

ABSTRACT

From a position of near parity in 2005/6, by 2012/13 recorded search rates in Scotland exceeded those in England/Wales seven times over. This divergence is intriguing given the demands placed on the police, and the legal capacity to deal with these are broadly similar across the two jurisdictions. The aim of this paper is to unpack this variation. Using a comparative case-study approach, the paper examines the role of structural 'top-down' determinants of policing: substantive powers of search, rules and regulations, and scrutiny. Two arguments are presented. First, we argue that the rise of stop and search in Scotland was facilitated by weak regulation and safeguards. Second, we argue that divergence between the two jurisdictions may also be attributed to varying levels of political and public scrutiny, caused, in part, by scrutinising stop and search almost exclusively through the prism of 'race'. In Scotland, the significance of these factors has been made evident by dint of organisational developments within the last decade; by the introduction of a target driven high-volume approach to stop and search in Strathclyde police force circa 2007 onwards; and the national roll-out of this approach following the single service merger in April 2013. The salient point is that the Strathclyde model was not hindered by legal rules and regulations, nor subject to policy and political challenge; rather a high discretion environment enabled a high-volume approach to stop and search to flourish without challenge.

Introduction

In the last decade, a gulf opened up between England/Wales and Scotland as regards the use of stop and search. From a position of near parity in 2005/6, by 2012/13 recorded search rates in Scotland exceeded those in England/Wales seven times over. This divergence is intriguing on several counts, not least the fact that until the advent of the single police service in April 2013, the use of stop and search in Scotland received little by way of public or political scrutiny (Scott 2015, p. 21). The divergence is also fascinating given the similarities between the two jurisdictions, both in terms of recorded crime trends (Bradford 2015) and statutory stop and search powers. There are, of course, differences in police governance and the political narratives around policing in the two jurisdictions (***** and Harkin, forthcoming). Nonetheless, it is arguable that the demands placed on the police and the legal powers to deal with these are broadly similar.

Against this background, this paper investigates variation in stop and search practice between England/Wales, and Scotland. The aim is to show how ‘top-down’ factors, such as substantive powers of search, regulations and scrutiny, can influence police practice. Such ‘constraining’ factors can be taken for granted. For example, Kinsey observes a tendency ‘to ignore the efficacy of rules almost entirely’ (1992, p. 478, cited in Dixon, 1997, p. 21). Similarly Dixon observes that the law is ‘often regarded as being, at best, marginally relevant and, at worst, a serious impediment to the business of policing’ (ibid. p. 9, McConville *et al.* 1991). Rather, the way in which officers deviate from, or modify rules and regulations is usually viewed as the principal difficulty (McBarnet 1983, pp. 3-5). To be clear, the analysis in this article is not intended to downplay the discretionary nature of policing. The fact that reform and regulation around stop and search has been patchy, at times ineffective, and met with resistance, demonstrates the inherent difficulties in controlling police discretion. Nonetheless, we would suggest that by comparing policy and practice in England/Wales with that of Scotland, the value of legal and quasi-legal rules, as well as robust scrutiny, becomes clearer.

The paper takes a comparative case-study approach in order to explore differences in stop and search practices and regulation in the two jurisdictions. The paper argues, first, that a permissive regulatory environment facilitated the development of volume stop and search in Scotland. Second, that divergence between the two jurisdictions can also be attributed to varying levels of political and public scrutiny; to the fact that the stop and search agenda in England/Wales is well-established, whereas scrutiny in Scotland is in its infancy. Whilst it is clear that stop and search operates in a discretionary environment in both jurisdictions, the salient point is that a weak regulatory framework, coupled with a lack of scrutiny or political engagement enabled police practice in Scotland (Sanders and Young 2008, p. 284). The significance of these arguments is brought to the fore by the Scottish policy direction circa 2007 onward: by the target-driven ‘proactive’ volume approach, initially adopted by Strathclyde police force, and then rolled out nationally following centralization in 2013 –and latterly, by policy and legal reform from 2015 onward, that rapidly precipitated a substantial fall in recorded stops and searches.

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3 The paper draws on published statistics and data accessed via the Freedom of Information
4 (Scotland) Act 2002 (FOISA). Note that there is a contrast between access to data in
5 England/Wales and Scotland, which reflects our observations apropos standards of
6 accountability and transparency in the two jurisdictions. Authorities in England/Wales have
7 been required to publish annual data under the Criminal Justice Act 1991, s.95 on the
8 criminal justice system and race since 1992, albeit in varying forms, as well as Home Office
9 statistics on police powers (*Police Powers and Procedures* data series). The statistics detail,
10 by police force area, the number of stops and searches, the reason for the search, the
11 legislation used (broadly grouped), the number of resulting arrests, the self-defined ethnicity
12 of the person searched and rates of stop and search per 1,000 of the population, including by
13 ethnicity. Twenty-two forces also provide data sets on their websites (HMIC 2013). In
14 Scotland, prior to 2014, the main vehicle for data has been the FOISA. In May 2014, the
15 Scottish Police Authority (SPA) took responsibility for the publication of stop and search
16 statistics, and published the first detailed background in January 2016. Since June 2014,
17 Police Scotland has published statistics online (tabulated and disaggregated) which detail
18 search location, reason for the search, whether statutory or non-statutory, outcome (positive
19 or negative) ethnicity, age and gender. In June 2015, Police Scotland introduced additional
20 data fields, including grounds for suspicion, legislation used and disposal (excluding arrest).
21 Data quality is poor in both jurisdictions. The HMIC criticised English and Welsh forces for
22 ‘simply stop[ing] recording some of the data which we believe is necessary to allow a good
23 assessment of the effectiveness of the power’ (2013, 47). The All Party Parliamentary Group
24 on Children also criticised the lack of routine national collation of statistics on stops and
25 searches of children and noted that there may have been errors in the data provided (2014).
26 Prior to the introduction of new recording standards in June 2015, the data quality in Scotland
27 was arguably worse; in March 2015 HMICS stated that they had no confidence in data
28 collected by Police Scotland. Nonetheless, data from the two jurisdiction provide insight into
29 the different thresholds of suspicion in each. As Scott explains:

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‘The disparity with England serves to illustrate the scale of the practice in Scotland, which was principally driven by the use of non-statutory stop and search. Stripping out potentially distorting features and inaccuracies, the statistics still demonstrate that the practice has been used proportionately more per head of population in Scotland than elsewhere’ (2015, p. 19).

The paper also draws on Police Scotland’s ‘Stop and Search Operational Toolkit’ (2014), which pertain to the period of analysis (in December 2015, Police Scotland published Standard Operating Procedures (2015a), which address some of the concerns discussed herein). The analysis focuses on stop and search powers that can be exercised against people (and, where relevant, vehicles and vessels) when they are in public. It does not concern powers under the various Road Traffic Acts nor stop and search powers exercisable at borders.

Unless otherwise stated, all references to police forces in England and Wales are to the 43 territorial forces. In April 2013, the Police and Fire Reform (Scotland) Act, 2012 amalgamated Scotland’s eight police forces¹ into the Police Service of Scotland (‘Police

¹ These were: Strathclyde, Lothian and Borders, Central, Fife, Tayside, Grampian, Northern, Dumfries and Galloway.

Scotland'). Note the paper refers to policy and practices under the eight 'legacy' forces and under Police Scotland.

