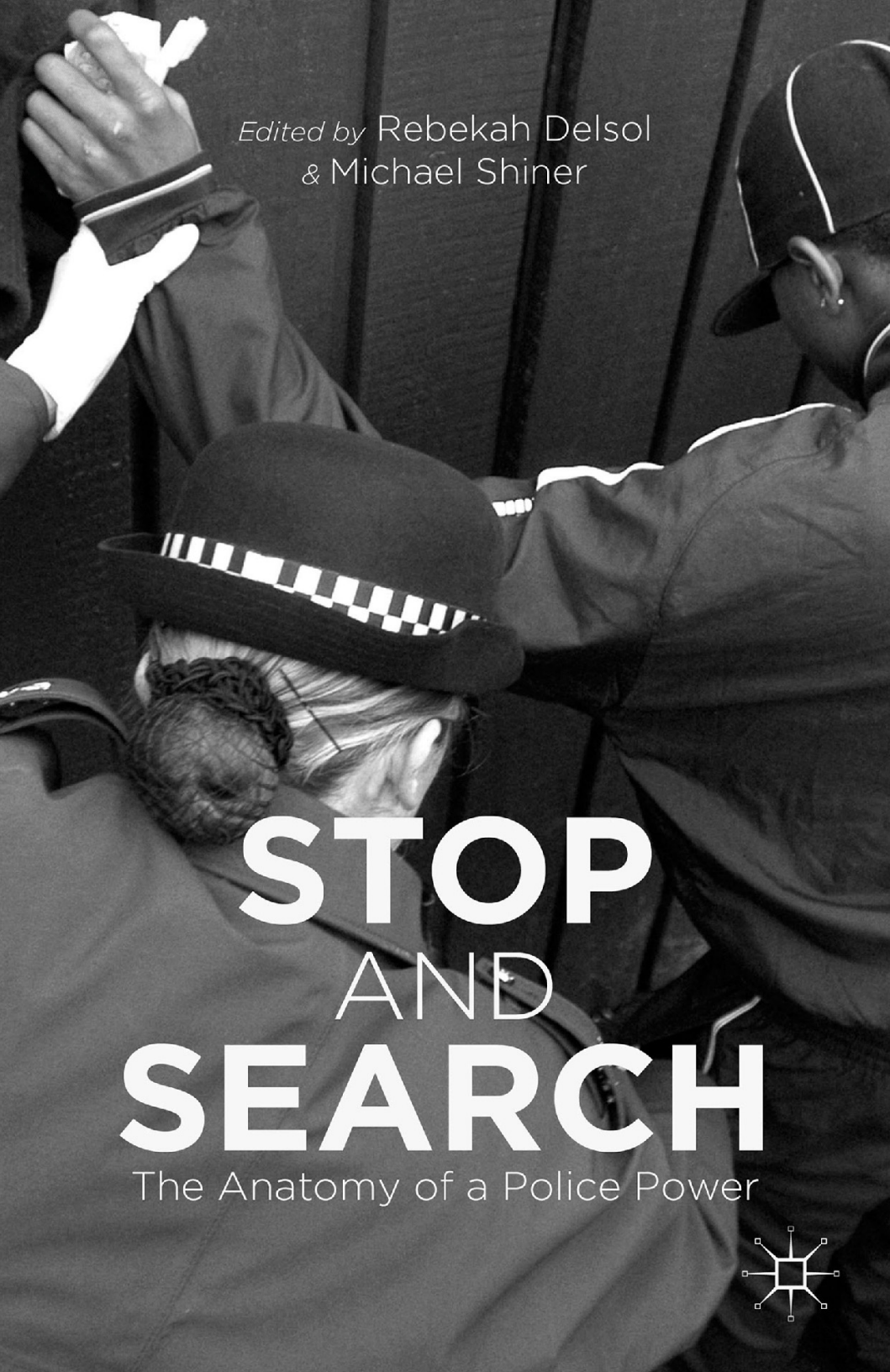
Edited by Rebekah Delsol
& Michael Shiner
STOP
AND
SEARCH
The Anatomy of a Police Power

