A Critical Systems Explanation for the Racial Effect of US and UK Counter-terror Stop, Search and Surveillance Powers

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Abbreviations

ACLU:	American Civil Liberties Union
AG:	Attorney General
BTP:	British Transport Police
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
FBI:	Federal Bureau of Investigation
FISC:	Foreign Intelligence Surveillance Court
HC Debs:	House of Commons Debates, Hansard
HL Debs:	House of Lords Debates, Hansard
HRA:	Human Rights Act 1998
HRCR:	House of Representatives Congressional Record
JCHR:	Joint Committee on Human Rights
MP :	Member of Parliament
MPA:	Metropolitan Police Authority
MPS:	Metropolitan Police Service
NPIA:	National Policing Improvement Agency
SCR:	Senate Congressional Record
USDOJ:	United States Department of Justice

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Introduction

0.1 Research Background

Counter-terrorism police powers are a widely utilised means of using criminal law to respond to the threat and commission of terrorist attacks. However, there remains a considerable on-going debate regarding the form that these powers should take and, in particular, the balance that should be struck within these powers between safeguarding the population from terrorist attack and maintaining individual rights and freedoms.[1] It is the way that this balance has been struck in US and UK counter-terrorism police powers, used since the terrorist attacks on the US on the 11 September 2001 ('9/11'), that is the focus of this thesis. More specifically, this thesis explores the negative impact that facially neutral national security measures have had on the individual right to equal treatment irrespective of race or ethnic background, without them representing an effective means of safeguarding either country against terrorist attack.

0.2 Aims and Objectives

There are two foundational premises on which this thesis is based. The first is the racial effect of the suspicion-less counter-terrorism stop, search and surveillance powers used in the US and UK in the aftermath of the 9/11 terrorist attacks. There is widespread empirical evidence demonstrating the racially uneven impact of these policing powers, alongside a trend of increasing condemnation of their ineffective and counter-productive nature, starting almost as soon as the powers were enacted or used.[2] Whilst such claims regarding police stop, search and surveillance powers are not unopposed,[3] this thesis uses the available data as a factual background from which to consider the factors behind the

[1] See, e.g., United Nations, *Handbook on Criminal Justice Responses to Terrorism* (Criminal Justice Handbook Series, 2006); J. Strawson, *Law after Ground Zero* (Glasshouse, 2002); C. Walker, 'Terrorism and Criminal Justice' [2004] *CLR* 311; and 'Keeping Control of Terrorists without losing control of constitutionalism' (2007) 59 *Stanford Law Review* 1395.
[2] B. Bowling and C. Phillip, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *MLR* 936.
[3] See, e.g., P.A.J. Waddington, K. Stenson, D. Don, 'In Proportion: Race and Police Stop and Search' (2004) 44 *British Journal of Criminology* 889.

deleterious impact of the counter-terrorism powers. The main sources of data include statistics recording the use of the powers across different ethnic groups gathered by governmental and non-governmental organisation, individual reports of racially-biased police deployment of the counter-terrorism powers, and the findings of independent reviews of the use and impact of the powers. A second starting point for this thesis is the persistence of the threat of terrorist attack faced by both the US and UK. Whilst it is recognised that the exact level and imminence of the threat of terrorist attack may at times have been exaggerated,[4] this thesis asserts that both countries have faced a real prospect of attack over the period of time with which this thesis is concerned, namely from 1999 when the UK's s.44 powers were debated in Parliament to the present, not least demonstrated by the commission of the 9/11 attacks in the US and the attacks in London on 7th July 2005 ('7/7'), as well as the attempted attacks on the city on the 21st July in the same year.[5]

Intelligence regarding terrorist activity in both the US and UK undoubtedly gives credence to the seriousness of the national security threat arising from international terrorism and, in particular, Islamic terrorists.[6] Muslims within both the US and UK are disproportionately individuals of Asian or Arabic origins.[7] These characteristics, relating to the level and origins of the terrorist threat, suggest that it is prima facie common sense for police counter-terrorism efforts to focus disproportionately on individuals from particular minority ethnic and racial backgrounds.[8] This thesis questions whether, instead of constituting an appropriate and effective means of countering the threat to the national security posed by terrorists, targeting of specific groups with counter-terrorism measures effectively provided a popular 'permission to hate' individuals connected with these

[4] F.P. Harvey, *The Homeland Security Dilemma: Fear, Failure and the Future of American Security* (Routledge, 2002); and R.A. Posner, *Countering Terrorism: Blurred Focus, Halting Steps* (Rowman and Littlefield, 2007).