1. Police powers to stop and search in England and Wales and Scotland

There are striking similarities in the underlying powers of stop and search in England/Wales and Scotland, with the statutory powers being virtually identical. The vast majority are subject to reasonable suspicion and tend to follow a similar formula: the police may stop and search a person if they reasonably suspect an offence has, is, or is about to be committed, or that the person is in possession of a prohibited article. Some powers extend to vehicles, drivers and passengers. It is notable first, that just over half of these suspicion-based statutory powers apply across the UK, with a further eight specific to England/Wales and nine relating to Scotland. Among these powers, which range from 'core' criminal offences such as possession of drugs or stolen property, to environmental and wildlife offences, there are remarkably few significant differences between the jurisdictions. Of these, only two relate to the 'core' criminal offences that constitute the overwhelming majority of stops in both jurisdictions. In England/Wales, the police may stop and search persons suspected of having articles for use in criminal damage and fraud (Police and Criminal Evidence Act 1984 (PACE), s.1). In Scotland, the power to search for stolen goods includes searching for evidence of the commission of theft (Civic Government (Scotland) Act 1982, s.60).² There are a further two statutory suspicionless stop and search powers, so termed because they explicitly do not require that the officer suspect the person of a particular offence or of carrying prohibited items to stop and search them. These are the Terrorism Act 2000, s.47A and the Criminal Justice and Public Order Act 1994, s.60, which are UK wide. In 2015, Home Office forces accepted voluntary restrictions upon the use of s.60 under the Best Use of Stop and Search (BUSS) Scheme (see part four), thereby creating a cleavage between the jurisdictions. Specifically, a higher threshold is required for authorisation, the maximum duration of which has been reduced from 24 to 15 hours, and there is a requirement to inform the public after an authorisation has been issued and, where practicable, in advance (Home Office 2014, *****, 2016).

Statutory differences between England/Wales and Scotland cannot explain the marked variation in search rates between the jurisdictions. Rather, the main point of divergence relates to non-statutory (or 'consensual') stop and search, used only in Scotland. Premised nominally on consent, officers may undertake a non-statutory search when a person 'is not acting suspiciously, nor is there any intelligence to suggest that the person is in possession of anything illegal' (Police Scotland 2014, p. 8). In England/Wales, non-statutory stop and search has been prohibited in relation to juveniles and persons incapable of giving consent since 1990 (the latter being unlawful in any event),³ and across the board since 2003.⁴ In

² In addition, Scotland has powers relating to offences involving areas subject to a special scientific interest notification (Nature Conservation (Scotland) Act 2004, s.43) and hunting wild animals with dogs (Protection of Wild Mammals (Scotland) Act 2002, s.7). England and Wales have powers relating to poaching offences (Poaching Prevention Act 1862, s.2). There are two further areas covered by each but in different ways. First, Scotland provides powers of stop and search to constables and water bailiffs in connection with offences relating to salmon and fishing, whereas only the latter have such powers in England and Wales (Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, s.53 c.f. Salmon and Freshwater Fisheries Act 1975, s.31). Second, both grant constables' power to stop and search persons or vehicles in relation to offences against deer, but in Scotland a warrant is the norm, with a requirement of urgency to search upon reasonable suspicion without a warrant (Deer (Scotland) Act 1996, s27(4)(b). C.f. Deer Act 1991, s.12(1)).

³ PACE 1984 (Codes of Practice) (No. 2) Order 1990, SI 1990/2580.

⁴ PACE (Codes of Practice) (Statutory Powers of Stop and Search) Order 2002, SI 2002/3075. See now Code A para.1.5.

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3 England/Wales, the Macpherson Report's recommendation to record all stops and searches
4 prompted the ultimate demise of non-statutory search (Macpherson 1999: Recommendation
5 61; see Sanders and Young 2007).
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8 The legality of non-statutory stop and search as practiced in Scotland is questionable (Scott
9 2015, p. 45, ***** 2016). It is trite law that consent must be freely given and fully
10 informed. Thus, the person must be under no coercion, understand the potential consequences
11 of a search, that a search may be declined and that refusal will not of itself provide grounds
12 for a statutory search nor trigger any other police action. In addition, the person must have the
13 legal capacity to consent. In practice, these criteria are unlikely to be met in all cases. First,
14 young children lack the capacity to consent. While the exact age at which a child has such
15 capacity is ambiguous (see further *****2016), it is clear that children under 8 years (the age
16 of criminal responsibility) would not have the requisite capacity. It is questionable whether
17 other young children would sufficiently understand the consequences of their action so as to
18 be able to consent. As discussed in part two, non-statutory stop and search has fallen
19 principally on young people, including children under the age of criminal responsibility.
20 Persons under the influence of drugs or alcohol may also lack the capacity to consent.
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25 Second, the police are not legally required to inform a person that they can refuse the search.
26 In *Brown v Glen Lord Sutherland* stated that 'there appears to us to be no logical reason why
27 [the police] should be obliged to issue any caution to accompany a request for a search to be
28 carried out when it must be perfectly obvious that the answer to that request may be either
29 yes or no' ((1998) SLT 115: 117). Research, however, shows that it is often not 'perfectly
30 obvious'. Dixon *et al.* observe: '[consent] frequently consists of acquiescence based on
31 ignorance' or due to the person's 'appreciation of the contextual irrelevance of rights and
32 legal provisions' (1990, p. 348). One officer they interviewed stated that '[a] lot of people are
33 not quite certain that they have the right to say no. And then we, sort of, bamboozle them into
34 allowing us to search' (ibid.).
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38 Leaving knowledge of one's choice to refuse the request aside, the research raised the
39 additional issue that agreement may be in be predicated on a conditioned response to police
40 authority or a disbelief in one's rights. It is doubtful whether such 'acquiescence', whatever
41 its base, constitutes free, informed consent. 'Bamboozling' a person through misinformation
42 or pressure, implied or explicit, clearly does not. Moreover, the inherent power imbalance
43 between the police and the person stopped may prompt people to consent 'not because they
44 make a free choice... but because that is how people respond to the authority of the police
45 (Delsol 2006, p. 116). Finally, research shows that refusal can lead to a statutory stop and
46 search, which undermines consent (***** 2014a, p.21).
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50 Routine stop and search engages the right to privacy under Article 8 of the European
51 Convention of Human Rights (ECHR) (*Gillan v United Kingdom* (2010) 50 EHRR 45). In a
52 non-statutory context, the questionable nature of the 'consent', at least in some cases, coupled
53 with the virtually unfettered discretion of the officer regarding whom to search and the lack
54 of information given to the person being stopped (or more generally available) makes it likely
55 that the power is not prescribed by law. As this is a prerequisite for a justifiable infringement
56 with the qualified rights under the ECHR, it is highly likely that non-statutory stop and search
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3 infringes Article 8 (Mead 2002, SHRC 2015, ***** 2016. On stop and search and the ECHR
4 generally, see: ***** 2013a, 2015, 2016). The next part of the paper examines the
5 ramifications of these observations, and how, until 2015, non-statutory stop and search
6 provided a vehicle for policies that legal rules, to some extent, might have constrained.
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8 9 10 **2. Policy and practice**