Stop and Search

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Stop and Search

The Anatomy of a Police Power

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To Elijah and Keziah

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Contents

Figures and Tables

Figures

Tables

Foreword

The purposes of policing (when not simply taken for granted) are generally couched in the loftiest of language, as promulgating a general, universal, objectively beneficial good. This was true of Sir Robert Peel's celebrated 1829 instructions to the newly born Metropolitan Police: 'the object to be obtained is the prevention of crime. To this great end every effort of the police is to be directed. The security of person and property, the preservation of the public tranquility, and all the other objects of the police establishment, will thus be better effected than by the detection and punishment of the offender after he has succeeded in committing the crime' (cited in Emsley, 2014: 12). And this remains the nominal purpose today. As Theresa May said at the beginning of the Home Office document initiating the coalition's profound shake-up of policing, 'The mission of the police which was established by Sir Robert Peel as preventing crime and disorder has not fundamentally changed' (Home Office, 2010: 2).

Yet, from the outset, the profane reality of what was described by contemporary critics of Peel's police as the 'New Engine of Power and Authority' contradicted this sanitised agenda. The overwhelming bulk of policing resources and activity has always been devoted to the patrol and surveillance of public space. The benefits and the burdens of policing are borne primarily by those who live out their lives predominantly on the streets and other public places.

The police, for the most part, do not deal with crime in general, but with those offences that are perpetrated by what in the 19th century were dubbed unceremoniously the 'dangerous classes', often, of course, against other working-class people but sometimes against those higher up the social scale too. Police deployment reflected this: they 'guarded St James's by watching St Giles'. The prime targets of both the iron fist and the velvet glove of policing were the crimes and minor disorders of the urban poor, to whom the police acted as 'domestic missionaries'. Peel explicitly recognised this in his policy of recruiting police from those 'who had not the rank, habits or station of gentlemen'. Democratic policing in the 19th century was of the people, by the people, but not primarily for the people.

Policing always has a double aspect. It protects a universally beneficial degree of order that is necessary for any possibility of any coordinated

large-scale social existence, but at the same time it reproduces the social inequality and domination that have blighted all societies to date. In Otwin Marenin's striking phrase, the police role encompasses both 'parking tickets and class repression' (Marenin, 1983). The task of legitimating the new policing apparatus was a formidable challenge, accomplished slowly, unevenly and never completely. But within this complex process, the notion that the police are agents of and governed by a fair and – at least in principle – equal 'rule of law' played an essential part.

'Stop and search', the subject of this timely, stimulating and often inspiring collection of papers, is thus at the very heart of the policing process, and the controversies that have always stormed around it. 'Stop and search' (and similar powers with varying names at different times and places) is the outer edge of the state–suspected citizen relationship, the crucial entry point for many, perhaps most, of those who will end up suffering the pains of punishment. As several chapters indicate, the constables who preceded the 1829 creation of the Metropolitan Police Service (MPS) already had highly discretionary powers to handle 'idle and disorderly Persons, and Rogues and Vagabonds' (in the words of the Preamble to the 1824 Vagrancy Act). These powers stretch back over centuries of vagrancy legislation aimed at disciplining the poor and powerless people who were seen as threatening respectable social order, and who have always constituted 'police property' around the world. The 'sus' law (s.4 of the 1824 Act), which conferred wide-ranging stop, search and arrest powers, remained highly controversial until its abolition in 1981. During the century and a half after 1829, many stop and search powers were conferred on particular forces (for example the MPS in 1839) and for a wide range of specific offences (listed in an appendix to the 1981 report of the Royal Commission on Criminal Procedure).

