report of the Royal Commission on Criminal Procedure, Cmnd 8092. HMSO, London.
Ryan, C.L., Williams, K.S., 1986. Police discretion. Public Law, 285–310.
Scarman, L., 1981. Report on the Brixton Disorders of 10–12 April 1981, Cmnd 8427. HMSO, London.
Sedley, S., 1985. The Uniformed Mind. In: Baxter, J., Koffman, L. (Eds.), Police: the Constitution and the Community Professional Books, Abingdon, pp. 5–10.
Sheehy, P., 1993. Report of the Inquiry into Police Responsibilities and Rewards, Cm. 2280. HMSO: London.
Smith, D.J., Gray, J., 1985. Police and People in London. Policy Studies Institute, London.
Smith, G., 1998. Police Crime: A Constitutional Perspective. Unpublished Doctoral Thesis, University College, London.
Spencer, S., 1985. Called to Account: The Case for Police Accountability in England and Wales. NCCL, London.
Starmer, K., 1999. European Human Rights Law. Legal Action Group, London.
Wong, G., 2000. Towards the Nutcracker Principle: reconsidering the objections to proportionality. Public Law, 92–109.
Zander, M., 1985. Determining whether the act achieves the right balance. Public Law, 403–412.