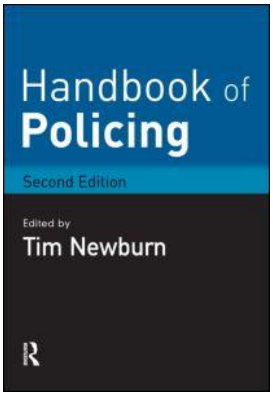


# Handbook of Policing

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## Police powers

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## Chapter 12

# Police powers

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### Introduction

The title of this chapter needs little explanation. We are all familiar with the idea of the police arresting people, carrying out street searches and detaining suspects so they can be questioned. We will look at these powers, and many more besides. However, it would be easy to create the false impression that policing is primarily a matter of the exercise of powers – of the exercise of coercion. In reality, much policing is by consent, much policing is done with the community, or sections of it, and much criminal activity is condoned, ignored or dealt with in non-coercive ways.

When no specific power is invoked power in a more general sense may nonetheless be brought into play. Power is exercised in many different places in society and has many different sources. But the power of law enforcement agencies is special. Much of it derives from specific powers given in legislation, and extended by judicial decisions, to those agencies. For example, many people consent to be searched by police officers because they believe (usually correctly) that if they do not consent the police will be able to invoke a power that allows them to insist anyway. In other words, the existence of extensive police powers facilitates the exercise of generalised police power, and so to understand the latter we need to understand the former. The importance of legal powers is not so much that they are *actually* invoked frequently, but that they *could* be.

Another way of saying that the police need not exercise their powers in any particular situation is to say that they exercise discretion. Whether potentially suspect communities are actually policed is thus largely a matter for the police. While it is true that the police are open to external influences (such as the Home Office, local police authorities and local communities), police discretionary choices at the level of both force policy and street-level decision-making are usually the key determinant of the use of police power. Further, while police powers are always limited by the legislation or judicial decisions that created them, we shall see that a power that is limited in law is not necessarily limited in action. We will therefore look later at controls on those powers and the redress available when they are breached.

This chapter focuses on problems created by police power in England and Wales. No doubt much of the time police power is used within the limits of the law and in ways that a majority of people considers uncontroversial. But those in that majority rarely encounter the police in an adversarial setting. This chapter looks at the issues from the perspective of the minority who suffer abuses, and questionable uses, of police power. Although we rely on research evidence in support of our arguments, the empirical record on some issues is thin. The police compare well with many other institutions in their willingness to engage with researchers, but much discretionary police work is of low visibility, making rigorous evidence difficult to obtain. Some of our arguments are therefore contestable. This is a particular problem at present as government-funded research has become increasingly geared to narrow evaluations of new policy initiatives that give little scope for asking searching questions about the police (or, indeed, any other criminal justice agency). Consequently, much of this chapter is based on findings from the 1990s, even though – as we shall see – the powers themselves have been subject to great change over the last few years. For a government that, when it was elected in 1997, proclaimed a commitment to 'evidence-led policy' this unwillingness to fund research of the type that used to be normal is deplorable.

Before discussing the most important police powers we will examine the applicability of 'models' of criminal justice to the police. This is so that we can rise above the detail of each particular power in order to identify patterns of development, whether they be aimed at greater protection of victims or of civil liberties, more convictions, or greater efficiency.

## 'Modelling' police powers

Packer (1968) famously characterised criminal justice systems as comprising two ideal types: due process and crime control. 'Due process' values prioritise civil liberties in order to secure the maximal acquittal of the innocent, risking acquittal of many guilty people. 'Crime control' values prioritise the conviction of the guilty, risking the conviction of some (fewer) innocents and infringement of the liberties of some citizens to achieve the system's goals. Due process-based systems tightly control the actions and effects of crime control agencies such as the police. Crime control-based systems do not. No system in a liberal democracy is likely to correspond exactly with either model. They are best understood as situated at either end of a spectrum, with existing systems located somewhere in between.

If the police wish to interview people they suspect of committing a crime, due process protections, such as the caution against self-incrimination, are triggered. On arrest the suspect is generally taken to a police station. This triggers further due process protections, such as a right of access to lawyers, as civil liberties are further eroded by lengthy detention, interrogation, search of the suspect's home, fingerprinting and so forth. In order to charge, further evidence is required and further protections are provided: the Crown Prosecution Service (CPS) to vet the case and Legal Aid to prepare a defence. In order to convict there must be yet more evidence. So, due process

requirements become more stringent at each stage, in parallel with the increased coerciveness of suspicion, accusation and trial. Suspects may be believed to be guilty by the police, and may indeed be guilty 'in truth'. But in the absence of sufficient evidence, due process requires that they be released.

This does not mean that police powers in England and Wales are necessarily located at the due process end of the spectrum. We shall see that little evidence is needed to stop and search or arrest someone; every year hundreds of thousands of people, against whom it is likely that there was little or no evidence of crime, are arrested, detained and released without formal action being taken, and the protection given to suspects who face questioning in the police station pales into insignificance when compared with the experience of that intimidating environment. Doubts about police efficiency and propriety on the part of advocates of due process lead them to argue for more stringent limitations on police powers, while advocates of crime control argue that even the legal protections that we do have obstruct discovery of the truth.

Despite the clarification provided by Packer's models, their value is limited. Take the purpose of police powers. Under the crime control model, their purpose is to identify as many criminals as possible with a view to their conviction. But what about the due process model? The aim of police powers can hardly be to protect suspects, for if that were the goal the solution would be simple – we would simply not give the police any powers at all. It seems then that it is hard to get away from the idea that crime control is the goal under both models, and that the key difference between the two is how far pursuit of that goal is tempered by a concern to protect the liberties of suspects. There are thus few, if any, due process protections for suspects that cannot be eroded if a sufficiently strong utilitarian (crime control) argument can be made for doing so. In Packer's models, in other words, protections are always being 'balanced' against police powers. Where that balance is struck largely determines where in the spectrum a system is located.

Ashworth and Redmayne (2005) attempt to provide a structure for this balancing act by developing a framework of ethical principles derived from the European Convention on Human Rights (ECHR). This is valuable, particularly now that the Human Rights Act 1998 makes the ECHR applicable to all areas of UK law, but it leaves many conflicts unresolved, as Ashworth and Redmayne's principles are reformulations of key due process principles. Moreover, many of them are vague, such as 'to be treated fairly and without discrimination' and 'reasonable grounds for arrest and detention'. Those that are precise, such as the 'right of innocent persons not to be convicted', are not absolute but may be undercut by the kinds of considerations one finds in the crime control model. Gearty (2006), another leading advocate of human rights, acknowledges these problems. He argues that although human rights principles should underpin law and political discourse we should not attempt to derive specific laws from those principles (in the way that Ashworth and Redmayne attempt to do).

An attempt to use the insights both of Packer and of human rights approaches is our 'freedom model' (Sanders and Young 2007). It starts from the recognition that police powers (and the limits to which they are subject) are intended to further conflicting values, aims and interests in the criminal

process, such as: convicting the guilty; protecting the innocent from wrongful conviction; protecting human rights by guarding against arbitrary or oppressive treatment; protecting victims; maintaining order; securing public confidence in, and co-operation with, policing and prosecution; and achieving these goals without disproportionate cost and consequent harm to other public services. Politicians like to pretend that these goals are all equally achievable but, in reality, choices have to be made over which are to have priority. The choices that are made give expression to particular philosophical standpoints. The standpoint we prefer establishes the promotion of freedom as the over-riding purpose of the criminal justice system in general, and police powers in particular. All the various interests and goals identified earlier are connected to this underlying goal. For example, arrest is not a valuable activity in itself. Arrests are made in the hope that, where the arrestees are offenders, what follows will reduce their (and everyone else's) propensity to commit crime. This should enhance the freedom of past and potential future victims. Similarly we expect the police to respect the rights of suspects on the street not because limiting police power is in itself a good idea but rather because no more freedom should be taken away from members of the public by state officials than has been constitutionally allowed by Parliament and the courts.

This model allows that different interests come into conflict and prompts us to search for compromises that are likely to maximise overall freedom. This is not a crude form of utilitarianism for it does not oppose a 'human rights' approach to criminal justice. Instead – as Gearty (2006) acknowledges is necessary – it supplements human rights. Moreover, using the language of 'freedom' can strengthen respect for rights. We might, for example, more effectively convince the police to respect defendants' rights if we highlight how those rights do not constrain but rather facilitate the achievement of the ultimate criminal justice goal of promoting freedom. This model has obvious links with Faulkner's (1996) account of an inclusionary form of criminal justice in which, because the end of law is to enlarge freedom, authority has to be accountable, solutions to crime must be sought by working with, and within, the community, and young people must be given opportunities rather than be treated as an enemy to be humbled through discipline and social exclusion. This model requires considerable elaboration as to the precise meaning of 'freedom', so here we use the model simply as a sensitising device, as a way of signalling that the use of police power in the pursuit of crime control may be counterproductive.