By the time the present major stop and search law (s.1 of the Police and Criminal Evidence Act (PACE) 1984) was passed, the main contours of controversy were already well established in relation to the 'sus' law and the national stop and search power in the 1971 Misuse of Drugs Act. These turned mainly on the huge disproportionality in the use of these powers, especially with regard to ethnicity. There was also concern about the very low rate of success in detecting offences, which indicated that a large number of innocent people were subject to incursions on their liberty on flimsy grounds. The formulation of s.1 of PACE, and the accompanying Code of Practice A, was intended to rectify these problems, specifying that stop and search required 'reasonable suspicion' and indicating a list of stereotypes that did *not* satisfy the

requirement. The requirement to complete records of stop and search was the main specific safeguard offered, along with other sections of PACE sanctioning breaches of its procedures and Codes of Practice. These were immediately criticised as inadequate, as they primarily relied on internal police record-keeping and discipline. The list of unacceptable criteria for reasonable suspicion (ethnicity, age, style of dress, etc.) could be cynically interpreted as advice on how to complete acceptable records rather than guidance on what did constitute objectively reasonable grounds.

The chapters of this book document in detail the continuation of these problems despite many reform attempts since 1984, notably in the wake of the 1999 Macpherson Report on the investigation into the murder of Stephen Lawrence. The issues of disproportionality and ineffectiveness are particularly marked in relation to the newer breed of 'suspicionless' stop and search powers introduced by the 1994 Criminal Justice and Public Order Act and the 2000 Terrorism Act (the latter now restricted, though not abolished), with specially negative consequences for police legitimacy. The sources of the powers, the explanation of the disproportionate pattern of their exercise, the reasons why reform has proved so intractable, the poor record of their effectiveness in dealing with crime, the baleful consequences of the rise of new forms of terror and the recurrent appearance of similar problems in other jurisdictions are all thoroughly explored in this excellent volume. The authors are a superb group of scholars and activists, who have produced uniformly clear, authoritative and insightful analyses. Volumes of essays are notoriously often less than the sum of their parts, but this one is an exception. The editors, Rebekah Delsol and Michael Shiner, have done a brilliant job in assembling a collection that provides a coherent, comprehensive, critical yet constructive overview of this topic, which is of pivotal importance for understanding policing and for achieving social justice. It will remain the definitive work on stop and search for a long time to come.

Having said that, I'd like to just offer some hostages to fortune in speculating about the future. The authors document the growing consensus in government and police leadership for reform of stop and search powers since the coalition took office in 2010. They are, on the whole, somewhat sceptical about how far these will succeed, and, I think rightly, foresee the need for organisations like StopWatch to continue their stalwart monitoring and campaigning.

However, I think they are perhaps unduly modest about what has been achieved. This is suggested by comparing the disproportionality of

'reasonable suspicion' stop/searches (unacceptably high as it is) with the spectacular disproportionality of 'suspicionless' searches. The literally paper-thin safeguards afforded by the Codes of Practice make some difference. So, too, does relentless campaigning, as with the now curtailed suspicionless searches.

On the other hand, the history of stop and search also offers serious warnings about the capacity of legal change to regulate police practice. When I conducted my PhD research in the early 1970s in a large urban force, it was one that did not have any general stop and search power. Nonetheless, stops and searches were carried out frequently, with the consent of the suspects. What PACE did in this and other areas of policing was 'authorise and regulate', in David Dixon's evocative phrase (Dixon, 2008). It authorised existing illicit practice and extended common law powers onto a statutory footing, but sought to regulate them by a regime of safeguards of debatable efficacy. The scope for 'voluntary' searches such as the ones I observed in the 1970s remains, even though the Code of Practice says all have to be recorded. In the low-visibility context of street encounters, how is this to be regulated? Even in the event that a complaint is made about an unrecorded search, it will usually be a case of one person's word against a constable's (or several).