11 Turning to policy, there is evidence of a performance-driven approach to stop and search in
12 both jurisdictions. The coupling of stop and search and performance can be traced to the rise
13 of New Public Managerialism in the 1980s, and subsequent embedding of performance
14 management in policing under the 1997 New Labour administration. Whilst the adverse and
15 distorting effects of performance cultures are well established, including an overemphasis on
16 outputs at the expense of outcomes, and a reduction in less tangible police-work (Fielding
17 and Innes 2006, Bevan and Hood 2006, McLaughlin 2007, Guilfoyle 2012), stop and search
18 performance measures have persisted in both jurisdictions. In England/Wales, some forces,
19 including the Metropolitan police, continue to set arrest or outcome targets (Metropolitan
20 Police Federation 2014). Curtis further observes that ‘the removal of targets at the top has not
21 necessarily resulted in significant changes in practice further down – counts of arrests, stop-
22 search and intelligence submissions remain basic measures of frontline performance in some
23 forces’ (2015; 15).
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28 In Scotland, a performance-driven approach to stop and search was spearheaded by legacy
29 Strathclyde Chief Constable, Sir Stephen House (***** 2015a). From circa 2007, House
30 promoted volume stop and search using precise numerical targets, set at the force level, at
31 times to one decimal point (Strathclyde Police Authority, 2012). By dint of an aggressive
32 performance regime, officers usually exceeded targets by around a third (ibid.), resulting in
33 disproportionately high recorded search levels. For example, in 2010 Strathclyde police
34 accounted for 84% of recorded stops and searches nationally, compared to a 43% share of the
35 population, a 53% share of recorded offensive weapon handling and drug offences (ibid.).
36 Officers undertook around three quarters of stops and searches on a non-statutory basis
37 (***** 2015), which provided a vehicle for volume activity, premised on deterrence.
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41 The move to a single force heralded significant changes in terms of governance and the
42 profile of Scottish policing (Anderson, Fyfe and Terpstra 2014). Whilst reform sought to
43 balance power between the Chief Constable, the Scottish Parliament and the Scottish Police
44 Authority, in practice, power coalesced around Sir Stephen House, the newly appointed Chief
45 Constable, and Scottish Ministers, with the latter routinely deferring to Police Scotland’s
46 ‘operational independence’ (MacLennan, 2016; 79). From April 2013, Police Scotland rolled
47 out a proactive approach to stop and search nationally, resulting in sharp increases in areas
48 that hitherto took a more discretionary approach. Stop and search was set as a closely
49 monitored Key Performance Indicator and a detection target set at 20%. Whilst the force
50 denied ‘individual targets’, HMICS documented that officers and supervisors felt pressured to
51 increase search numbers and be more ‘proactive’ (2015, p. 55).
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3 Comparative analysis between England/Wales, and Scotland reveals a marked disparity in the
4 use of stop and search that principally relates to non-statutory activity in Scotland. Looking
5 first at the raw counts (Home Office 2015, SS.01), the number of recorded stops and searches
6 in England/Wales peaked at over 1.5 million in 2008/9. In 2012/13, this fell to just over a
7 million. By 2013/14 recorded stops and searches had fallen to below one million for the first
8 time since 2005/6. A small minority are suspicionless: around 5,000 in 2012/13 (0.5% of the
9 total), down from a high of over 360,000 in 2008/09 (24% of the total).
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13 Suspicionless statutory powers acted as the primary driver of variation between 2001 and
14 2013/14. Between 2001/2 and 2010/11, officers recorded over 645,000 stops and searches
15 under the Terrorism Act 2000, s.44 (Home Office 2012). Its replacement, s.47A, has been
16 authorised once in Northern Ireland, but not used in Great Britain to date (Anderson 2015).
17 Between 2002/3 and 2006/7, use of the Criminal Justice and Public Order Act 1994, s.60
18 remained reasonably constant, at around 36,000 to 46,000 per year. However, its use tripled
19 between 2007/08 and 2008/09, rising to just over 150,000, and displacing other search
20 powers (Shiner 2012, p. 9). The number of s.60 stops and searches then fell to around 46,000
21 in 2011/12, collapsed to just under 5,000 in 2012/13, and dropped to under 3,500 in 2013/14
22 (Home Office 2015, SS.01). These fluctuations in statutory suspicionless powers can, in large
23 part, be attributed to legal challenges mounted against them. The European Court of Human
24 Rights (ECtHR) in *Gillan v United Kingdom* ((2010) 50 EHRR 45) held that the Terrorism
25 Act 2000, s.44 unjustifiably infringed the right to a private life under the European
26 Convention on Human Rights, Article 8. In response to the ruling, the power was suspended
27 from 8th July 2010 and ultimately repealed by the Protection of Freedoms Act 2012, s.61,
28 which inserted the new power under the Terrorism Act 2000, s.47A. The on-going legal
29 challenge of *R (Roberts) v Commission of Police of the Metropolis* [2014] EWCA Civ 69 and
30 the associated Stopwatch campaign significantly influenced the fall in recorded stop searches
31 under Criminal Justice and Public Order Act 1994, s.60. As Shiner and Delsol explain, the
32 granting of permission for the case to proceed to the High Court acted as a trigger for the
33 announcement of a number of significant reforms to the power (2015, pp.40-41).
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40 In Scotland, recorded stops and searches increased by 550% between 2005 and 2012/13, from
41 around 105,000 to 683,000. In 2013/4 (the first year of Police Scotland) recorded stops and
42 searches fell by 6% to around 641,000, and thereafter by 34% in 2014/15, to around 426,000
43 (*****, 2015a, 2015b). Between 2005 and 2014, approximately seventy per cent of recorded
44 searches were undertaken on a non-statutory basis (*****, 2014a, HMICS 2015, p. 6). The
45 absence of reliable data makes it impossible to assess the use of suspicionless statutory
46 powers in Scotland. The Terrorism Act 2000, s.44 was used, albeit 'barely', in Scotland
47 (Anderson 2011, para.8.19), but no data on the usage have been published, and an FOISA
48 request was refused.
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52 In order to compare the two jurisdictions, Figure 1 shows per capita trends in England/Wales
53 and Scotland between 2005/6 and 2014/15 (taking into account that the population of
54 England/Wales is nearly eleven times higher than Scotland).⁵ The figure shows how from a
55 position of near parity in 2005/6, a marked divergence opened between the two jurisdictions.
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58 ⁵ Mid-2014 population estimates: England and Wales, 57,408,700; Scotland, 5,347,600 (ONS, 2015).
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Figure 1 shows that by 2012/13 the per capita search rate in Scotland was seven times higher than England/Wales, at 129 and 18 stops and searches per 1,000 people respectively. The main driver of variation was the increase in non-statutory stops and searches in Scotland, coupled with the fall in suspicionless statutory stops and searches in England/Wales. Despite falling rates of recorded stops and searches from 2013/14 onwards, rates in Scotland remained over four times higher than England/Wales in the nearest comparable period, at 80 and 16 stops and searches per 1,000 people respectively. A comparison of search rates expressed in terms of recorded crime also reveals variation. In 2013/14, the stop and search rate per 1,000 recorded crimes and offences in Scotland was 3.5 times greater than England/Wales, at 833 and 219 respectively (Police Scotland 2015; Scottish Government 2015, tables 5,6; Home Office 2015, SS.01; ONS 2015, table A4).

Per capita search rates varied within each jurisdiction. In England/Wales, these ranged from 5 per 1,000 in several forces, to 45 per 1,000 in Cleveland in 2013/14 (Home Office 2015, SS.08). In the same period, search rates in Scotland ranged from 10 stops and searches per 1,000 in Aberdeenshire and Moray, to 310 per 1,000 in Greater Glasgow. Looking at the largest cities, officers recorded 371 stops and searches per 1,000 in Glasgow (Police Scotland 2014, p. 79), compared to 35 per 1000 by the MPS (Home Office 2015, SS.08). In Scotland, the five Divisions with the highest rates in 2013/14 (152 searches per 1,000 upwards) deployed non-statutory tactics extensively, from 63% of recorded stops and searches in Argyll and West Dumbartonshire, to 76% in Ayrshire (**** 2015b).

There was some variation in the reasons for stopping and searching people (non-statutory stops and searches in Scotland are assigned 'reasons', which are included in this comparison). The most common reason in both jurisdictions was drugs. Viewed as a straightforward win by officers (Bear 2013), drugs accounted for 53% of recorded stops and searches in England/Wales in 2013/14 (Home Office 2015, SS.02) and 44% in Scotland (HMICS 2015, p. 13). Thereafter divergence occurred. For England/Wales, the second most common reason was stolen property (21%), followed by going equipped for criminal damage (14%), offensive weapons (7%), 'other' (covering the various other categories described in section one above, including suspicion of being a terrorist) (4%), criminal damage and firearms (both 1%) (Home Office 2015, SS.02).