[5] See Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005*, Cm 6785 (HMSO, May 2006); and National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (Government Printing Office, 2004).

[6] G. Mythen, S. Walklate and F. Khan, ''I'm a Muslim, but I'm not a terrorist': Victimisation, risky identities and the performance of safety' (2009) *British Journal of Criminology* 736.

[7] T. Smith, 'The Polls – Review: The Muslim Population of the United States: The Methodology of Estimates' (2002) 66 *Public Opinion Quarterly* 404.

[8] Home Affairs Committee, *Terrorism and Community Relations*, HC165-II, Written Evidence, Memorandum submitted by the Police Federation of England and Wales, Ev.85, para 3.2; and Home Affairs Committee, *Terrorism and Community Relations*, HC165-III, Written and Oral Evidence (6 April 2005), Oral Evidence taken before the Home Affairs Committee (1 March 2005), Hazel Blears, Ev.97.

groups,[9] so that the mode of counter-terrorism policing appeared to be reasonable and effective despite the small proportions involved when viewed in the context of national Muslims populations in both the US and UK.[10] In this way, the counter-terrorism powers not only appear to have been an ineffective weapon against terrorism but may have also helped to increase levels of minority community distrust in the police as well as cutting off potentially valuable sources of community information.[11]

This thesis looks at the often-subtle process by which apparently race neutral legislative provisions are created, used and renewed in a way, which means that through both omissions and commissions, they have a demonstrable racial effect.[12] The overt nature of consciously prejudicial behaviours makes them more readily identifiable than unconsciously biased behaviour, and consequently more able to be separated from mainstream operations of the legal system, which purport to deploy provisions in a racially neutral manner.[13] Rather than seeing racism as a consequence of isolated individual prejudice, therefore, this thesis treats discrimination as an endemic phenomenon, arising from, and expressed through, institutional discourses and practices.[14] In particular, this thesis explores the way in which law, and the institutions responsible for enacting, implementing and reviewing it, can respond to and engage with its environment while maintaining its separateness and governing all of its operations according to self-referential rules and communications. This characteristic, and its impact upon the interplay between the legal machinery of the state and social and political

[9] S. Poynting and V. Mason, 'Tolerance, Freedom, Justice and Peace? Britain, Australia and Anti-Muslims Racism since 11 September 2001' (2006) 27 *Journal of Intercultural Studies* 365, 367.

[10] In the UK the Muslim population is approximately 2.5 million and in the US the Muslim population is around 6.5 million. See, T. Choudhury and H. Fenwick, *The Impact of Counter-terrorism Measures on Muslim Communities* (EHRC Research Report, No. 72, 2011) 9. The figures relating to the US have, however, been subject to particular criticism and labelled as little more than guesses, see T.W. Smith, 'Estimating the Muslim Population in the United States', http://www.ajc.org/site/apps/nl/content3.asp?c=ijITI2PHKoG&b=843 637&ct=1044159, accessed 03.07.2012.

[11] House of Commons, Home Affairs Committee, *Terrorism and Community Relations*, HC165-II, Written Evidence (The Stationery Office, London, 2003), Memorandum submitted by the Association of Chief Police Officers, Ev.1, para 1.2; and *ibid*, Memorandum submitted by the Independent Police Complaints Commission, Ev.50.

[12] See, e.g., N. Gotanda, 'A Critique of "Our Constitution Is Color Blind"' (Nov 1991) 41(1) *Stanford Law Review* 1; D.A. Bell, 'Racial Realism' (1992) 24(2) *Connecticut Law Review*; C.I. Harris, 'Whiteness and Property' (1993) 106 *Harvard Law Review* 1707; L.S. Greene, 'Race in the Twenty-First Century: Equality through Law?' (1990) 64 *Tul L. Rev* 1515; and G. Peller, 'Race-Consciousness' (1990) *Duke L. J.* 758.

[13] C.R. Lawrence III, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39(2) *Stanford Law Rev* 317.