The dangers of counter-productive attempts to regulate on-street discretion and 'voluntary' cooperation are indicated further by the unhappy history of 'stop and account'. There is no such power: case law is clear that people are not under a legal obligation to answer a police officer's questions, although, of course, constables are free to ask them and do so frequently, and most people will answer voluntarily. Because of concern that such interventions were as discriminatory as stop and search, Macpherson recommended they should also be recorded, and this was taken up by the Home Office response to his Report. However, the requirement to record 'stop and account' was dropped in 2011, as the chapters in this book make clear. So we are left with a phantom power brought into some kind of formal existence by a now abolished safeguard.

Finally, the chapters in this collection indicate the considerable reforms launched under the coalition (despite the relaxing of recording requirements), in the broader context of a massive shake-up of police governance and conditions of service. They do not offer much by way of explanation of these, and neither can I. The Owl of Minerva flies at dusk, and we may be able to understand the *volte face* in Conservative attitudes to the police when we are looking at them in the rear-view

mirror (can't wait). But as a guide to the past and present of police powers to stop and search, and the quest to understand and regulate their operation so as to minimise discrimination and maximise effectiveness and legitimacy, this volume is a superb achievement. It deserves to be a great success.

Robert Reiner
London School of Economics

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Lee Bridges is Emeritus Professor at the School of Law, University of Warwick. He has a long record of conducting empirical research on aspects of the UK criminal justice system, including the pilot and subsequent evaluation of the provision of custodial legal advice under the Police and Criminal Evidence Act 1984, national evaluations of contracting for criminal legal aid and evaluation of an experimental public defender scheme. He is a joint author of *Standing Accused: The Organisation and Work Practices of Criminal Defence Lawyers in Britain* (1994) and has written regularly on issues of race and criminal justice for the journal *Race & Class*.

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1
Introduction

Rebekah Delsol and Michael Shiner

Stop and search is one of the most common forms of adversarial contact between the police and public, bringing citizens face-to-face with the coercive power of the state. It also provides a visible reminder of what policing is fundamentally about. Although the police 'force' has been repackaged into a 'service', it remains a 'dirty work' occupation (Hughes, 1962) that has to deal with 'inherently contentious situations' as a matter of routine (Reiner, 2010: 253). How officers respond to such situations involves considerable discretion. Whether incidents are treated as crimes is often a matter of judgement, and attending officers may well leave the scene having done little more than listened to the disputants, offered words of advice and, perhaps, 'moved people on' (Sanders et al., 2010). Banton (1964) famously observed that police officers spend far more time 'keeping the peace' than enforcing the law, but the pursuit of peace is often backed up by the threat of force. If conflict escalates or disputants refuse to submit to police authority, officers can invoke their legal powers, and 'no amount of public relations work can entirely abolish the sense that there is something of the dragon in the dragon-slayer' (Bittner, 1970: 6–7). Force or the threat of force remains essential to the police function even though it is typically disguised. According to Manning (2003: 37), the police, in modern welfare states, are 'beneficiaries and guardians of symbolic violence'. Their authority may seem natural and inevitable, yielding instinctive forms of compliance, but it is the product of a carefully cultivated power relationship: 'The police in every society are insulated in some fashion from those they police – by civil laws, traditions, legal conventions such as the common law, civilian review boards, and other modes of accountability' (Manning, 2003: 37).

Somewhat provocatively, perhaps, Klockars (1988: 257) framed the issue in the following terms: 'The only reason to maintain police in

modern society is to make available a group of persons with a virtually unrestricted right to use violent and, when necessary, lethal means to bring certain types of situations under control.' This 'fact', he argues, is as fundamentally offensive to the core values of modern society, which seek to eliminate violence as an acceptable means of conducting human affairs, as it is unchangeable. 'To reconcile itself to its police', therefore, 'modern society must wrap it in concealments and circumlocutions that sponsor the appearance that the police are either something other than what they are or are principally engaged in doing something else' (Klockars, 1988: 257). Following Bittner (1970), Klockars suggests that legalisation is probably the most powerful circumlocution currently mystifying the institution and functions of police in modern society. Despite a sizeable body of law covering police behaviour, he argues, courts have little control over what the police actually do. This is due, in part, to the highly selective way in which the police enforce the law and 'the enormous influence on police discretion of such things as suspect demeanour, complainant preferences, and a host of other factors that have nothing to do with "the law" ' (Klockars, 1988: 243). Professionalisation is said to be another circumlocution on the grounds that the tasks and situations routinely encountered by the police are too varied and complex 'to be covered by the crude provisions of general bureaucratic regulations' (Klockars, 1988: 246).