In addition to classifying the rules regulating police powers in crime control and due process (or human rights) terms, we can also classify them according to how far they influence police behaviour. Table 12.1 identifies four types of rule. First there are rules that express crime control values – which, in other words, give powers to the police. These may be 'enabling rules' that allow the police to do things that they could not do before, such as the rules on stop and search; or they may be 'legitimising rules' that allow the police to do things that they used to do anyway, such as the rules authorising precharge detention (largely doing away with the concept of suspects 'helping the police with their inquiries'). Then there are rules that express due process values. 'Inhibitory' rules, such as those that stop the police from assaulting suspects during a

**Table 12.1** Types of legal rule and their effect on police behaviour

| | *Rule expresses crime control values* | *Rule expresses due process values* |
|---|---|---|
| Influence police | Enabling effect | Inhibitory effect |
| Do not influence police | Legitimising effect | Presentational effect |

formal interrogation, actually constrain the police, while 'presentational' rules have little or no effect except at the level of appearances. This classification alerts us to the need to go beyond simple comparisons of the 'law in books' with the 'law in action' by analysing the relationship between rules and police behaviour.

## Police decisions 'on the street'

In the first decades after the establishment of the police in their present form, sufficient evidence to prosecute was needed before street powers could be exercised. Arrested persons were taken directly before the magistrates, who decided whether to prosecute. In theory, then, police investigation had to take place before arrest (a due process approach), although in reality many people were forced to 'help the police with their inquiries' in custody. Arrests are now often made to facilitate investigation, bringing the formal rules nearer to a crime control reality. The current legal position is somewhere between the crime control and due process models, but it is steadily moving away from 'due process'. For example, arrest without judicial warrant was extended to most 'normal' crimes (including theft, burglary, serious assaults, sexual offences, drugs offences, public order offences and possession of offensive weapons) by the Police and Criminal Evidence Act 1984 (PACE), and arrest powers were then extended to *all* offences by the Serious Organised Crime and Police Act (SOCPA) 2005. Rather than needing sufficient evidence to prosecute, all the police generally need to stop, search and arrest is 'reasonable suspicion'. Increasingly, even 'reasonable suspicion' is no longer needed in relation, for instance, to offensive weapons (Criminal Justice and Public Order Act 1994 s. 60, and extended yet further by the Knives Act 1997, s. 8), and terrorism (Terrorism Act 2000, s. 44). See, generally, Sanders and Young 2007: chs 2–3.

### *'Reasonable suspicion' and discretion*

Guidance on the meaning of 'reasonable suspicion' (where this is still needed) is given in the codes of practice on stop and search and on arrest issued by the Home Office under the authority of PACE. The latest edition of the relevant Codes (C and G) came out in 2008. Code C states that 'there must be an objective basis' for suspicion which 'can never be supported on the basis of personal factors alone' (para. 2.2). However,

> Reasonable suspicion can sometimes exist without specific information or intelligence . . . For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. (para 2.3)

It would be hard to find a better example of an 'enabling' rule.

Clearly, police officers have to exercise discretion in deciding whether to stop and search and arrest, for all sorts of behaviour could be interpreted as suspicious in these terms. Some people look less 'suspicious' than others, and multitudes of actual or likely offences have to be prioritised. Minor offenders (prostitutes, unlicensed street traders and so forth) are often simply ignored (Smith and Gray 1983). Arrest is used less frequently than informal action even for relatively serious violence (Clarkson *et al*. 1994; Hoyle 1998). Similarly, when officers are able to be proactive (as opposed to their usual reactive mode) they have to use discretion about the offences or offenders in which to invest their time. Discretion is also created as a consequence of the way offences are defined. How carelessly does someone have to drive before the police decide to intervene, for example? So, stop and search and arrest decisions are constrained only loosely by law: the powers themselves, based (at best) on reasonable suspicion, are ill-defined and subjective; many of the offences for which the powers are exercised are similarly ill-defined; and the police largely set their own priorities. Equally important influences on the exercise of discretion are general policing goals, specific police force policies (e.g. Miller *et al*. 2000) and 'cop culture' (see Chan 1996).

### *Patterns of bias and police working rules*

Research prior to PACE found that the weak constraints imposed on discretion by law allow considerable scope for bias in policing (e.g. Stevens and Willis 1979; Smith and Gray 1983). Stops were often based on classic stereotypes leading to patterns of bias on lines of age, class, gender and race. PACE was intended to make some difference, for, although it gave more, not less, power to the police, it also incorporated more controls than there were before. These include requirements to tell suspects why they are being arrested or stop-searched and to make records of the incident.

Stop and search and arrest decisions are of intrinsically low visibility (Goldstein 1960). Thus written records can be constructed after the event (McConville *et al*. 1991: ch. 5). Accounts of incidents can correspond as much with legal expectations as with the reality of the incidents (Ericson 1981). Thus officers are aware that the precise way in which forms are completed may either help or hinder a member of the public subsequently making a formal complaint about their actions (Bland *et al*. 2000: 73). It is hardly realistic to expect an officer to record on their stop and search form that their reason for exercising a power was 'because he's a fucking paki' (*The Secret Policeman*, BBC 2003), yet we know that such reasoning does take place (see below). On the other hand, at least the requirement to record has the potential to focus

officers' minds on the limits of their legal powers, and some officers do claim this has an influence on them (Bland *et al*. 2000: 71–2). However, when scrutiny of forms reveals the reasons for searches to be sometimes recorded in such vague terms as 'drugs search', 'info received' and 'acting furtively' (Bland *et al*. 2000: 44), the extent to which there has been a genuine shift in police reasoning is open to question. Supervising officers should now scrutinise these forms to ensure that each stop was lawful and to see that there is no pattern of discrimination. This is all welcome, but difficult to carry out, and requires a culture change on the part of supervisors who have not hitherto regarded this as important. Moreover, many stops used not to be recorded at all, and although the recording requirements have been tightened up, it is almost impossible for a supervisor to ensure that a record is made of an incident (or take action when it is not) if no one makes them aware of that incident (see generally Sanders and Young 2007: ch. 2). Research has not found the control and accountability mechanisms in PACE to have achieved their intended effects, particularly with regard to ethnic minorities (see generally Bowling *et al*., this volume). Police records show that in 2004/05 black people were 6 times, and Asians 1.8 times, more likely to be stop-searched under PACE than white people. Black and Asian people were similarly over-represented in stops under s. 44 and s. 60 (Home Office 2006). Asian people feel particularly targeted in the wake of the '9/11' and '7/7' terrorist attacks on New York and Washington and on London in 2001 and 2005 respectively. Indeed, Hazel Blears, the minister responsible for counter-terrorism in 2005, told a parliamentary committee that Muslims will have to accept as a 'reality' that they will be stopped and searched by the police more often than the rest of the public.: 'there was no getting away from it', because the terrorist threat came from people 'falsely hiding behind Islam' (Dodd and Travis 2005). Some researchers argue that when statistics on recorded stops and searches are compared with the population 'available' to be stopped and searched (i.e. those who use public places when and where stops take place) no general pattern of bias against those from ethnic minorities is evident (MVA and Miller *et al*. 2000; Waddington *et al*. 2004). However, this does not take account of the under-recording mentioned earlier, which might be expected to be most prevalent where the grounds for stop-searches are weakest.

Moreover, the number of stops is only one problem of which many black and Asian people complain. Another problem is the justifiability of stops. According to the Home Office (2005: 38) itself, 'In a number of forces stop and search was used as a tool for public reassurance and to prevent people from gathering in certain places, although there was no reasonable suspicion of a crime'. Yet another problem is the way stops are carried out: 'It's not what they say, it's how they say it' (Bland *et al*. 2000: 87). Offensive and racist language is particularly resented. One young Pakistani adult described his interaction to Bland *et al*. as follows: 'their exact words were, yeah (and I've got witnesses because I was with two other people, yeah) was: ''Don't fuck me about right, and I won't fuck you about, where have you got your drugs?'' ' (2000: 83). Black people were found to be far less likely than Asian or white people to report any positive experiences of respectful treatment by the police, and the

overrepresentation of black people is continued at the arrest stage (Hillyard and Gordon 1999).