[14] E. Said, *Orientalism* (Penguin, 1985); and M. Mirza, 'Being Muslim is not a Barrier to being British' *The Guardian* (7 February 2007).

discourses,[15] will be linked to the creation and sustenance of a 'suspect community',[16] through the application of social systems theory. This jurisprudential framework is applied to explain how the system-specific programmes of behaviour by which the law-making, policing and judicial sub-systems responded to the threat of terrorist attack helped to facilitate the existence of an unconscious racial effect arising out of the US and UK counter-terrorism powers.[17]

0.3 Structure of Thesis[18]

Over nine chapters, this thesis analyses the systems-based origins of the racial effect of the counter-terrorism stop, search and surveillance powers. Chapter one sets out the jurisprudential framework on which the substantive claims, pertaining to the systems-based origins of the racial effect of the powers, are centred. Chapter two describes the particular statutory provisions which are used as a case study for the racial effect of counter-terrorism powers, namely section 44 of the Terrorism Act 2000 (the 'Terrorism Act') in the UK and sections 214 and 215 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the 'Patriot Act'), in the US.[19] These powers have been chosen because of their particular suitability for analysis through the social systems framework, which forms the analytical core of this thesis. Chapter two also provides an overview of some of the key empirical evidence demonstrating that these and analogous counter-terrorism powers have had a racial effect when deployed by each country's law enforcement organisations, and the critical race theory informed approach adopted herein, which sees racial inequality as a permanent feature of US and UK societies.

Having set out the background for this thesis, in terms of its legal, factual and jurisprudential frameworks, chapters three to eight concentrate on the operation of three social subsystems - the law-making, policing and judicial subsystems and their operation

[15] C. Pantazis and S. Pemberton, 'Restating the case for the 'suspect community': a reply to Greer' (2011) *British Journal of Criminology* 1054, 1056.
[16] P. Hillyard, *Suspect Community: Peoples' Experiences of the Prevention of Terrorist Acts* (Pluto Press, 1993) which coined this phrase in relation to the counter-terror legislation enacted to tackle Irish terrorism.
[17] See N. Luhmann, *Law as a Social System* (OUP, 2004); and G. Teubner, *Law as an Autopoietic System* (Blackwell, 1993).
[18] See fig. one.
[19] Terrorism Act 2000 (c.11), s.44; and Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, ss.214-215.

in enacting, using and reviewing the counter-terrorism powers. Using the stop, search and surveillance powers as a case study, this thesis argues that, as a result of subsystem behaviours and communications, what were intended as racially neutral, security enhancing law enforcement tools were ineffective and racially uneven in deployment. Whilst this thesis focuses on the law-making, policing and judicial subsystems it is not claimed that these represent the entirety of influences leading to the racial effect of the powers. The media, for example, has been cited as an important factor in shaping the law enforcement and law-making subsystems' response to the threat of terrorism, by directing public perception of the need for particular forms of legislative and police behaviour, which the police and legislatures then responded to.[20] Nevertheless, the law-making, policing and judicial subsystems are the analytical focus for this thesis because they each play a vital role in the operation of the legal system and are the key subsystems involved in the creation, use and review of counter-terrorism law enforcement powers.

Through the operation of these three subsystems legislative proposals become codified in statute, are used to direct the behaviour of the police and comprise the adjudicatory workload of the judiciary. This is important because it enables an analysis of the powers from conception to condemnation and indicates that there is not a single cause or source of their racially uneven and negative impact. Instead, it arose as a result of the cumulative effect of various responses to a set of circumstances. In addition, whilst the case study explored in this thesis is linked to a set of specific contextual circumstances it suggests a more broadly-applicable conclusion regarding the difficulties, even impossibility, of achieving the successful interaction between different societal institutions responsible for shaping and using legal powers to ensure the smooth-running of society.

This thesis focuses on the three subsystems in turn, with each forming the analytical focus of two successive chapters. Chapter three considers the operational qualities attributed to the law-making subsystem by which it maintains its functional legitimacy in enacting

[20] See, e.g., M. Slone, 'Responses to Media Coverage of Terrorism' (2000) 44(4) *Journal of Conflict Resolution* 508; B.L. Nacos, 'Terrorism and Media in the Age of Global Communications' in D.S. Hamilton (ed.), *Terrorism and International Relations* (Washington Center for Transatlantic Relations, 2006) 81-102; A. Saeed *et al*, 'Media, Racism and Islamophobia: The Representation of Islam and Muslims in the Media' (2007) 1 *Sociology Compass* 443, 451; R. van Swaaringen, 'Public Safety and the Management of Fear' (2005) 9 *Theoretical Criminology* 289, 293; and B. Hoffman, *Inside Terrorism* (Columbia University Press, 2006).