Klockars (1988: 240) does not advocate the abolition of the police, noting that 'no one whom it would be safe to have home to dinner argues that modern society could be without police'. Rather, he opposes the 'creation of immodest and romantic aspirations that cannot, in fact, be realized in anything but ersatz terms' (1988: 257). This does not lead him to question the need for regulations governing police conduct, however, and part of his objection to legalisation is that it tends to discourage police accountability to political authorities by creating the impression that courts oversee and control police practice. We might, therefore, be equally wary of having anyone home for dinner who argues that modern society could do without formal regulations governing the ability of the police to use force. To dismiss legal and bureaucratic controls as circumlocutions is, perhaps, to understate their importance and to gloss over the nuances involved in the construction of police legitimacy. It is a characteristic of democratic societies that police are subject to the rule of law; can intervene in the lives of citizens only under limited and carefully controlled circumstances; and are publicly accountable (Marx, 2001). Codifying police powers in this way

serves an important normative function, outlining what is expected of police, as well as creating a system through which they may be called to account for misconduct. We cannot assume that changes in regulations and procedures will necessarily translate into changes in practice, but the legal powers that are made available to police are indicative of the political and social context in which they operate. The recent trend has been towards the prioritisation of crime control over 'due process values' and this is a matter of concern 'from a standpoint of principled legality' (Reiner, 2010: 212).

Stop and search is one of the most controversial powers available to police officers in England and Wales. In a recent independent review, Her Majesty's Inspectorate of Constabulary (HMIC, 2013: 2) noted:

> For decades the inappropriate use of these powers, both real and perceived, has tarnished the relationship between constables and the communities they serve, and in doing so has brought into question the very legitimacy of the police service. Thirty years after the riots in Brixton, concerns about how the police use stop and search powers were again raised following the riots in England in August 2011.

The 1981 Brixton 'riots' were a pivotal moment in the history of British policing, which signalled a loss of hard-earned legitimacy. What Reiner (2010: 68) refers to as the 'golden age' of policing rested on a series of disarming policy choices that encouraged a low-profile, legalistic stance built around bureaucratic organisation, the rule of law and the strategy of minimal force. By the 1950s, 'policing by consent' had been achieved to the maximum degree that it is ever possible, and the British police were firmly established as a symbol of national pride. From the late 1950s, the tacit contract between police and public began to fray as social and political changes created a more challenging policing environment. The rise of the Sixties counter-culture and associated protest movements heralded a renewed politicisation of policing. 'A more crucial change', however, 'was the catastrophic deterioration of relations with the black community' as 'a vicious cycle of interaction developed between police stereotyping and black vulnerability to the situations that attract police attention' (Reiner, 2010: 94–5). What happened in Brixton was characterised by the subsequent inquiry led by Lord Scarman (1981: para. 3.110) as 'essentially an outburst of anger and resentment by young black people against the police'. This anger and resentment was attributed, in part, to the adoption of policing priorities and practices that did not command local support and impacted

disproportionately on black and minority ethnic communities. Particular criticism was reserved for the heavy-handed use of stop and search in the form of operation 'Swamp 81', which was identified as the immediate trigger of the disorder.