The 'working rules' that McConville *et al*. (1991) argued nearly 20 years ago structure police decision-making are still alive and well. For example, the 'rule' that many stops are based on general 'suspiciousness' was found by McAra and McVie (2005) to lead to a focus on the 'usual suspects'. The 'rule' that threats to police authority or public order should be squashed, by arrest if necessary, was found to operate by Warburton *et al*. (2005) even when the offence – such as cannabis possession – is trivial. Given these working rules, it is not surprising to find that stop and search is a crude instrument of crime control. Although more stops lead to more arrests, the proportion of stops that lead to arrest decreases as the number of stops rises. This consequence of the crime control approach can be observed in most years since PACE was implemented; the number of recorded stops has increased tenfold since 1986 yet the proportion leading to arrest declined from 17 per cent in 1984 to 10 per cent in 2004–05 (Home Office 2006; Sanders and Young 2007: ch. 2). Only about 7 per cent of arrests are a product of stop-search, and in most of these cases the police could have arrested anyway if the stop was legal, as the grounds for stops and arrests are identical in most cases. Thus, use of the stop and search power results, at best, in only a marginal impact on crime. Overall, it has been estimated that the various types of searches conducted by the police in 1997 reduced the number of crimes susceptible to this tactic by just 0.2 per cent (Miller *et al*. 2000: 28).

We have shown that attempts to control discretion through use of formal rules and laws have not been very successful. But this is not to say that, under certain conditions, changes in formal rules are completely ineffective. Several studies of domestic violence have assessed the impact of Home Office circulars that encourage arrest wherever there is evidence of an offence. Arrests rose significantly as a result, although not to the extent that full adherence would have produced (Hoyle 1998; HMIC and HM CPSI 2004; Paradine and Wilkinson 2004). It seems that the police perception of domestic assaults as 'not worth their time' can be partially overcome, albeit not entirely. As Chan (1996) argues, police culture is not independent of societal pressures and legal rules. Whether, and how, practices and rules correspond are always empirical matters. So, Hoyle (1998) found that, in the enthusiasm of police officers to implement this new policy, many arrests took place on inadequate evidence: an example of legal rules being overridden by non-legal concerns.

### *Police powers on the street: inclusionary or exclusionary?*

It might seem from the above that we are ignoring the role of the public in policing. Arrests for serious offences often follow information from, and complaints by, victims or witnesses, and this remains true notwithstanding the late 1990s revival of proactive policing (see chapters by Tilley and Maguire, this volume). But for summary offences (such as public order, prostitution, drunkenness, etc.) police initiative has always been more pronounced. Even when the police do not have a proactive role, the initiator of police action may be influenced by similar forms of stereotyping. Store detectives, security

personnel in shopping malls, and civilian CCTV operators all stereotype (Wakefield 2003; Smith 2004), and doubtless 'ordinary' members of the public do too. Citizen initiation usually involves the transmission of rather sketchy and sometimes downright unreliable information to the police (see, for example, Quinton *et al*. 2000: 31–3). Moreover, that information still has to be sifted, evaluated and acted upon (or not) by the police and stereotyping plays an important part in these processes (e.g. Grady 2002). The police are not simply the agents of the public. Thus, the British Crime Survey has repeatedly shown that the police record, at most, three-quarters of the crime reported to them (Nicholas *et al*. 2005).

In other words, police discretion and the exercise of judgement are still operative even when arrests are citizen initiated. The same is true when information is obtained from informants, on whom the police increasingly depend (Field and Pelser 1998; Billingsley *et al*. 2001: 5). Information from the public is one resource among many upon which the police draw in exercising discretion on the street according to their own priorities. It is only when a community is well organised and vociferous in its demands for changes in policing practices that the police are likely to modify their working rules in favour of working with that community in a genuinely inclusionary way (Miller 2001).

The increased formal powers of stop and search and arrest given to the police since the mid-1980s, combined with the ability of the police to stop and search and arrest largely on the basis of broad intangible suspicion, led to the increased use of this activity throughout the late 1980s and 1990s (Sanders and Young 2007: chs 2 and 3). Other new laws, such as s. 5 of the Public Order Act 1986, provide arrest powers for trivial offences which are used extensively by the police to enforce their authority (Brown and Ellis 1994). The increasing use in recent years of ASBOs and fixed penalties, and sub-legal measures such as 'acceptable behaviour contracts', has added to this (Squires and Stephen 2005; Young 2008). Young males, especially from poor and minority sections of the community, bear the brunt of this power (Meehan 1993; Brown 1997: chs 2 and 4). They feel – with some justification – discriminated against, and the consequent social unrest creates a vicious spiral of yet more policing and more unrest (Keith 1993; Macpherson 1999). The police sometimes use arrest powers to stamp their authority on challengers, often without any intention of prosecuting (Choongh 1997; Warburton *et al*. 2005). The poor and underprivileged, it is claimed, are often treated dismissively as part of, and in order to emphasise, their exclusion from normal standards of protection (Young 1991).

From a freedom model perspective, police powers on the street are clearly drawn too wide and used too indiscriminately. While we have concentrated in considering how police power impacts on suspects and their communities, the situation is similarly problematic when viewed from the perspective of victims or, indeed, of the police themselves. For every arrest which fails to prevent or solve a crime creates a twofold loss of freedom: the arrestee loses some liberty and privacy; and the time, money and resources wasted in the arrest will not have been used to protect potential victims (e.g. through street patrols of high-crime areas) or to provide non-law enforcement public services.

## Detention and questioning

PACE required, for the first time, that on arrest, all suspects, except in exceptional cases, should be taken directly to a police station. It was then for the custody officer (the old station sergeant) to decide whether or not the suspect should be detained. The idea was to protect suspects from arresting officers who might harass or intimidate them. The Criminal Justice Act (CJA) 2003 changed this by allowing arresting officers to bail suspects immediately, obliging them to report to a police station at a particular time days or weeks later. While this does not completely return us to the pre-PACE situation, 'street bail may be used where there is little or no evidence, as an instrument of police authority and control or simply as a way of keeping tabs on known offenders' (Hucklesby 2004: 808). These risks have to be set against the good reasons for this provision: enabling enquiries to be made that may lead to bailed suspects never being detained at all, and easing pressure on custody officers and police facilities at busy times (such as Saturday nights).

### *Grounds for detention, time limits and police bail*

Whether one is taken to the station by an arresting officer, or reports to the station following bail, what happens next is up to the custody officer. There are only two grounds for detention: in order to charge or caution (warn) the suspect; or, where there is insufficient evidence to charge or caution, in order to secure that extra evidence. But this is allowed only where detention is necessary for that purpose, and only for as long as it is necessary. Senior officers are obliged periodically to review detention to ascertain this. Detention is normally limited to 36 hours (a recent increase from 24 hours which, in itself, was longer than was normal pre-PACE) but can extend to 96 hours with the leave of the magistrates' courts. Suspected terrorists can be held even longer under the Terrorism Act 2006, s. 23 – for 28 days – and at the time of writing this looks likely to be extended further. In 2004, under less draconian legislation (allowing detention for 14 days), there were 162 arrests for terrorist offences; of these one-quarter were charged, though only half of these were in fact for terrorist offences (Sanders and Young 2007: 183) However, some are made subject to 'control orders' under the Prevention of Terrorism Act 2005, which create a form of house arrest that can last indefinitely (on policing terrorism, see Innes and Thiel, this volume).

These time limits are intended to ensure that suspects are not intimidated by the prospect of indefinite detention. However, the prospect of up to 36 hours – or, for terrorist suspects, up to 28 days – in the cells will be intimidating in itself. Decisions concerning the necessity of detention are consequently of great importance. In recognition of this, the custody officers have to complete custody sheets that record everything that happens to, and is decided about, detained suspects. However, this evidence is written by the members of the agency against whom it is supposed to be a protection – rather like records of stop and search. Thus, despite the outward appearance of everything being done 'by the book', detention is hardly ever refused (in one month picked at random recently there were just 45 refusals out of 8,000

detentions – a refusal rate of around 0.05 per cent; Sanders 2008). Reviews of detention can be perfunctory (senior officers can conduct the review over the phone), and the suspect might remain in custody for as long as investigating officers wish, subject to the time limits stated in PACE (McConville *et al*. 1991; Phillips and Brown 1998).

When the police do decide to release the suspect, they have to decide what else to do, if anything. Suspects released without charge may be given bail by the police while further inquiries are carried out. When custody officers decide to charge suspects with offences they have to decide whether to release on bail or to hold the suspect in custody pending the next magistrates' court hearing (usually the next morning). Detention is allowed only if the suspect's real name and address cannot be verified, if they are unlikely to appear in court to answer the charge, if they are likely to interfere with witnesses or police investigations or if they are likely to commit a significant crime. Around 80 per cent of charged suspects are granted bail by the police, this percentage having risen in recent years after the police were granted powers to set conditions, such as not making contact with the victim (see, generally, Bucke and Brown 1997; Raine and Willson 1997). Just because most suspects are granted bail does not mean that the police have refrained from exercising power over this group. The bail decision gives the police a bargaining tool in interrogation, which can be used to extract information about current and previous offending, other offenders and so on (for an example, see McConville 1992). The fact that the police can make this decision on a largely discretionary basis gives them generalised power that goes far beyond the specific bail powers written into the law.