In Scotland, alcohol was the second most cited reason (31%), although this statistic also included (unquantified) confiscations under Section 61 of the Crime and Punishment (Scotland) Act 1997.⁶ Offensive weapons accounted for 18% of recorded stops and searches (2.5 times higher than England/Wales) and stolen property for 7%. Others reasons, including firearms, accounted for less than 1% of the total. Overall, the distribution (determined principally by activity in the West) reflected a policy focus on serious disorder and (relatedly) binge-drinking (Audit Scotland/HMICS 2011, p. 38) – or 'blades and booze' (Scottish Executive 2003). Specifically, officers deployed stop and search (as well as seizure) to

⁶ Alcohol searches and seizures were recorded separately from June 2015 onwards. The respective number of alcohol searches and seizures prior to this point is unknown.

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3 confiscate alcohol with a view to preventing the escalation of serious violent crime (****
4 2015, p.171).

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7 It is not possible to compare the effectiveness of stop and search in terms of 'hit-rates'. In
8 England/Wales, this refers to the proportion of stops and searches that result in an arrest. In
9 2013/14, the arrest rate was 12% (Home Office 2015, SS.08). Given the absence of a
10 requirement of suspicion, it is unsurprising to find the rate for the suspicionless powers was
11 lower, at 5%. Police Scotland measure stop and search 'hit-rates' in terms of detection, rather
12 than arrest. In 2013/14, the detection rate was 19%, although the (unquantified) inclusion of
13 alcohol confiscations under s.61 (HMICS 2015, p. 43) inflates this statistic. There was also a
14 significant difference in detection rates for statutory and non-statutory stops and searches, at
15 28% and 16% respectively (ibid., p.3). There have been some attempts to portray low hit-
16 rates as a 'success', for example, as evidence that stop and search is functioning as intended
17 by permitting the police to confirm or allay suspicion without recourse to arrest. In Scotland,
18 senior officers have interpreted low hit-rates as proof of deterrence (**** 2015a; c.f. Delsol
19 and Shiner 2015 disputing the deterrent effect), although there is no research evidence to
20 support this assertion. Leaving the suspicionless powers to one side, Bowling's argument
21 (2007) that suspicion can hardly be 'reasonable' (and the stop therefore not lawful), when the
22 suspicion is unfounded in the vast majority of cases, is compelling.

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27 Some demographic differences are evident.⁷ In England/Wales, stop and search has long been
28 associated with the disproportionate policing of black, Asian and minority ethnic (BAME)
29 communities (Scarman 1981, Holdaway 1996, Macpherson 1999, EHRC 2010). In 2011/12
30 'Black' people were stopped and searched at six times the rate of 'White' people and 'Asian'
31 people and those of 'mixed' ethnicity were stopped at twice the rate of 'White' people
32 (Ministry of Justice 2013, p. 41). When the London forces are excluded the disproportionality
33 remains, albeit at a lower level, with, respectively, 'Black', 'Asian' and 'Mixed ethnicity'
34 persons being 2.8, 1.4 and 1.6 times more likely to be stopped than 'White' persons (ibid., p.
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39 In Scotland, stops and searches have generally targeted white working-class boys (McAra
40 and McVie 2005, p. 28, **** 2015, p. 284). Unlike England/Wales, ethnicity has not
41 surfaced as a high-profile concern (Reid Howie 2001) although poor recording preclude more
42 robust conclusions. The age distribution is concerning, for example, in 2014/15, officers
43 recorded more stops and searches on sixteen year olds in Glasgow than the resident
44 population of sixteen year olds (**** 2015b). Whilst it might be argued these trends reflect
45 the established age-crime curve (McVie, 2005, p.1), as well as the greater availability of
46 young people on the street (MVA and Miller, 2000), it is notable that the age-distribution of
47 stop and search varies in ways that are not readily explicable in terms of crime trends. For
48 example, in Edinburgh, 5% of recorded stops and searches fell on sixteen year olds,
49 compared to 13% in East Renfrewshire (Police Scotland 2015). The fact that detection rates
50 are lower among younger populations (**** 2014) suggests age-disproportionality, insofar as
51 the threshold for suspicion is lower for young people, and searches most likely for social
52 control (rather than detection) purposes (Bowling and Philips, 2007; 938).

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58 ⁷ Space precludes a detailed consideration of gender. Whilst there is some evidence of males are searched disproportionately, this does not
59 appear to be sizeable, compared to recorded data on gender and offending (****, 2015; p.150).

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4 Equally problematic is searching very young children. In Scotland, officers recorded over
5 1,300 stops and searches on children under ten between 2006 and 2010 (FOISA), and 262
6 stops and searches in 2013/14 (Police Scotland, 2015). The closest equivalent data for the
7 Home Office forces is from the APPG report 'Children and the Police' (2014) which found
8 that officers across twenty-two forces (excluding the MPS) recorded 1,136 stops and searches
9 on children under ten between 2009 and 2013.⁸ The MPS alone recorded 101 stops and
10 searches on under ten year olds between November 2011 and October 2014 (FOI). Whilst
11 these figures may include inputting errors,⁹ it is notable that the Scottish annual figure is
12 substantially higher than the three year total from the MPS,¹⁰ despite the MPS having a force
13 population 1.9 million greater than that of Police Scotland (SPA 2014, p. 10).
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17 Taking an overview of the jurisdictions, the main points of similarity and divergence are as
18 follows. A low hit-rate and focus on drugs is evident in both jurisdictions. A strong focus on
19 alcohol and weapons is apparent in some (but not all) parts of Scotland. Stop and search in
20 Scotland has not coalesced around 'race' in the way that it has in England/Wales (Delsol and
21 Shiner 2006, p. 244). Rather, criminalisation tends to hinge on social class and exclusion
22 (Croall and Frondigoun 2010, p. 17). Whilst these criteria are flagged in some English and
23 Welsh research (Mooney and Young 1984, Jefferson and Walker 1992, Waddington *et al.*,
24 2004, Loftus 2009), the narrative around class is stronger in Scotland. In part, this divergence
25 stems from raw demographic differences (Bond 2006, p.14) and the smaller proportion of
26 BAME people in Scotland, as well as the purposeful exclusion of 'race' narratives (see part
27 four). By far the most significant divergences between the two jurisdictions are the scale of
28 stop and search in Scotland and the related use of non-statutory stop and search.
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32 33 **3. Restraining factors: safeguards and regulation**

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35 The fact that police cultures are resistant to legal rules and can, and do, subvert them is well
36 established. As Hawkins observes, rules are not 'mechanically applied' (1986, p.1164).
37 Complicating the picture is the fact that stop and search is part of street policing where
38 'norms and practices of the street level police officer take priority over outside regulation'
39 (Young 1994, p. 14). Relatedly, both HMIC (2013, pp. 28-29) and HMICS (2015) have
40 reported inadequate supervision over the encounter and the subsequent search record. It is
41 therefore unsurprising that stops and searches are perennially under-recorded (Bland 2000,
42 **** 2015a); that when records are made they are incomplete; that not all officers explain the
43 procedure or rights to the person stopped; and there are not always sufficient grounds for
44 reasonable suspicion (HMIC 2013, ch. 6). Nonetheless, these observations do not suggest that
45 legal rules have no effect (Holdaway 1989, Ericson 1993). This part of the paper investigates
46 the legal and quasi-legal regulatory mechanisms in the two jurisdictions, and shows how a
47 lack of safeguards and regulations further enabled a permissive climate in Scotland. The
48 analysis examines three factors aimed at limiting police discretion – reasonable suspicion,
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56 ⁸ The forces were: Avon and Somerset; Bedfordshire; Cambridgeshire; Cheshire; Cumbria; Derbyshire; Dorset; Essex; Gloucestershire;
57 Gwent; Lancashire; Norfolk; North Wales; North Yorkshire; Staffordshire; Suffolk; Sussex; Thames Valley; Warwickshire; West Mercia;
58 West Midland; West Yorkshire.

⁹ See: APPG, 8; HMIC, 2015.