The broader message of the Scarman Report was, in some ways, a familiar one, echoing Reith's (1956: 287–8) insistence that the fundamental principle of policing is 'the process of transmuting crude physical force, which must necessarily be provided in all human communities for securing observance of laws, into the force of public insistence on law observance'. According to Scarman, the functions of the police, which he identified as the prevention of crime, the protection of life and property, and the preservation of public tranquillity, should be pursued with regard to two fundamental principles: namely, 'consent and balance' and 'independence and accountability'. The nub of Scarman's approach was that, where necessary, the maintenance of public tranquillity should be prioritised over law enforcement. This is the opposite of what had been happening in Brixton, and the 'riots' illustrate what can happen when the iron fist forgets about the velvet glove. The solution recommended by Scarman was to rebuild 'consent' using a variety of means, including increased consultation and improved accountability through lay station visitors and independent review of complaints against the police.

Although Scarman's message was not entirely new, it provoked a 'fundamental reorientation of police thinking' (Reiner, 1985: 199). Following the 'riots' and publication of the Inquiry report, several chief constables sought to redirect policing activities in ways that would restore public confidence and relegitimate the force, giving rise to a flurry of 'community policing' initiatives. It was precisely this kind of intervention that Klockars (1988: 258) was so critical of, arguing it was the latest in a long line of circumlocutions: the 'song of community policing', he claimed, like the songs of legalisation, militarisation and professionalisation before it, 'is about some very good things we might gladly wish, but which, sadly, cannot be'.

Since the Brixton 'riots' and their immediate aftermath there have been two 'revolutions' in the development and legitimation of police powers in England and Wales (Reiner, 2010: 207). The first was the introduction of the 1984 Police and Criminal Evidence Act (PACE). For most of its history the legitimacy of the British police had been nourished by the minimisation of its legal powers and the myth of the constable as a 'citizen in uniform' with no special powers beyond the ordinary member of the public. PACE replaced this myth with the principle of a 'fundamental balance' between police powers and procedural safeguards.

An accompanying code of practice was devoted to stop and search and to identifying the circumstances under which such powers can be legally deployed by officers (see Home Office, 2013a). After little more than a decade, the 'fundamental balance' was superseded by a proliferation of police powers which lack balancing safeguards and a whittling away of the due process provisions introduced by PACE. What this meant for stop and search was the rise of 'exceptional' powers that are free of the normal procedural safeguards regulating their use, and the paring back of requirements governing officers' accountability for their use of the powers. Such developments have been justified by claims about the need to rebalance the system in favour of victims due to the threats posed by crime, anti-social behaviour and, more recently, terrorism. This 'shift in legitimatory myths reveals dramatic transformations in the politics of policing and security, and involves deep issues of principle about the relationship between state and citizens in a democratic society' (Reiner, 2010: 208).

It was in the midst of the second, post-PACE, revolution that several contributors to this collection came together to form StopWatch, a coalition of civil society organisations, academics, lawyers, community workers, activists and young people, which campaigns for fair and accountable policing (see http://www.stop-watch.org/). StopWatch works to:

- promote effective, accountable and fair policing;
- inform the public about the use of stop and search;
- develop and share research on stop and search and alternatives;
- organise awareness-raising events and forums;
- provide legal support challenging stop and search.

Since its inception in 2010, StopWatch has led a wide-ranging campaign challenging the disproportionate use of stop and search against people from black and minority ethnic groups, the increased use of exceptional stop and search powers, and the weakening of accountability mechanisms. Collectively, we have carried out and commissioned research, written reports and submitted evidence to various commissions and inquiries; organised seminars and presented papers at conferences; participated in consultations, sat on boards and committees, lobbied politicians and attended parliamentary events; supported legal challenges and signposted people to lawyers for legal advice; organised public hearings, produced factsheets and delivered training; written blogs, placed stories in national newspapers, spoken on the radio and appeared on television; made films, organised a flashmob and produced a play.