### *Access to legal advice*

PACE requires free legal advice to be provided to all suspects who request it. Advice may be delayed in exceptional cases but not denied outright. Information about this unambiguous right has to be provided by the custody officer to the suspect. Custody records state whether or not suspects were informed of their rights, whether or not suspects requested advice and what (if anything) happened then. Request rates have now risen to around 40 per cent and actual advice rates to around 34 per cent (Bucke and Brown 1997). This is a massive increase over the pre-PACE situation, when less than one in 10 suspects requested advice (Sanders and Young 2007: 195) but, even today, two out of every three people do not make use of an entirely free service that is designed to help them. This requires explanation.

Some suspects have negative attitudes towards solicitors, which is not surprising. Advice is frequently provided by telephone, rather than in person, and, in many cases, no one attends interrogations. When Legal Aid lawyers (who are often para-legals) do attend, they are often passive; they have a generally non-adversarial stance and take their lead from the police. The behaviour of the police themselves is often an additional factor in suspects' decision-making. The research (summarised by Brown 1997: ch. 6; Sanders and Young 2007: 199–214) shows, first, some suspects do not request advice because they are not informed (wholly or partly) of their rights; some suspects'

requests are denied, ignored, or simply not acted upon (custody records recording only some of these instances); and the police often attempt to dissuade suspects from seeking advice and to persuade them to cancel their requests. Such events were noted in 331 cases (40 per cent of all cases observed) in the study conducted by Sanders *et al*. (1989) and included such things as the disquieting information: 'You'll have to wait in the cells until the solicitor gets here'.

The net result is that the potential for, and likely effect of, getting help from a solicitor are among many factors that suspects must weigh up when detained. Police station legal advice and assistance is now regulated more rigorously in an effort to make it more effective (Cape 2006), but the effect of this is undermined by changes to the right of silence (discussed below). Moreover, recent changes to the Code of Practice restrict legal aid payment, in minor cases, to advice over the phone.

### *Police interrogation*

Interrogation has assumed ever greater importance in police investigation over the years. Around three-fifths of detained suspects are interrogated (Bucke and Brown 1997: 31). The PACE *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Code C) sets out basic standards for interrogation (the provision of proper heating, ventilation, breaks, access to solicitors and others, and so forth), but also states that a police officer is 'entitled to question any person from whom he thinks useful information can be obtained . . . A person's declaration that he is unwilling to reply does not alter this entitlement' (Note 1K). So, police officers may attempt to persuade suspects to change their minds about not speaking, and to hold them, subject to the time limits, for as long as that takes.

Many suspects against whom there is plenty of evidence anyway will talk to the police under almost any conditions. Others have to be persuaded. Some are susceptible to 'deals': confessions in exchange for favours such as bail or reduced charges. Then there are those who are intimidated by being held against their will in 'police territory' where the environment is deliberately denuded of psychological supports, by being in fear of spending the night in the cells or by the employment of any number of 'tactics' against them. Examples of such tactics are offering inducements, claiming that there is overwhelming evidence against the suspect and using custodial conditions such as return to the cells. The latter can be particularly effective, given the importance attached by most suspects to the shortest detention possible. To understand the coercive nature of detention, it is necessary to appreciate how it is experienced by suspects: in these conditions, 'time passed exceedingly slowly' (Newburn and Hayman 2002: 97). If a tactic does not work in the initial interrogation, 24 hours (or more) thus allows ample time for the suspect to be psychologically 'softened up' for further interrogation. Evans (1992: 49) found a strong statistical association between the use of tactics and confessions.

Extreme tactics are now unacceptable in formal interrogations since such interactions must be tape recorded. That this is required gives rise to another way of securing confessions: through informal interrogation. This may occur

on the way to the police station, before and after formal interrogations, or in the cells under the guise of a 'welfare visit'. Custody officers are supposed to record the precise times at which interviews begin and end, but this does not prevent officers having an 'informal chat before I switch on the tape' (Evans and Ferguson 1991; McConville 1992). Many appeals turn on confessions allegedly made 'informally' but not repeated 'formally'. As one officer told Maguire and Norris (1992: 46–7), there would be nothing to prevent him from distorting the contents of informal conversations 'if I was dishonest'. While it appears that 'tactics' are now used less frequently in formal interrogations than they were before PACE, it is possible that they have simply been displaced to 'lower visibility' settings. The scope for this is reduced in police stations with CCTV cameras (Newburn and Hayman 2002), but at present few have installed them, and the problem of what goes on outside the station will remain. Because of the absence of recent research we do not know whether informal interviews are better controlled than before. But we do know that evasion of controls appears to be a normal feature of policing. In New South Wales (Australia) for example, recent research found that huge numbers of formal, recorded interviews are preceded by informal interviews, particularly where the formal interviews were videoed. Sixty-three per cent of police officers interviewed said they had done this in the case about which they were being interviewed (Dixon 2006, 2007).

Coercion occurs in both informal and formal interrogations. This is inevitable under English law, for the job of the police interrogator is to elicit answers even from suspects who have declared a refusal to provide answers: in other words, to persuade them to change their minds. Tactics are designed to do this, and not all are of the 'carrot' variety: 'Sometimes it's necessary to shout at people . . . you have to keep up the pressure' (detective cited by McConville *et al*. 1991: 4). Even interrogation practices which would be innocuous to most people are coercive to vulnerable people (Gudjonsson and MacKeith 1982; Littlechild 1995). Procedures for identifying, and making allowances for, vulnerable people in police custody have proved to be inadequate (Bucke and Brown 1997; Phillips and Brown 1998; Young 2002; Medford *et al*. 2003). Vulnerable suspects should be interrogated in the presence of an appropriate adult, but they are often not. Though appropriate adults are frequently over-passive, it does seem that the police are less coercive when they are present, and legal advisors (when they are present) are more interventionist when this is appropriate (Medford *et al*. 2003). Without appropriate adults (where applicable) and legal advisors, suspects seem to be more likely to be trapped into saying or accepting things that they did not necessarily mean (though this has been challenged in the Northern Ireland context, where it is suggested that appropriate adults are not sufficiently attuned to the legal rights of suspects: Quinn and Jackson 2007). All of this can lead to false confessions. 'Falsity' can be a matter of interpretation and degree. McConville *et al*. (1991) argue that interrogation is a process of construction whereby facts are made and not discovered. An example is given by Maguire and Norris (1992: 4), who report a CID sergeant saying that he had been taught to induce people found carrying knives to say that they were for their own protection. This, unknown to the suspect, constitutes admission of the crime

of carrying an 'offensive weapon'. This type of confession, with elements of falsity arising from the process of case construction, is probably more common than what is commonly thought of as constituting a 'false confession', and yet may similarly lead to wrongful convictions.

McConville *et al*. (1991) argue that false confessions are an inevitable result of crime control values dominating the criminal justice system. This view contrasts with that of Moston (1992), who argues that police failure to verify confessions and avoid leading questions is simply a matter of technical competence and a failure of training. Less confrontational 'investigative interviewing' or 'ethical interviewing' is advocated by him and others instead. A massive programme to train police officers in investigative interviewing was instituted in the 1990s and, by the end of that decade, over two-thirds of police officers had received this training. Clarke and Milne (2001) conducted a major evaluation of the effectiveness of this training after a number of smaller-scale studies had indicated that investigative interviewing was not having the impact in the workplace that some had anticipated. Their evaluation involved skilled police officers reviewing and rating the tape recordings of interviews with suspects without knowing whether the interviewing officer had been trained in investigative interviewing or not. The authors claim that, compared with earlier studies, the research indicates a decline in the use of leading questions and the more frequent provision of information required by law, such as the right to legal advice. It is doubtful whether these changes can be attributed to the training, however, since trained and untrained officers were found to interview in much the same way as each other. Moreover, standards of interviewing indicated that the training had failed to bring about a radical change in police behaviour. For example, listening skills were rated as poor, interviews were found to be dominated by the use of closed questions and 10 per cent of the interviews were considered to involve possible breaches of PACE. Interviews with victims and witnesses raised even more concern, and 'damning' evidence was found of interviewers apparently looking to interviewees to confirm police suspicions rather than provide their own accounts (Clarke and Milne 2001: 110). The research also found that there was little effective supervision of interviewing and that scant interest had been shown by police leaders in ensuring that their officers actually used the skills taught in training. In our view, miscarriages of justice arising from coercion and false confessions would be more effectively reduced by preventing confession evidence forming the sole basis of convictions, and by providing the defence with the same resources as are provided to the prosecution, than by trying to change interrogation practices.