¹⁰ The MPS force population is 1.9 million higher than the Police Scotland force population (SPA 2014, p.10).

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3 officer conduct requirements, and recording practices – and reveals how these have differed
4 in the two jurisdictions.
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7 *a) Reasonable suspicion*

8 Reasonable suspicion is one of the major safeguards against the arbitrary exercise of stop and
9 search powers. In England/Wales, PACE Code A supplements the statutory requirements,
10 providing additional detail on required conduct during stop and search encounters. A breach
11 of the Code is a disciplinary offence and may be entered into evidence, but is of itself neither
12 a criminal nor a civil wrong (PACE, ss.67(10)-(11)). Police Scotland is subject to the Code
13 when stopping and searching under the Terrorism Act 2000 (Home Office 2012, 2015b).
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16 Code A explains that the officer must have formed a genuine suspicion in their own mind and
17 that reasonable suspicion must be based on objective grounds, whether facts,
18 information/intelligence, or the behaviour of the person (Home Office 2015a, para.2.2). In
19 Scotland, the Operational Toolkit describes reasonable suspicion as that which is ‘backed by
20 a reason capable of articulation and is something more than a hunch or a whim’ (2015c,
21 p.10). This looser definition could encompass exclusively subjective grounds undermining
22 the safeguarding role of reasonable suspicion.
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26 Both Code A and the Police Scotland Toolkit state that officers cannot base reasonable
27 suspicion on personal factors such as age, gender, race or stereotypes (Home Office 2015,
28 para.2.2B, Police Scotland 2014, p. 6), but differ on the issue of prior convictions. Code A
29 rejects their use, either alone or in combination with other factors (Home Office 2015,
30 para.2.2B), whilst they are listed as a relevant factor in the Toolkit (2014, p. 11). This
31 position is based on *Bett v Lees* (1998) SLT 1069, although in the case - which pre-dates the
32 Human Rights Act 1998 – prior convictions were only one of two factors that, taken in
33 conjunction, gave grounds for reasonable suspicion. Code A permits personal factors relating
34 to persons wearing gang insignia and particular organised protest groups in limited
35 circumstances (Home Office 2015, para.2.6). It is unclear whether Police Scotland permits
36 these exceptions. For instance, they may come within ‘suspects clothing’, although this
37 appears more widely drawn (Police Scotland 2014, p. 6).
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41 Of course, reasonable suspicion remains an imperfect safeguard that is subject to different
42 interpretations, primarily because of the layers of discretion involved. These include the
43 officer’s discretion as to whether the circumstances amount to reasonable suspicion; their
44 discretion as to whether to proceed against the person, given reasonable suspicion; and, the
45 discretion afforded by the broad base offences (such as criminal damage) (Williams and Ryan
46 1986, Bland *et al.* 2000). Research in England/Wales has consistently found first, that
47 officers take into account extraneous factors when determining who to stop and search, and
48 second, that a proportion of stops and searches do not meet the requisite standard (Bottomley
49 1991, Quinton *et al.* 2000, Quinton 2011). Indeed, the HMIC’s 2013 Report found that that
50 27% of the stop forms examined did not record reasonable grounds for suspicion (p.30).
51 Nonetheless, the definition of reasonable suspicion in Code A provides a base against which
52 to assess officer’s actions – as exemplified by the HMIC’s 2013 Report. Conversely, the
53 vague definition adopted in the Toolkit fails to constrain officers or provide any meaningful
54 base against which to judge officers. Overall, Police Scotland’s explanation of reasonable
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3 suspicion lacks clarity and detail. Code A's explanation is more expansive and
4 understandable for both officers and members of the public. However, the crucial issue
5 relates to objective factors as the basis for suspicion, which is a necessary requirement in law,
6 but not clearly defined in the Toolkit.
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9 While accepting that officers frequently circumvent the limitations intended by reasonable
10 suspicion, we would suggest the trends shown in figure 1 make its value clearer. In
11 England/Wales, and Scotland, suspicionless statutory and non-statutory stops and searches
12 respectively fuelled the upward trends, more markedly so in Scotland. The absence of
13 reasonable suspicion not only removes one of the key elements of oversight, it significantly
14 weakens those that remain, such as recording requirements – which are reduced to proof that
15 an encounter occurred, with little to no room for post-hoc scrutiny, such as that conducted by
16 the HMIC (2013). The fact that changes to the usage of the statutory suspicionless powers
17 were largely prompted by legal challenges from outwith the regulatory regime is therefore no
18 surprise. In relation to the Terrorism Act 2000, s.44, it was precisely this absence of any
19 meaningful regulatory system that led the European Court of Human Rights to hold that the
20 power was not compatible with the right to privacy (*Gillan v United Kingdom* (2010) 50
21 EHRR 45). The absence of any authorisation process for non-statutory stop and search in
22 Scotland and the fact that officers are not restricted as to the items they can search for creates
23 an even less regulated environment.
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28 *b) Regulating conduct*

29 Rules and regulations pertaining to officer conduct and standards can also place limits on
30 police discretion. In England/Wales, Code A (para. 3.8) requires officers to identify
31 themselves, showing documentary evidence if not in uniform, provide their name – or
32 warrant number in counter-terrorist stops or where giving their name may put the officer in
33 danger – and station, the grounds for carrying out the search and the object of the search. The
34 stringency of these requirements when challenged (albeit that such legal challenges are
35 comparatively rare (see further Fielding 2005), is underlined by *R v Christopher Bristol*
36 [2007] EWCA Crim 3214. In this case, a police officer saw what he believed was a wrap of
37 drugs in the appellant's mouth and, without identifying himself or station, applied mandibular
38 pressure and stated 'drugs search, spit it out'. The officer found no drugs and a struggle
39 ensued. The appellant was convicted of intentionally obstructing an officer in the execution
40 of his duty and sentenced to twelve months imprisonment. However, the court quashed the
41 conviction upon appeal. The court pointed to the clear wording in the statute and that,
42 notwithstanding the 'emergency' nature of the situation, stated it was not impracticable for
43 the officer to state his name and station. These provisions apply even where the officer and
44 suspect are known to each other (*R (Michaels) v Highbury Corner Magistrates' Court* [2009]
45 EWHC 2928 (Admin)).
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51 Officer conduct in Scotland is less proscribed. For example, an officer must identify
52 themselves, only when not in uniform, whilst a person must be informed of the reason for the
53 search for some powers (e.g. Criminal Law Consolidation (Scotland) Act 1995, ss.48 and 50),
54 but not others (e.g. Civic Government (Scotland) Act 1982, s.60) thereby resulting in
55 different standards of legal protection across similar powers.
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3 c) *Recording practices*