Much of this activity lies outside the traditional arena of academia or, indeed, policy work, but can usefully be thought of as an exercise in public criminology in the sense that it represents an explicit attempt to engage in, and shape, political and public debate about a key area of policing. As noted by Loader and Sparks (2011), the crime control climate has become considerably hotter and more volatile in recent times, and, like other criminologists who have made forays into this hostile environment, we have sought to employ 'cooling devices': that is to say, we have responded 'to an emotive and politicized penal field by seeking to reassert the values and institutions that hot penal politics tends to devalue or disregard – legality and justice, scientific evidence and techniques, and bureaucratic rationality' (Loader and Sparks, 2011: 9). In so doing, our aim has been to contribute to 'a better politics of crime and its regulation' through what Loader and Sparks (2011: 117) refer to as 'democratic under-labouring'. While such an approach is committed, first and foremost, to the generation of knowledge, it is said to have most to offer when due attention is also paid to normative aspects of crime and justice. One of StopWatch's principal functions is to inject rigorous criminological knowledge into debates about policing, challenging misinformation and promoting a more evidence-based approach. But this function operates alongside a commitment to ensuring that impacted communities have a voice in the debate (we consider these voices to be a vital source of evidence). In terms of the styles of engagement identified by Loader and Sparks (2011), StopWatch combines the roles of 'scientific expert' and 'social movement theorist/activist'.

Most of the contributors to this collection are members of StopWatch, and many of the chapters were developed for a Roundtable event that took place at John Jay College of Criminal Justice, New York, on 10 and 11 August 2011.[1] The event focused on racial disparities in police-initiated stops in the UK and the US. It began less than a week after the fatal police shooting of black Londoner Mark Duggan, which sparked some of the most serious rioting in recent British history. According to press reports, the riots were 'a sort of revenge' against the police, that were partly fuelled by anger and resentment over stop and search (Prasad, 2011). Despite the best efforts of Lord Scarman and all that followed, it seems the lessons of Brixton have not been learned. What, then, is to be done about stop and search?

The following collection is comprised of eight substantive chapters. Lee Bridges starts things off by reviewing the development of stop and search powers in England and Wales as well as regulations governing their use. His analysis pays particular attention to the role of the Police

and Criminal Evidence Act 1984, the impact of the Stephen Lawrence Inquiry and the subsequent weakening of existing regulations through, among other things, the use of 'exceptional' counter-terrorism powers. By way of conclusion, Bridges considers recent moves to reassert regulatory authority over police stop and search activity. The next chapter, by Michael Shiner and Rebekah Delsol, considers how the use of stop and search fits with the broader politics of crime control. Drawing on official statistics, government surveys and observational studies, they argue that stop and search should not be understood as a straightforward response to crime, suggesting that its use has been shaped by the emergence of a more punitive political climate. In developing these claims, Shiner and Delsol examine trends in stop and search, variations between forces, the types of offence that are targeted by police and the characteristics of the people who are stopped and searched. Particular attention is paid to debates about the disproportionate focus on black and minority ethnic groups and the role of police racism. The issue of police racism is examined in more detail by Paul Quinton, who addresses a specific gap in the literature by looking at officer decision-making at a micro level. He begins by identifying several different mechanisms through which ethnic disparities might be produced, before going on to assess them based on the literature and observational fieldwork in several police forces.

Chapters 5 to 7 focus on the impact of stop and search. Rebekah Delsol assesses claims that stop and search provides a 'powerful tool' in the 'fight against crime'. Her analysis is organised around the observation that any judgement about the effectiveness of an intervention should take account of its costs as well as its benefits. In the absence of robust experimental evidence covering England and Wales, the apparent crime-fighting benefits of stop and search are assessed on the basis of arrest rates, the extent to which this activity is intelligence-led and the type of offences that are targeted. Drawing on these indicators, as well as the more general literature, the benefits of stop and search are said to be outweighed by the costs, which include damage to community relations, particularly with black and minority ethnic communities, and loss of trust and confidence in the police. The costs of stop and search are explored further by Ben Bradford, who contrasts the uncertainty surrounding the effectiveness of this tactic with the extensive evidence of its associated harms. Drawing on procedural justice theory, he identifies a series of unintended consequences, arguing that stop and search is likely not only to damage people's sense that the police are fair, but also to undermine police legitimacy, damage cooperation between police and public, encourage a turn towards 'self-help'