Over half of all suspects who are interrogated either confess or make incriminating statements to the police (see, for the most recent research, Bucke *et al*. 2000). Only two to four per cent of suspects exercise absolute silence although a further five per cent or so simply make flat denials, while 8–15 per cent answer some questions and not others, and some suspects are silent at the start but then answer questions later (or vice versa) (Leng 1992). Despite this low rate of silence, and the few 'ambush defences' that take advantage of it (Leng 1992), in 1994 the law was changed so that when suspects rely in court on a fact which they could have been reasonably expected to mention when questioned by the police, the court can draw an adverse inference from this

silence. Similarly, courts can draw adverse inferences from failures to answer questions in court. Exactly what inferences a court should draw from silence is a matter of debate. The law is still being developed by the English and European courts and is likely to remain a matter of great difficulty for lawyers, police officers and judges for some time to come. Consequently these changes have been castigated on pragmatic (for example, Birch 1999) as well as principled grounds (for example, Sanders and Young 2007: 223–35). Despite Article 6 of the European Court of Human Rights (ECHR) proclaiming that 'Everyone . . . shall be presumed innocent until proved guilty by law', the ECHR has accepted the lawfulness of these provisions, although it has sought to reduce their potential impact by declaring that silence cannot be the sole or main basis for a conviction (see, generally, Cape 1997, 2006; Birch 1999). As might be expected, the effect of the new provisions is to lower the use of the right of silence, probably because lawyers, who were becoming more adversarial in the early–mid 1990s, became more circumspect again about advising silence. Thus Bucke *et al*. (2000) estimated silence in the late 1990s to be back down to the rates found in the 1980s.

### *How well regulated are police powers of detention and questioning?*

We have seen that the legal regulation of detention does not prevent it from being lengthy and intimidating, that access to lawyers can be obstructed and is often of little value and that the police apply different forms of pressure. Thus McConville *et al*. (1991) argue that while police powers have changed in an apparently due process direction, generalised police power remains undiminished. This is controversial (see Duff 1998) and Dixon (1992) observes that 'sea change theorists' (mostly practitioners) argue that, if anything, the protections for suspects we have discussed here significantly obstruct crime control aspirations. Although few academic commentators accept this view, it is attractive to those politicians who seek electoral advantage through the dismantling of protections for suspects. Indeed, the need to 'rebalance' the system is the underlying message of countless government policy documents over the last decade (e.g. discussion of the 'justice gap' in the white paper *Justice for All*, Home Office 2002), used as an excuse for yet more crime control-based police powers in, for example, the Criminal Justice Act (CJA) 2003 (for detailed analysis of post-PACE 'rebalancing' see Cape 2008).

It seems to us that crime control-oriented police practices have shifted rather than been eradicated or even reduced. Thus there is little violence now, but there is more use of other tactics and pressures. The new rules and constraints to which 'sea change' theorists point are access to lawyers, tape recording of interrogation, custody records and the general supervisory role of the custody officer. As we have seen, these developments hardly represent a 'sea change'. Moreover, there appears to be a 'balance' between due process and crime control only because we now unquestioningly accept the right of the police to use coercive powers. But why do suspects not want to wait for a lawyer, for instance, to come to the station? Why do suspects 'voluntarily' answer police questions? Only because they are in the police station against their will in the first place. So, for example, most suspects do want lawyers, but the desire to

get out of the station quickly is stronger (Brown *et al*. 1992). And why is police station legal work often of poor quality? Perhaps, largely because the police have the power to create the forces that so shape it. Solicitors send unqualified staff, give telephone advice or miss interrogations in part because of all the time they would otherwise spend at relatively low rates of pay (Cape 2006). But it is the police who control the time-frame (Sanders 1996a). The legal 'trading' which undermines adversarialism is forced on to lawyers – who usually need little persuading. And in providing the right to detain in such broad circumstances, the law cedes most practical power to the police.

Why have politicians, lawyers and others allowed this to occur? Is it because they do not bear the brunt of these powers? Research has shown that most people who are stopped, searched, arrested, detained and interrogated are young working-class men, with an over-representation from ethnic minorities. The treatment they are given is frequently humiliating – and often deliberately so (Young 1991; Choongh 1997). Opinion-formers, lawyers and legislators, on the other hand (older, middle-class, white people in the main), are very rarely subjected to such exclusionary processes. In the one sphere of criminality where large numbers of middle-class people come into adversarial contact with the police (motoring offences), extensive use is made of informal warnings, 'tickets' and postal guilty pleas in preference to the more stigmatising processes of arrest, detention, prosecution and formal court appearances. There is evidence that pre-trial processes, including the way in which police power is exercised, are as important to a citizen's sense of the legitimacy of state action as the formal outcome (Tyler 1990). Of course, some middle-class people are roughly treated and some poor people are not, but the contrast between the integrated and the excluded is as striking in the field of criminal justice as in other fields of social policy.

How might a freedom model perspective help us in considering reform in this area? First, it again alerts us to the argument that the frequency and lack of discrimination with which the police resort to detention are counterproductive: all detentions infringe freedom and the majority do not result in any significant net gain in liberty. Secondly, it makes the case for treating detained suspects fairly, and in accordance with legal standards, seem much more compelling. If the freedom of suspects is respected to this extent, it is much more likely that they will co-operate with the police in future (whether as a victim, a witness or a suspect). In our ideal world, the police would internalise the values of human rights and the freedom model, and the need for oversight and other regulatory mechanisms would diminish. Under present conditions, however, it is naive to expect the police to safeguard suspects' rights when so many of them believe that those rights hinder effective policing. It follows that the rights of suspects should not be dependent on the integrity of custody officers and investigating officers but should be either automatic or guaranteed by a genuine third party. Independent lawyers working in the police station might be a solution, although they would need to attend all interrogations and possess an adversarial ethos. Their position could be buttressed by changes in the rule of evidence to render confessions inadmissible unless made in their presence or, where this is impracticable, unless tape recorded. We offer further concrete suggestions in the final section of the chapter.

### Other evidence-gathering powers

The police have many evidence-gathering powers in addition to detention and questioning. All we can do here is to give an indication of their nature and extent (for a detailed discussion see Sanders and Young 2007: ch. 6). One of the oldest is the power to enter premises. This can be to search for and arrest a suspect, or to search the premises for evidence or proceeds of crime upon or after an arrest. If such evidence is found, it can be seized and may form the basis for an arrest that could not have been otherwise made. Like arrest, these powers were once exercisable only rarely without a judicial warrant. Warrants would, in principle, have been issued only if the police provided evidence of reasonable suspicion to justify the action. Search warrants, like arrest warrants, are now seldom sought (Brown 1997: 31). Over the last 20 years or so the police have been given increasingly extensive powers of entry, search and seizure, consistent with the growing crime control orientation of the system. PACE, in particular, led to more police-authorised searches being carried out (Brown 1997: 34), and further powers were given to the police by SOCPA 2005, which amended the sections of PACE referred to below. And another classic crime control (enabling and legitimising) rule is that, if evidence of a crime is found, it can be seized even if it has nothing to do with the crime for which the police began the search in the first place (PACE *Code of Practice* B: 7.1; and see, generally, Sharpe 2000).

Under s. 32 of PACE, arresting officers may, without warrant, enter and search premises in which the arrested person had been around the time of the arrest or, under s. 17 of PACE, in order to make an arrest (on warrant or on reasonable grounds). Under common law powers preserved by s. 17(6) of PACE, they may also enter without warrant to deal with, or prevent, a breach of the peace, or to protect someone from serious injury, which can be important in domestic violence incidents. The bulk of recorded searches of premises, however, take place under s. 18 of PACE (Brown 1997: 34), which allows searches without warrant of premises occupied or controlled by a person under arrest for an arrestable offence. The police need a magistrates' warrant in most other circumstances, such as if they believe that a search will reveal evidence relating to a serious crime (see s. 8 of PACE). Magistrates should only issue a warrant when there is a reasonable basis for the claims of the police, but they usually have no way of assessing these claims, as 'suspicion' is often based on unverifiable intelligence, such as information from informers (see Brown 1997: 32–3). Sharpe (2000: ch. 3) observes that magistrates seldom look far below the surface of police claims, and empirical evidence supports the view that magistrates tend to 'rubber stamp' requests for warrants (Brown 1997: 33).