4 Police accountability for stop and search depends on accurate recording. First, relevant and
5 complete data are required in order to make stop and search transparent, via data publication,
6 and to understand the impact on crime and the community, through scrutiny and analysis
7 (HMIC 2013, p. 6, also Bichard 2004). Second, the provision of a 'receipt' enhances street
8 level accountability by placing responsibility on individual officers. The onus to provide a
9 receipt also means that officers may 'think twice' about using their powers (Bland *et al.*
10 2000). This focus on controlling discretion through on-the-spot and post-hoc scrutiny (or
11 'bureaucracy'), especially through the recording of stops and searches dominated the stop and
12 search debate in England/Wales, particularly post-Macpherson (Flanagan 2008, Wilding
13 2008).
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17 In England/Wales, under PACE, s.3, officers must record every search made, including: the
18 date, time and place; the name(s) of the officer(s) involved; the self-defined ethnicity of the
19 person searched and, if different, the ethnicity as perceived by the officer; the grounds for and
20 object of the search and whether the search resulted in an arrest. The introduction of the
21 BUSS Scheme in December 2014 (see part four) extended the recording requirements to
22 specify one of seven outcomes, including cautions, penalty notices and community resolution
23 in addition to arrests (Home Office 2014). This more nuanced 'hit-rate' aims to facilitate
24 analysis of the link between the object of the search and its outcome and the effectiveness of
25 the powers more generally. Officers must complete the search record on the spot, or as soon
26 as reasonably practicable, and make a receipt available to the person searched. Officers
27 cannot demand the person's details short of arrest, and under the most recent iteration of
28 Code A, should not ask for their details to complete the search form (Home Office 2015a,
29 para.4.3A).
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34 The introduction of new recording procedures in June 2015 brought Scotland broadly in line
35 with the Home Office forces. Previously, recording standards were ill-defined, unsystematic,
36 and did not allow links to be made between the grounds for the search, powers used and the
37 outcome. In March 2015, HMICS reported that the recording process lacked clarity, to the
38 extent that it was unclear what a stop and search is, or how it should be recorded (2015, p. 5).
39 In the context of a statutory stop and search, the Criminal Procedure (Scotland) Act 1995,
40 s.13 underpins recording. The Act states that if a constable has reasonable grounds for
41 suspecting that a person has committed or is committing an offence she may require the
42 person to give their name, home address, date of birth, place of birth and nationality. In a
43 non-statutory context, officers may ask, not demand, a person's details. Whilst there is no
44 duty on the person to provide these, officers are not required to inform the person of this fact.
45 Consistent with Delsol's observation that people consent 'because that is how people respond
46 to the authority of the police' (2006, p. 116), Police Scotland data (2015) indicate that most
47 people give their details when asked. For example, people gave age details in virtually all
48 negative non-statutory stops and searches, despite no requirement to do so. Officers have also
49 recorded some details not provided for in law. For example, HMICS (2015, pp. 76-77) found
50 that officers recorded details as diverse as occupation and telephone numbers in their
51 notebooks. In terms of street level accountability, receipts are not available in Scotland,
52 which means that members of the public cannot document individual or repeat search
53 encounters (c.f. Delsol and Shiner 2006, p.255).
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4 Street powers of stop and search have inherently high levels of discretion (Young 1994). The
5 challenge therefore is to provide multiple layers of accountability, through mechanisms such
6 as those discussed here, together with robust supervision. In England/Wales, particularly
7 since the introduction of the BUSS Scheme (see part four), accountability is factored in
8 before the encounter, through requiring reasonable suspicion; during the encounter, by
9 imposing duties on officers; and after the encounter, through post-hoc supervision and
10 transparency. In the case of suspicionless statutory powers, the authorization process attempts
11 to balance the greater 'front-end' discretion, exercised by the authorising officers, through
12 heightened 'back-end' discretion, exercised by the officer conducting the search (Ip 2013).
13 Prior to 2015, these layers of accountability were not replicated in Scotland. Reasonable
14 suspicion was absent in the majority of stops, few limits were placed on officer conduct, nor
15 was the use of stop and search balanced by heightened 'front-end' or indeed post-hoc
16 accountability. Again, we would argue that the disparity between England/Wales, and
17 Scotland reflects the extensive discretion afforded by dint of these conditions; that a lack of
18 clear rules around reasonable suspicion, officer conduct and recording further exacerbated the
19 volume approach shown in part two. Added to this is the fact that until the move to a single
20 police force in April 2013, the use of stop and search in Scotland was untroubled by political
21 and public scrutiny. It is to this final issue that we now turn.

22 23 24 25 26 27 28 **4. Political and public scrutiny** 29 30 31

32 There is a marked difference between the politics of stop and search in England/Wales and
33 Scotland, principally in relation to the maturity of the debate. In England/Wales, stop and
34 search politics have evolved over three decades. Forged against a backdrop of brittle
35 relationships between the police and BAME communities, the politics of stop and search are,
36 at least in some quarters, now marked by a willingness to engage with difficult issues.
37 Nonetheless, the perennial nature of the complaints several decades underlines the limitations
38 and deeply contested nature of the debates and, perhaps, an unwillingness to adopt radical
39 change. The debates on stop and search are also indelibly tied to the broader landscape and
40 cycles of crisis and reform, lurching from riots through public inquiries to legal challenges,
41 back to (more) riots, legal challenges and public inquiries. In Scotland, it is only since the
42 formation of the single service in April 2013 that any semblance of accountability or
43 engagement has emerged. The analysis below suggests that the divergence in search rates in
44 the two jurisdictions also relate to the respective histories of political and public scrutiny.

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48 In England/Wales, the use of stop and search has been subject to scrutiny of varying intensity
49 for over three decades. The 1981 Royal Commission on Criminal Procedure (RCCP), whose
50 report provided the genesis of PACE, considered stop and search powers, alongside various
51 other investigative police powers. It proposed that the existing powers be rationalised and
52 subsumed within one power to stop and search for stolen goods or prohibited articles, arguing
53 that 'reasonable suspicion' and requiring a record of each search provided sufficient
54 safeguards against misuse (Philips 1981, paras.3.25-3.26). The recommendation took form as
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3 PACE, section 1 that for many of the police forces, entailed an extension of their existing
4 powers (Reiner 2010).
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7 The Brixton riots erupted only three months after the RCCP reported. The subsequent
8 Scarman Report discussed stop and search in two brief paragraphs, arguing the powers were
9 necessary to combat street crime and that an objective test of reasonableness, subject to
10 review by the courts, provided a sufficient safeguard (Scarman 1981, paras.7.2-7.3). Given
11 the interaction between stop and search, other street powers (notably 'sus', which, while often
12 referred to as a stop and search power in fact granted the police the power to stop and arrest a
13 'reputed thief' or 'suspected person' loitering with intent to commit a felony in a public place
14 (Vagrancy Act 1824, s.4)) and police-community tensions, it is surprising that Scarman did
15 not subject the powers to greater analysis or engage with the arguments that the powers were
16 used in a discriminatory manner (Bowling and Phillips 2003 although c.f. Reiner 2010, pp.
17 163, 246 defending Scarman's overall critique of discrimination by the police).
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20 The next significant scrutiny came with the Stephen Lawrence Inquiry (Macpherson 1999).
21 While nominally limited to matters arising from the death of Stephen Lawrence and the
22 investigation and prosecution of racially motivated crimes, a number of the Inquiry's
23 recommendations related to stop and search. The Inquiry pointed to the nationwide disparity
24 in stop and search figures as one indicator of institutional racism, concluding that, while the
25 figures raised complex issues, 'there remains...a clear core conclusion of racist stereotyping'
26 (ibid., para.6.45). Its uncompromising tone and acknowledgment of the deep-seated police-
27 community tensions around the use of the powers, regarded as a 'universal' area of complaint
28 (ibid., para.45.8), distinguish it from earlier reports. On its recommendation all stops and
29 searches began to be recorded, not just those under PACE, and police authorities undertook
30 publicity campaigns to inform the public of the relevant law and their rights (PACE (Codes
31 of Practice) Order 2004, SI 2004/1887, APA 2009). As noted in part one, the report
32 influenced the decision to prohibit non-statutory stops and searches or 'so called 'voluntary'
33 stops' (Macpherson 1999, para.45.8). It is important to highlight that the police, politicians
34 and the media met both the Macpherson and Scarman Report with considerable resistance.
35 Notably, the post-'Macpherson dip' (Shiner, 2010) and increase in stop and search thereafter
36 showed 'the police service pushing back and reasserting its authority' (Delsol and Shiner
37 2015a: 35; see also Foster, Newburn and Souhami 2005; Sanders and Young 2007).
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43 From the mid to late 2000s the use of the Terrorism Act 2000, s.44 became the most
44 prominent issue (see Home Affairs Committee, 2005, Carlile, 2008, Joint Committee on
45 Human Rights, 2009). The next major report to tackle stop and search in general was the
46 Equality and Human Rights Commission's 'Stop and Think' (EHRC 2010). The Commission
47 pointed to some areas of best practice but remained pessimistic, given the consistent racial
48 disproportionality evident in the deployment of stop and search. The report rejected the
49 various justificatory arguments as inadequate, and suggested that officers may have used their
50 powers in a discriminatory and unlawful manner. It subsequently held further inquiries into
51 five forces, initiating legal action against two of these, with positive results in terms of
52 driving down disproportionality and overall search rates (EHRC 2013).
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56 Next, the Home Secretary commissioned the HMIC Report 'Stop and Search Powers: Are the
57 police using them effectively and fairly?' (2013), prompted by the 2011 riots. Its conclusions
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3 were damning, highlighting poor leadership, ineffective supervision, failure to adhere to
4 recording requirements and the likelihood of a large number of stops without reasonable
5 grounds. In terms of effectiveness, it concluded that '[v]ery few forces could demonstrate that
6 use of stop and search powers were based on an understanding of what works best to cut
7 crime' (ibid., p.8). The HMIC made ten recommendations in relation to training, guidance on
8 effective and fair use, supervision and monitoring of stops and stop forms, stop forms,
9 complaints procedures, communication with the public, and the use of technology and
10 processing intelligence.
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14 In 2014, while laying the responses to a public consultation on stop and search before
15 Parliament, the Home Secretary announced a series of measures aimed at reducing the overall
16 number of stops and searches and improving the hit-rate (May 2014). There were four main
17 developments. First, the College of Policing reviewed its stop and search training, and
18 published a definition of what a 'fair and effective' stop and search (2015). Second, PACE
19 Code A was revised to clarify the meaning of 'reasonable suspicion'. Third, stop and search
20 was added to the Government's crime maps and the Best Use of Stop and Search scheme was
21 announced in August 2014. Although 'voluntary', the Home Secretary threatened to
22 introduce legislation if the reform package, including the scheme, did not work (May 2014).
23 Thirty-five of the forty-three Home Office forces implemented the BUSS Scheme. The
24 remainder partially implemented it, and, with the British Transport Police (BTP), committed
25 to full implementation in 2015 (Home Office 2014). The Scheme expanded the recording of
26 outcomes and, as detailed in part 1, restricted the use of the Criminal Justice and Public Order
27 Act 1994, s.60. The scheme also required that lay observers view the deployment of stop and
28 search by officers, and provide feedback, with a view to facilitating dialogue between the
29 police and communities, and improving police-community relations. A 'community
30 complaints trigger' aimed to clarify and expand on the complaints system, and could prompt
31 forces to explain their use of the powers once a threshold (set by the force) is met.
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37 In 2015, HMIC published a follow-up report that tracked the progress of forces against the
38 ten recommendations from its 2013 report and added additional recommendations. It
39 concluded that of the ten original recommendations, good progress had been made towards
40 one, some progress towards four and insufficient progress towards the remainder. Finally, the
41 HMIC's PEEL inspections include a question whether stop and search decisions are fair and
42 appropriate (2015a). This on-going scrutiny by the HMIC is a new departure and its latest
43 report serves as a reminder of the challenges involved in changing policing cultures.
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47 In Scotland, scrutiny of stop and search is in its infancy. Looking back, divergence between
48 the jurisdictions in terms of scrutiny may be in part be traced to the publication of the
49 Macpherson report, which in relation to stop and search received a cool, rather than a
50 contested response, as per England/Wales (Shiner, 2010). An Association of Chief Police
51 Officers in Scotland (ACPOS) Cross-standing Committee Working Group initially
52 considered the recommendations on stop and search (NAS HH41/3406, 27/9/1999),
53 principally through the prism of 'race'. With no clear evidence of ethnic disproportionality,
54 the Group deemed the introduction of accountability mechanisms for stop and search
55 unwarranted.
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3 This logic subsequently fed into 'The Stephen Lawrence Inquiry: Action Plan for Scotland'.
4 Published by the Scottish Executive in July 1999, the plan stated that the stop search
5 recommendations would require a 'large bureaucracy to implement' and noted a lack of
6 criticism to date. Towards the end of 1999, a Steering Group appointed by the Scottish
7 Executive commissioned an independent study into young people's experiences of stop and
8 search, which makes for prescient reading. In addition to recommendations on recording,
9 publishing statistics and making people aware of their rights, the researchers suggested that
10 ACPOS provide guidance on searching children, and engage with the legal and civil liberties
11 issues raised by non-statutory stop and search. Caution was advised over the use of
12 performance targets, and it was suggested 'as a matter of urgency', that all forces address 'the
13 perceived failure of some officers to interact routinely with members of black and minority
14 ethnic communities' (Reid Howie Associates 2002, p. 102). However, following the
15 dissolution of the Steering Group in 2002, no initiatives were forthcoming. Prompted by the
16 Race Relations (Amendment) Act 2000, Scottish forces began to record stops and searches
17 from 2005 onwards, but did not publish national statistics.
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22 Within the first year of Police Scotland, media reports began to pick up the scale of stop and
23 search. In January 2014, the issue came to the fore following the publication of a report by
24 the Scottish Centre for Crime and Justice Research (SCCJR) which revealed the scale of
25 search activity, the extensive use of non-statutory stop and search, and the disproportionate
26 targeting of young people (***** 2014a). Published into a politicized and volatile policing
27 climate, the report was met with a defensive response from the Scottish Government and
28 Police Scotland, who asserted that high volume stop and search had significantly contributed
29 to the fall in violent crime in Scotland, and represented a proportionate policing response
30 (Guardian, 17/1/2014, SP Official Report 23/1/2014, col. 26968). In May 2014, the SPA's
31 'Scrutiny Review' of stop and search policy and practice challenged this position. The
32 Authority stated it could find 'no robust evidence to prove a causal relationship between the
33 level of stop and search activity and violent crime or anti-social behaviour', nor could it
34 'establish the extent to which use of the tactic contributes to a reduction in violence' (2014, p.
35 17).
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40 Thereafter, against a backdrop of intense media and political scrutiny, Police Scotland
41 announced a number of policy initiatives. These included: the establishment of a National
42 Stop and Search Unit; the ending of non-statutory stop and search on children aged eleven
43 and under; a pilot scheme aimed at improving effectiveness, recording practices and
44 community confidence; and the appointment of Expert Reference Groups to advise on policy
45 development (HMICS, 2015). These changes prompted a fall in the number of stops and
46 searches on young children, however in February 2015 it was revealed that some non-
47 statutory stops and searches were still being carried out on under twelves, despite a
48 commitment to end the practice (BBC 4/2/2015).
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52 In March 2015, HMICS reported that it had no confidence in Police Scotland's stop and
53 search data; that training was limited; that targets, key performance indicators and pressure
54 from managers to carry out stops and searches had resulted in negative behaviours; and that
55 the internal governance processes were unclear. Echoing both the SCCJR and SPA reports,
56 the HMICS also noted a lack of evidence to support a causal relationship between search
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3 rates and crime reduction. Key recommendations included consultation on a Statutory Code
4 of Practice; a presumption towards the use of statutory powers; clear counting rules; and
5 improved recording procedures. In response, the Scottish Government (31/3/2015) appointed
6 an Independent Advisory Group to examine the regulation of stop and search. Both the
7 Group's remit and the appointment of John Scott QC, solicitor advocate and human rights
8 lawyer, as Chair, signalled a major shift by the Scottish government, which under the
9 previous Justice Secretary, had viewed stop and search as an 'operational matter' (2/4/2014
10 MacAskill, SP Official Report col. 29702). In September, following the publication of the
11 Independent Advisory Group report (Scott 2015), the Justice Secretary, Michael Matheson,
12 announced that the Scottish Government had accepted the Group's recommendations in full.
13 These included the abolition of non-statutory stop and search, the introduction of a Statutory
14 Code of Practice, a statutory duty to consider the best interests of children, and the
15 introduction of robust scrutiny mechanisms.. Thereafter, the Scottish Government
16 incorporated the recommendations as a package of amendments to the Criminal Justice
17 (Scotland) Bill, which passed in December 2015.
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22 Looking back, the absence of significant or sustained scrutiny into stop and search in
23 Scotland undoubtedly fed into the permissive and unregulated approach to the powers. By the
24 same token, the degree of critical scrutiny following reform prompted tighter rules and
25 regulation, and a reduction in recorded search levels. In addition to the formal scrutiny
26 channels, intensive critical media attention placed further pressure on Police Scotland and the
27 Scottish Government, in effect, rendering stop and search a national 'scandal' that tapped into
28 wider concerns around centralization, a lack of local accountability and a target culture
29 ([*****](#), 2015a p. 322). Whilst recording procedures introduced in June 2015 preclude a
30 direct comparison with previous years, it is clear that the number of recorded searches has
31 fallen significantly. By August 2015, the number of recorded searches (and seizures) had
32 fallen by 81% compared to the same period in the previous year. Of the searches, 25% were
33 non-statutory and 75% statutory, more than a reversal of the long-standing ratio between the
34 two types (Police Scotland 2015).
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39 **Conclusion**