Arrested persons, whether or not originally stop-searched, may be searched for limited purposes by the arresting officer on arrest (s. 32 of PACE). Once in the police station, a thorough search under s. 54 of PACE (including a strip-search if the custody officer so decides) is usual. An 'intimate' body search for Class A drugs or weapons, governed by s. 55 of PACE, may only be carried out if a senior officer authorises this, and it has to be performed by a nurse or doctor unless this is not practical (in which case the search is carried

out by a constable). There are generally fewer than 200 intimate searches a year, of which less than 20 per cent find drugs or weapons, but rather more strip-searches (Sanders and Young 2007: 189). While the taking of 'intimate' samples (blood, semen) is confined to specific circumstances, 'non-intimate' samples can – as a result of the CJA 2003, s. 10 (amending PACE ss 62 and 63) – be taken from almost anyone searched in the station. But if you were forced to allow someone to put their gloved hand into your mouth to scrape out some saliva, for example, would you regard this as a 'non-intimate' procedure?

PACE Code of Practice B, which governs searches of people and premises, stipulates that they should be carried out at a reasonable time, using only reasonable force, with due consideration for the privacy and property of the occupier and so forth. There is little research to indicate how these provisions are generally interpreted and how far they are complied with. However, research by Hillyard (1993) and Choongh (1997) suggests, albeit on the basis of limited data, that these powers are sometimes used in order to discipline suspect populations rather than primarily to gather evidence for prosecution purposes. This may explain Newburn and Hayman's finding that Afro-Caribbean detainees were twice as likely as any other ethnic group to be strip-searched on arrival at Kilburn police station in north London (2002: 50–2).

Search and seizure may be carried out with the consent of the person concerned, thereby evading many of the PACE safeguards such as the requirement of reasonable grounds for believing that relevant material will be found. We do not know precisely how often this occurs, but research has shown it to be frequent (Brown 1997: 36–7). Many people think (often correctly – see Brown 1997: 37–8) that if they refuse, the police have the power to go ahead anyway, and that to refuse would be regarded as suspicious in itself. In other instances, the police seek consent because no power to search exists, although suspects might not be told this. Instead, the police play on suspects' ignorance, as when 'consent' is obtained from persons in custody (Brown 1997: 37). Again, we can see that specific police powers (of arrest, detention and search) give the police far more generalised power than is evident simply from the letter of the law in the statute book and judicial decisions.

Reasonable suspicion on which to base an arrest or search sometimes emerges from undercover policing, and surveillance methods such as telephone taps, mail interception, 'bugging' of buildings and CCTV. Often these methods are combined with the use of informants, an essential source of police knowledge (Innes 2000). In so far as much policing is based on information from ordinary members of the public, this is reasonable. Many people, usually criminals, are, however, used by police as informers. In 1998, some 50,000 informers were officially registered with the police (*Guardian* 12 October 1998), but following the Regulation of Investigatory Powers Act (RIPA) 2000, which was supposed to regulate the use of informers more tightly, in any one year there have only been between 3,500 and 5,000 (see e.g. Chief Surveillance Commissioner 2007: ch. 6). Our worry that this apparent 900 per cent drop reflects evasion of legal regulation is shared, albeit expressed in more sober terms, by the Chief Surveillance Commissioner (2007: para 2.3).

Undercover policing in general, and the running of informers in particular, amounts to allowing criminal conspiracies to develop until arrests can be

made. Since this involves observing and encouraging, or even participating in, crime, and running the constant risks of corruption of officers and double-dealing by informers, regulation is vital but inevitably very difficult (Clark 2001). Undercover policing powers, which might best be regarded as legitimising rules, have hugely increased in the last 20 years, particularly as a result of RIPA 2000. Most of the powers legitimised by this legislation can be exercised on the authority of senior police officers. Although the fact that some require judicial authorisation makes it appear that due process norms are upheld, authorisation is only applicable because these new powers were created in the first place – yet another distinctly 'crime control' development. It appears that human rights and other legal norms currently provide scant regulation of 'sneaky' forms of policing that might do more harm than good (see generally Sanders and Young 2007: ch. 6).

Other evidence-gathering powers appear at first sight to be more solid and less open to misuse than those discussed so far, but appearances can be misleading. Take identification evidence. It might come from victims or other witnesses (including police officers), or from DNA or fingerprint samples. Sample-gathering can be abused, and so can identification parades (regulated under PACE code of practice D), for all forms of evidence are susceptible to 'construction'. Thus, police officers unconsciously 'lead' witnesses if they know who the suspect is because they cannot always help the way they look at them (Phillips *et al*. 1999). This, together with the notoriously inflated opinion that witnesses have of their own accuracy (Tinsley 2001), renders it unsurprising that a survey in the USA revealed that mistaken identification evidence was the most common cause of miscarriages of justice (Jackson 2001). Video identification is better, but not always possible and still not entirely reliable (Roberts 2004).

Similarly, 'scientific' evidence is not as solid and value-free as many people believe. This is partly because criminals are often not kind enough to leave clean and complete prints and samples behind. Samples thus often give rise to possibilities and probabilities. Moreover, scientists have to be told by the police what to look for and are frequently asked to give opinions; in this process they sometimes become partisan. The result is several miscarriages of justice in the last few years, including the infamous 'shaken baby syndrome' cases in which several convictions were reversed (Redmayne 2001; Wells 2004). Even DNA evidence can be problematic, and the police sometimes arrest in order to get particular people onto their DNA database. In other words, exaggerated belief in the value of such evidence leads to the police being given greater powers than might be warranted even if those powers were used properly, but are particularly worrying when they are not (McCartney 2006).

The powers discussed in this section – all discussed in more detail in Sanders and Young (2007: ch. 6) – are increasingly relied on by the police. This is because of an increased emphasis on 'proactive' policing (in which specific crimes and specific suspects are targeted by the police) at the expense of 'reactive' policing. Thus the problems of inadequate legal regulation, along with the problem that stereotyping and working rules underlie the targeting process (Gill 2000), are likely to increase (see chapters by Maguire and Tilley, this volume).

## Prosecution

Soon after the police were first established they gradually began to take over responsibility for prosecution, despite the lack of any specific or exclusive prosecution powers. As arrest turned into a tool for (rather than the culmination of) investigation, pre-charge detention arose and the police developed various non-prosecutorial dispositions including the 'police caution'. Although the police are no longer responsible for continuing prosecutions, nor (consequent on the CJA 2003 amending PACE s. 37) the initial decision to prosecute, they remain the gatekeepers and they have retained the power to caution. There are now well over a million prosecutions initiated by the police per year but, even so, around one in four suspects are released from pre-charge detention with no further action (NFA), and many more suspects are given a formal caution or informal warning. Police officers decide whether to arrest and whether to release, caution or ask the CPS to prosecute using a mixture of their own criteria and Home Office criteria, and on the basis of evidence collected and evaluated by themselves. Thus, arrest does not necessarily lead to prosecution, and prosecution need not be the normal response to suspected crime (see, generally, Sanders 1996b).

We do not generally think of prosecution as a 'police power'. But prosecution powers are closely connected with the powers we have examined so far. Although police powers are provided to enable the police to gather evidence to support a prosecution, it has been claimed they enable the police to wield more generalised power in order to subjugate marginal communities (Choongh 1997; Hillyard and Gordon 1999). The police power over prosecution can also be used to justify earlier action that might be in breach of legal rules (McConville *et al*. 1991). Even warnings can be used as policing tools, for example as part of a 'deal' to secure information and keep informers 'on-side'. The low visibility of these decisions allows the discretion operating here (as in relation to stops and arrests) to be structured more by working rules than legal rules. Thus it has been found that the police often prosecute cases that are weak, that these cases often fail (McConville *et al*. 1991; HM CPSI 2003) and that defendants are disproportionately drawn from ethnic minorities, this being 'consistent with discriminatory treatment' (Feilzer and Hood 2004).

This makes no sense in terms of Home Office guidelines, but is perfectly rational in terms of police working rules. Very rarely do custody officers caution or NFA when the arresting officer wants a prosecution, or vice versa, for custody officers are in a weak position in inquiring into evidential strength. If they try to evaluate arresting officers' evidence they have only one source of information on which to draw (apart from the suspect): that same arresting officer. In the mid-1980s the CPS was created to operate as a check on these decisions and in an attempt to reduce the number of weak prosecutions. But the police role in constructing the evidence that forms prosecutions, and the charging power that follows, prevented the CPS from exercising much influence, except in more obvious cases, such as those where there was clear racial bias (Mhlanga 2000). Only time will tell whether the transfer of power to decide prosecutions to the CPS will prove to be inhibitory or merely presentational. Since the need for speedy decisions from the CPS (in the

interests, as much as anyone else, of suspects who might otherwise spend even longer in the cells) has led to some prosecutors being stationed in police stations there is the danger that they will become even more police-oriented than before.