40 The findings in this paper provide an example of how regulation and scrutiny can influence
41 police practice. To begin, the paper argued that the variation in search rates between
42 England/Wales, and Scotland is not explicable in terms of statutory powers or crime trends,
43 which are broadly similar. Looking back, the analysis suggests a target-driven proactive
44 policy, based on volume rather than detection, prompted the rise of stop and search in
45 Scotland, notably in the West. The salient observation for our purposes is that a permissive
46 regulatory environment enabled this approach; the ability to search on a non-statutory basis,
47 poor accountability, and a lack of scrutiny and oversight. Whilst an emphasis on performance
48 was evident in England/Wales, comparative analysis suggests that police discretion was, to
49 some extent, tempered by legal and quasi-legal rules and regulations. Recorded search rates
50 in England/Wales rose by 84% between 2003/4 and 2008/9, compared to a 325% increase in
51 Scotland in the nearest comparable six year period (2005 to 2010). The paper also provides
52 insights into the role of scrutiny. In England/Wales, legal challenges and ongoing
53 contestation prompted a sharp fall in suspicionless statutory stop and search. In Scotland, an
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3 unprecedented degree of media and political engagement under the single service prompted a
4 reduction in search levels.
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7 In terms of future research, the findings underline the need, as recognised by others such as
8 Delsol and Shiner (2006), to broaden the scope of enquiry around stop and search. Although
9 this paper focuses on Great Britain, globally stop and search is often viewed through the lens
10 of 'race' and/or ethnicity (Weber and Bowling 2012). In the case of Scotland, it is perverse
11 that the absence of one form of disproportionality was used to avoid, in an example of
12 Nelsonian blindness, acknowledging other flaws in the practice. The lens through which stop
13 and search is scrutinised needs to be widened beyond 'race'. One could view the various
14 groups (and sub-groups) that are subjected to greater levels of stop and search as falling
15 within Lee's broad category of 'police property' (1981, pp. 53-4). Discovering which
16 characteristics of each group makes them susceptible will require researchers to disentangle
17 the multiple direct and indirect discriminations suffered by the communities or groups,
18 whether cumulatively or intersectionally. Disaggregation would permit a closer investigation
19 of the origins of disproportionality and could highlight areas where accountability can, and
20 should be, strengthened. Analysis may also reveal under-researched commonalities. For
21 instance, it is clear that young males bear the brunt of stop and search in England/Wales, and
22 Scotland. Socio-economic status is another likely common thread (see further Loftus 2009).
23 Whilst this approach has been taken before (Jefferson and Walker 1992), it seems fair to
24 suggest that stop and search remains principally viewed through the lens of 'race'. In this
25 regard, the findings are relevant beyond the geographical focus presented here. Specifically
26 the findings show how such a framing can overlook other examples of disproportionality, as
27 well as issues of accountability and effectiveness more generally. A broader focus on
28 intersectional disproportionality is urgently needed, alongside a more general focus on
29 accountability over these high-discretionary powers.
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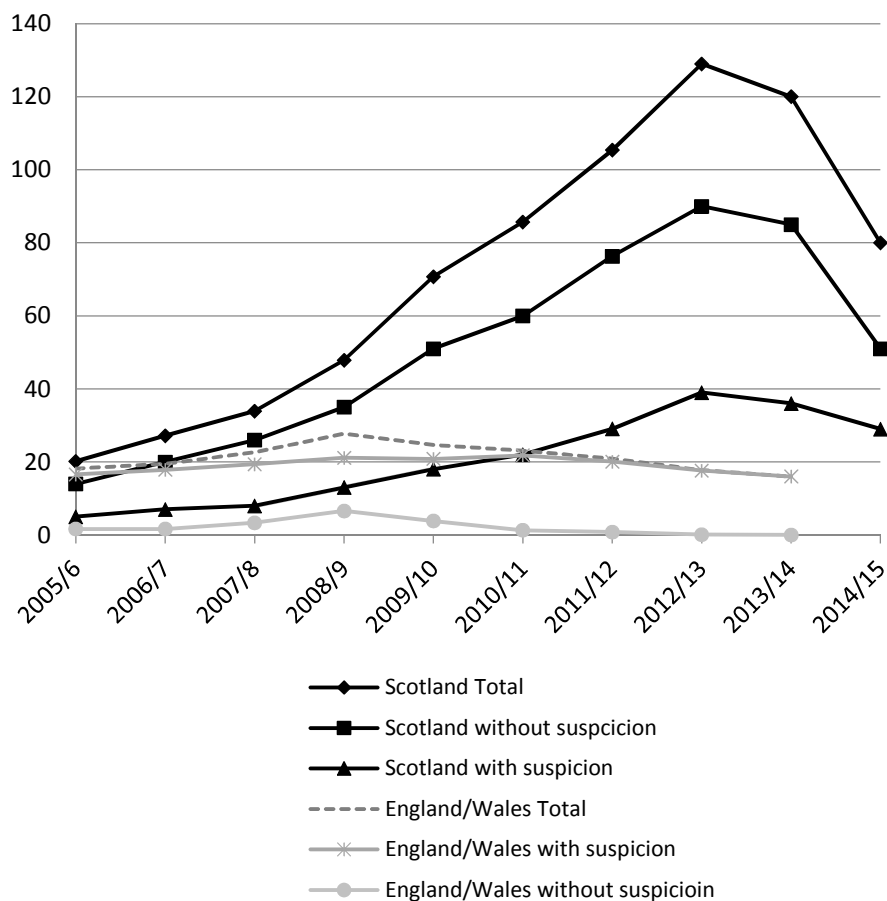
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POLICING AND SOCIETY: FIGURE 1

Figure 1. Stop and search per 1,000 people 2005/6 to 2013/14 (England/ Wales) and 2014/15 (Scotland)



Source: Scottish Police Forces (FOISA); Police Scotland (2015b); Home Office (2014a) (Table SS.01 Stops and searches in England and Wales (excluding British Transport Police) by legislation).

Notes:

- Population calculations based on ONS Mid-year estimates, 2005/6 to 2012/13
- 2013/14 and 2014/15 Scotland calculations based on 2012/13 estimates.
- There is a 3 month time lag in the England/Wales and Scotland data between 2005 and 2010. In this period, Scotland data were presented by calendar rather than financial year.
- Missing data: No Scottish data are available between 2010/11 and 2012/13. Dumfries and Galloway and Fife were unable to provide data between 2005/6 and 2009/10. Tayside was unable to provide data between 2005/6 and 2008/9. However, in the years for which these three forces provided data, they accounted for 2 to 3 per cent of all searches in Scotland. As such, their commission is unlikely to affect the overall calculations.