Low visibility sometimes leads traditional police cautioning to be used in a far from 'welfarist' way. Lee (1995) describes many cautioning processes as 'degradation ceremonies', her accounts of which sound similar to the accounts of the humiliation of 'toe rags' in the custody room provided by Choongh (1997) and the non-prosecution processes of the DSS (Cook 1989). We do not know how typical are Lee's findings or those of Choongh because there has been little research on the treatment of suspects and defendants. The early findings on 'restorative cautioning' indicate significant and welcome shifts in police practice but also raise concerns that a traditional police agenda may dominate restorative encounters, leaving offenders and victims in some cases almost as marginalised as before (Young 2001; see Hoyle, this volume). Thus prosecution processes and many diversionary processes remain exclusionary. It is not the case that prosecutorial discretion must necessarily result in exclusionary practices. Whereas the police charge more often than they NFA or divert from prosecution, most non-police agencies behave in the opposite way and seek to work *with* suspects and offenders in order to promote voluntary compliance with the law. From the point of view of crime prevention and recidivism there seems to be no justification for these different patterns (Braithwaite 2001).

From the freedom perspective, there is a justification for changing these patterns. In particular, it can be argued that the freedom of those with economic, social or political power (high-status suspects often committing high-value or grave crimes) should not be afforded greater respect than the freedom of the poor, the vulnerable and the marginal (usually committing low-value property offences). As a first step, it might be helpful if prosecution policy and power were concentrated in one body with unified channels of accountability to Parliament, the courts and the democratic representatives of local communities. In that way the great disparities of practice between the various forms of prosecuting agencies might become a matter of public debate, and the advantages of principled diversion from prosecution more widely accepted.

## The misuse of police powers

The extent of police misuse of their powers is not known as it is impossible to research such a hidden issue adequately, but the research reviewed above shows that there is considerable misuse. Sometimes misuse stems from corruption (Newburn 1999; Clark 2001) but more often the police act in excess of their powers in pursuit of evidence of guilt or to control or intimidate suspect populations.

The fact that trials are conducted in relatively independent unbiased courts, and that defendants are represented by relatively independent lawyers regardless of their financial means, undoubtedly deters much potential abuse

of power, provides a way of bringing instances of misuses of power to light and protects against some wrongful convictions. The deterrent and protective effects of prosecutions, however, are bound to be partial. First, as we have seen, many suspects are stopped and/or arrested with no prosecution in mind, and many are released with no charge. When police power is used as a disciplinary mechanism, the letter of the law regulating powers is largely irrelevant. Secondly, the overwhelming majority of defendants plead guilty without a trial. In these cases there is no opportunity to bring misuses of power to light. Thirdly, even if evidence was obtained, for example, following an unlawful search or illegal questioning, it would not necessarily be excluded from the trial. While *oppressively* obtained confessions cannot be used, unfairly obtained confessions (or other evidence obtained in breach of the powers we have discussed) can be (Ormerod and Birch 2004). Fourthly, suspects or defendants will not raise the question of misuse of power if they are unaware that it has occurred. Few people know precisely what the police are, and are not, allowed to do. Apart from the inevitably complicated nature of much of the law, much covert policing – the kind of proactive policing that is encouraged by government – relies on deception. These practices include 'stings' (such as posing as a drugs buyer or dealer), and implying to suspects that the evidence against them is stronger than it really is (Ashworth 1998; Sanders and Young 2007: 289–97). Even if a practice is unlawful, and even if the person at the receiving end knows this (or is told this afterwards by a lawyer), there is the difficulty of proving this. And, quite naturally, the police tend to close ranks when they come under investigation (for an example following the shooting of Harry Stanley, who was carrying a table leg that was mistaken for a gun, see IPCC 2006).

The main way of bringing misuse of powers to light is through the complaints and discipline procedure. The introduction in 1985 of an independent oversight body, the Police Complaints Authority (PCA), led to very few complaints being substantiated: 903 in 2000–01, which represented nine per cent of the complaints which were investigated, but only three per cent of the 31,034 complaints initially made (Povey and Cotton 2001). This, along with the acceptance that there was a significant element of institutionalised racism in the police service which affected, among other things, the complaints system (Macpherson 1999) led to the PCA being replaced in 2004 (as a result of the Police Reform Act 2002) by a new Independent Police Complaints Commission (IPCC). This enhanced the civilian element of the system, enabling IPCC staff to investigate the most serious cases (previously done by the police). Though welcome, the experience of other countries shows that this is no panacea (Goldsmith and Lewis 2000) – particularly as most investigations are still done by the police themselves. Certainly the figures so far do little to inspire confidence. Of the 28,998 complaints in 2006–07, 1389 (4.7 per cent) were substantiated (Gleeson and Grace 2007). The other 95.3 per cent per cent of complaints were either dealt with informally (47 per cent), adjudged by the PCA to be not practicable to investigate and so 'dispensed with' (10 per cent), investigated but not substantiated (approx. 26 per cent) or withdrawn (12 per cent) – something that often happens because of police pressure (Maguire and Corbett 1991). There are three main possible explanations for the low level of

substantiation: that most complaints are unjustified; that most police complaint investigations (and IPCC scrutiny) are biased; and that evidence of malpractice cannot be obtained in most cases.

All three explanations are doubtless partially true. Regarding bias, the processes of discrediting and discouraging complainants discussed by Box and Russell (1975) and Young *et al*. (2005) in relation to the pre-IPCC system is unlikely to have been affected by changes in the structure of supervision, for nearly all complaints are still investigated by the police themselves. The IPCC is in the same position as is the CPS vis-à-vis investigating police officers. Rather than reinvestigate, the IPCC peruses a carefully constructed document. Despite this, around one-third of all appeals against police determinations are upheld by the IPCC (Gleeson and Grace 2007). This shows that the IPCC is an improvement on the previous PCA system. Nonetheless, even in the few cases that the IPCC investigates itself, the police often collude to prevent sufficient evidence of malpractice or crime being proven, as the IPCC itself indicated in its *Harry Stanley* report (IPCC 2006). Of greater significance in the long run than the body allegedly 'in charge' may be a shift towards a more inclusionary, restorative, way of handling police complaints that some police leaders advocate (Young *et al*. 2005; see Hoyle, this volume).

The complaints system, therefore, in most instances still fails all due process tests (openness, not allowing officials to be judges in their own cause, giving all parties a fair hearing and so forth) and only weakly deters the police from crime control practices in general and law-breaking in particular. This should be surprising only if we see incidents that give rise to complaints as the products of pathological 'bad apples'. If they are on the contrary regarded as normal reflections of policing practice (Goldsmith 1991), both the behaviour complained of and the closing of ranks to prevent substantiation are to be expected (Irving and Dunnighan 1993). Maguire (1992) notes that police investigators probably do not consciously try to exonerate officers who 'overstep the mark', but 'the mark' is not a clear or unchanging line. It depends on the circumstances at the time, the police working rules being pursued and the characteristics of the complainant.

It is not surprising to find that many people are deterred from complaining, and instead are advised to prosecute or sue the police. Only recently the Police Action Lawyers Group, who represent complainants, resigned from the IPCC's advisory board, alleging it was biased in favour of the police (see *Guardian* 25 February 2008 and, for the IPCC reply, 27 February). Prosecutions are rare – there are around 20–30 per year – for obvious reasons, not least because few types of police malpractice are actually criminal. Prosecutions are initiated by the DPP following invocation of the complaints procedure. Increasingly, aggrieved complainants or relatives of people who die in police custody are challenging DPP decisions to not prosecute police and prison officers, or to prosecute only on relatively trivial charges, especially following inquest verdicts of 'unlawful killing'. For example, the Metropolitan Police were prosecuted for health and safety offences for the fatal shooting of Jean Charles de Menezes, who was wrongly thought to be involved in terrorism (*Guardian* 1 November 2007), and there were no prosecutions at all (or disciplinary charges) in the Harry Stanley case. The fact that some of these challenges

succeed suggests that the DPP is over-cautious in deciding not to prosecute (though many of these prosecutions fail in court), in contrast to cases where the police are the complainants and the socially marginalised are the accused. A horrific example is a British Muslim arrested in a terrorism raid in 2003 who suffered 50 injuries while detained for six days without charge. Yet the DPP decided not to prosecute anyone (*Guardian* 11 September 2004). Frequently, officers found to have committed crimes such as assault and perjury are allowed to resign instead of facing prosecution or discipline charges (Quinton 2003; Sanders and Young 2007: 600–4).

All other things being equal, a civil action is more likely to succeed than a prosecution because it involves a lower standard of proof, though they remain expensive, lengthy and difficult to win. Punitive damages can be awarded in civil actions, and juries are becoming increasingly alarmed at police behaviour. In a notable case in 1996 (some four years after being punched, kicked, racially abused and illegally detained for 90 minutes), Kenneth Hsu was awarded £220,000 in punitive damages. The officers remain unpunished and undisciplined, and in 1997 the Court of Appeal stated that the maximum sum that could be awarded for abuse of police power was £50,000. Hsu's damages were reduced to £35,000 (Dixon and Smith 1998). In another attempt to reduce civil actions, legal aid is now generally unavailable unless the complaints system is used first. Despite all this, they have increased, indicating the inadequacy of the other available remedies. The Metropolitan Police, for example, paid £1.3m compensation in 2006/07 in 138 cases (usually out-of-court settlements) (Metropolitan Police Authority and Metropolitan Police Service 2007). Though this is a drop since the late 1990s it is still more than the annual average in the early 1990s. The civil law has not kept pace with the growth in police powers, however. While wrongful arrest and false imprisonment are traditional actions in tort, PACE itself created no new torts or crimes. Thus the 'right' to a lawyer is not a real right, for there is no court action available to enforce it or to seek compensation for its denial. The same is true of most unlawful interrogation. It seems that it is more important to protect property, reputation and tranquillity than it is to protect the civil liberties of 'police property'. Unlike the complaints system, court-based remedies are open and complainant driven, as distinct from being police driven, but their disadvantages render them almost equally ineffective (see generally Sanders and Young 2007: 604–12). If freedom is to be maintained, there must be a sense in society that those infringing the rights of others will be held to account in an effective manner. That, after all, is the essential justification for police powers. The current inadequacy of the remedies for abuse of these powers, however, leaves some sections of society with the distinct impression that the police are a law unto themselves.

## Conclusion

Police powers matter. Without at least some of them the police would be less effective in enforcing the law, and crime would rise. But whether the police need all the powers outlined in this chapter is another matter. And we have

seen that there are major costs to freedom: innocent as well as guilty people are increasingly subject to being stopped, questioned, searched, arrested, locked up in police stations, made to suffer isolation and deprivation, and put through the mill of prosecution, Some suspects are even killed, both in the streets and in police custody. Much of this is lawful, and so if we gave the police fewer powers there would be less abuse, less death, and less resentment of the police in socially marginal groups. Perhaps people would co-operate more with the police, who might find their crime-fighting ability no weaker than before.

Some of the time the police abuse their powers, and are rarely called to account for that. The law appears to exert less moral force on the police than is often believed, for there is a gap between many legal rules and the working rules of the police. This means that much of the law is presentational in nature, providing a misleading appearance of a system subject to numerous inhibitory due process safeguards. In reality, law-breaking by the police and lesser failures of due process are tolerated. How can this be? We have seen that the police are rarely punished, and victims of malpractice are rarely compensated, but what about the authorisation and recording processes that we have discussed? The reason these are weak is because they are forms of self-regulation. This form of regulation is only effective if it is in the interests of the regulators to enforce it, or if the penalties for not doing so are high. In the case of the police neither applies. Moreover, unlike most self-regulation, where there is a pyramidal structure that enables those high up the pyramid to regulate those further down, most police regulation is (supposedly) done by investigating officers themselves (e.g., completion of stop-search forms) and custody officers (usually sergeants who have nothing to go on except what the arresting officer tells them). When senior officers are involved they usually have little basis on which to agree to requests from below other than what they are told by those officers making the requests (such as reviews of detention carried out over the phone). Hardly any actual stop-searches, for example – as distinct from one-sided records of stop-searches – are ever scrutinised by another officer. It need not be like this, and used not to be. It was precisely because the police were not trusted that detention without charge was illegal (now it is allowed for ever longer periods) and there used to be a system of judicial warrants for arrest, search, etc. This has now almost disappeared. Whether judicial oversight should be strengthened or whether there should be other forms of regulation cannot be debated here. But the literature on regulation makes it clear that self-regulation of the kind that operates on the police is necessarily ineffective, and needs to be replaced or supplemented by other forms of regulation (Sanders 2008).

It is argued by some that changes to legal rules can change police practices radically rather than marginally (e.g. Brown 1997; Dixon 1997). These commentators point to the apparent effects of PACE on interrogations: 'ethical interviewing', less informal interviewing, fewer confessions and a drop in convictions. However, these benefits have been offset by the government's emasculation of the right to silence, thus returning to the police their eroded interrogation power, by other crime control-oriented changes such as contained in the CJA 2003 and SOCPA 2005, and by the displacement of crime

control activity to other parts of the system. In particular, proactive policing – including the use of informants, surveillance and bugging – is an increasingly important, and less controllable, part of the police armoury. At the time of writing a Home Office review of PACE is due to report. Despite all the problems catalogued here we fully expect the introduction of more crime control-oriented police powers and even less accountability for their use.

Prospects for progressive change depend in part on one's view of the reasons why police powers are used in the way that they are. Bureaucratic explanations, which focus on the values of particular institutions, produce more optimistic scenarios than do societal ones. Our view is that, for so long as the state remains obsessed with 'crime reduction' or 'law and order' as the ultimate goal of the criminal justice system, the freedoms of the marginal, the unpopular and the vulnerable will continue to be eroded. It might be different if more was known about the impact of changes to criminal justice processes. But, as we have seen, there has been little objective criminal justice research in the last 10 years, and hardly any 'bottom up' research, asking what it feels like for suspects and defendants. Research should pay more attention to the experiences of suspects, to the lessons to be drawn from Northern Ireland and to the linking of theoretical, policy and empirical questions (Hudson 1993), for when it has done (notable examples are those of Hillyard 1993; Carlen 1996; Loader 1996; Choongh 1997; Mulcahy 2006) the results are illuminating.

How much power the police need depends on how their job is conceptualised. A short-term emphasis on crime control should be replaced with a long-term focus on maintaining and enlarging the sense of a free society. As we have seen, there is a case for a much more discriminating use of police powers on the street. In their overview of the mounting research evidence, Bowling and Foster (2002: 997) conclude that 'the proper management and targeting of police resources is better than unfocused patrol and ''fire fighting'' ' when it comes to tackling crime. As the government-commissioned report by former Chief Constable Ronnie Flanagan pointed out, referring particularly to the effect of performance targets, 'officers are encouraged to criminalise people for behaviour which may have caused offence but the underlying behaviour would be better dealt with in a different way' (Flanagan 2008: para 5.39).

Only rarely is the fundamental question 'why prosecute?' asked in relation to the kinds of case handled by the police. Prosecution often does both too much (stigmatising offenders and driving a wedge between them and their victims) and too little (failing to protect victims from reoffending). For most victims as well as most defendants, a reintegrative approach would be more effective and less alienating than the punitive dichotomous approach embodied in prosecution (see Hoyle, this volume, for a discussion of reintegrative restorative justice). The introduction of conditional cautions (under which any conditions imposed had to be oriented towards rehabilitation or reparation) by the CJA 2003 offered some potential here, but, depressingly, the Government quickly amended the scheme to allow the conditions to be oriented towards punishment (Jackson 2008). Again, exclusionary processes are adopted for the socially marginal, while inclusive processes are adopted for the relatively wealthy subject to enforcement by non-police agencies.

It is easy when highlighting the many deficiencies in the regulation of police powers in England and Wales to overlook the point that the police are afforded much greater latitude in many other jurisdictions. Indeed, the PACE regime may seem attractive when compared with the lack of regulation or codification of police powers found elsewhere. But it does not follow from the fact that torture is not a common policing tactic in this country that our aspirations for greater control of police power should be reined in. This is still one of the wealthiest countries in the world and one that claims to adhere to liberal democratic values, including human rights norms. We can afford to be aspirational in our thinking. And if the price of freedom is eternal vigilance, then it is appropriate to focus on the gap between the ideals of justice and the reality of police power.

## Selected further reading

Several texts on criminal justice examine police powers, among other things. Most take either a 'legal' or a 'social policy' approach. Three books which integrate legal and sociological material are Dixon's *Law in Policing* (1997), Ashworth and Redmayne's *The Criminal Process* (2005) and Sanders and Young's *Criminal Justice* (2007). For a detailed legal treatment, see Clark, *Bevan and Lidstone's The Investigation of Crime* (2004). The focus of Vogt and Wadham, *Deaths in Police Custody: Redress and Remedies* (2003) is obvious. Bowling and Phillips' *Racism, Crime and Justice* (2002) and Foster *et al*.'s *Assessing the Impact of the Stephen Lawrence Inquiry* (Home Office Research Study 294) (2005) are also well worth reading. The implications of growing powers and technologies of surveillance and data collection, and the concomitant increasing co-operation between the police and other institutions, are explored in Ericson and Haggerty's *Policing the Risk Society* (1997) and Coleman's *Reclaiming the Streets* (2004). E. Cape and R. Young's (eds) *Regulating Policing: the Police and Criminial Evidence Act 1984, Past, Present and Future* (2008) presents novel perspectives from police officers, defence solicitors and academic researchers on the regulation of police powers.

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