legislation. This analysis focuses on how the US and UK subsystems seek to balance majoritarian responsiveness and minority protection. Chapter three also shows that the US and UK law-making subsystems recognised the potentially deleterious impact on the quality of the statutory provisions enacted where this balance is not achieved. Despite this awareness, Chapter three ends by arguing that both the US and UK law-making subsystems departed from its normative considerations in enacting the s.44 and ss.214-215 powers. Chapter four uncovers the subsystem behaviours behind the apparent inability of either country's law-making subsystem to stop repeating the negative modes of behaviour that gave rise to the enactment and use of the suspicionless police powers. Despite the different circumstances in which s.44 and ss.214-215 were enacted this chapter will focus on three trends in both country's law-making subsystem behaviour. Chapter four suggests that each subsystem demonstrates a tendency to emphasise the exceptionalism of the legislative context. This exceptionalism helped to curtail subsystem debate and with it the mechanism upon which the subsystems rely to balance majority interests with majority protection. Finally, chapter four considers the types of imagery used within each country's subsystem and suggests that these presupposed a particular race-based bias in police use of the powers that echoed popular and media stereotypes of the threat, rather than an intelligence-led assessment.

Chapters five and six repeat the approach of chapters three and four, but in relation to the policing subsystem. Chapter five firstly explores the normative legislative safeguards intended to protect individuals against police misuse of their powers, namely reasonable suspicion and probable cause, chapter five goes on to demonstrate that the risk, in terms of its impact on police behaviour, of removing these safeguards was recognised within both the US and UK. Chapter five ends by considering the extent to which the police reverted to deploying s.44 and ss.214-215 in previously criticised patterns of use, influenced by racial profiling and institutionally racist behaviour. Chapter six looks behind the statistics pertaining to the racial effect of the powers at the subsystem communications relating to their use. This analysis suggests that the police understood the actions of the law-making subsystem in enacting the suspicion-less powers differently from how the law-making subsystem understood its own actions. These different subsystem understandings meant that what the law-making subsystem intended to be flexible powers deployed on the basis of police professional judgement were used as discretionary powers with not minimum standard for use. A further gap in inter-

subsystem understanding explored in chapter six is that while the law-making subsystem expected use of the powers only in response to the most exceptional threat, the police interpreted the law-making subsystem's exceptionalism as necessitating high levels of use of the powers more widely. Coupled with different subsystem understandings of when the powers should be used, Chapter six also argues that the law-making and police approaches to intelligence differed and accommodated police use of s.44 and ss.214-215 on broad brush race-based profiles which gave these powers an operationally unjustifiable racial effect.

Chapters seven and eight turn to the judicial subsystem, looking at its role as defender of minority interests together with the expectations of both the law-making and policing subsystems that it would act to counteract any deficiencies, in terms of infringing minority right, in their own operations. Chapter seven ends by analysing judicial behaviour in a selection of cases relating to police counter-terrorism powers and argues that the reality of the court's rights-protecting role did not match the expectations expressed by the other subsystems. Chapter eight considers the obstacles faced by the judicial subsystem in meeting expectations for the level of minority protection it was able to provide. Firstly, chapter eight evaluates the structural obstacles to the right-safeguarding role of the courts resulting from the structure of the statutory protection. Secondly, chapter eight analyses each judiciary's own interpretation of its rights-protecting function and the extent to which this differs from the expectations expressed by the law-making and policing subsystems. Finally, chapter eight analyses the apparent susceptibility of the judiciary to political irritants, contrary to expectations of its independence from such influences.

Chapter nine draws together the findings, within chapters three to eight, relating to the causes and consequences of each subsystems operational programme and offers recommendations for 'strategies of translation' by which each of the subsystems in both the US and UK may be able to safeguard against the recurrence of such deleterious law-making, policing and judicial adjudication in the face of each new threat to national security.[21]

[21] J. Black, 'Proceduralizing Regulation' (2001) 21(1) *OJLS* 33.

At the start of each of the key analytical chapters within this thesis there is a diagram which maps out the arguments relating to that subsystem and how its operations contributed to the racial effect of the stop, search and surveillance powers. The numbers stated in the diagrams relate to the relevant section of this thesis where that argument is primarily explored. Because of the way subsystem operations are affected by other systems, and external factors, some of the sections referred to are contained within different chapters.

0.4 Broader Relevance of this Thesis

Alongside the context-specific findings, this thesis potentially has broader applicability. The analysis of the origins of the racial effect of the counter-terrorism powers centres on the relations of relative power between the constitutionally-ordained institutions responsible for making, implementing and reviewing statutory provisions.[22] In analysing these relations this thesis looks for evidence of, and explanations for, how and why law finds it difficult to take cognisance of other social systems, of other systems, or other parts of the legal system. The case study, therefore, offers an example of how society brings to the legal system, and to the subsystems that comprise the legal system, disputes to resolve and policies to legitimise. At the same time it brings with it the possibility of unexpected or undesired effects of the legal system addressing these on the basis of its own, self-deployed internal norms and operational rules.

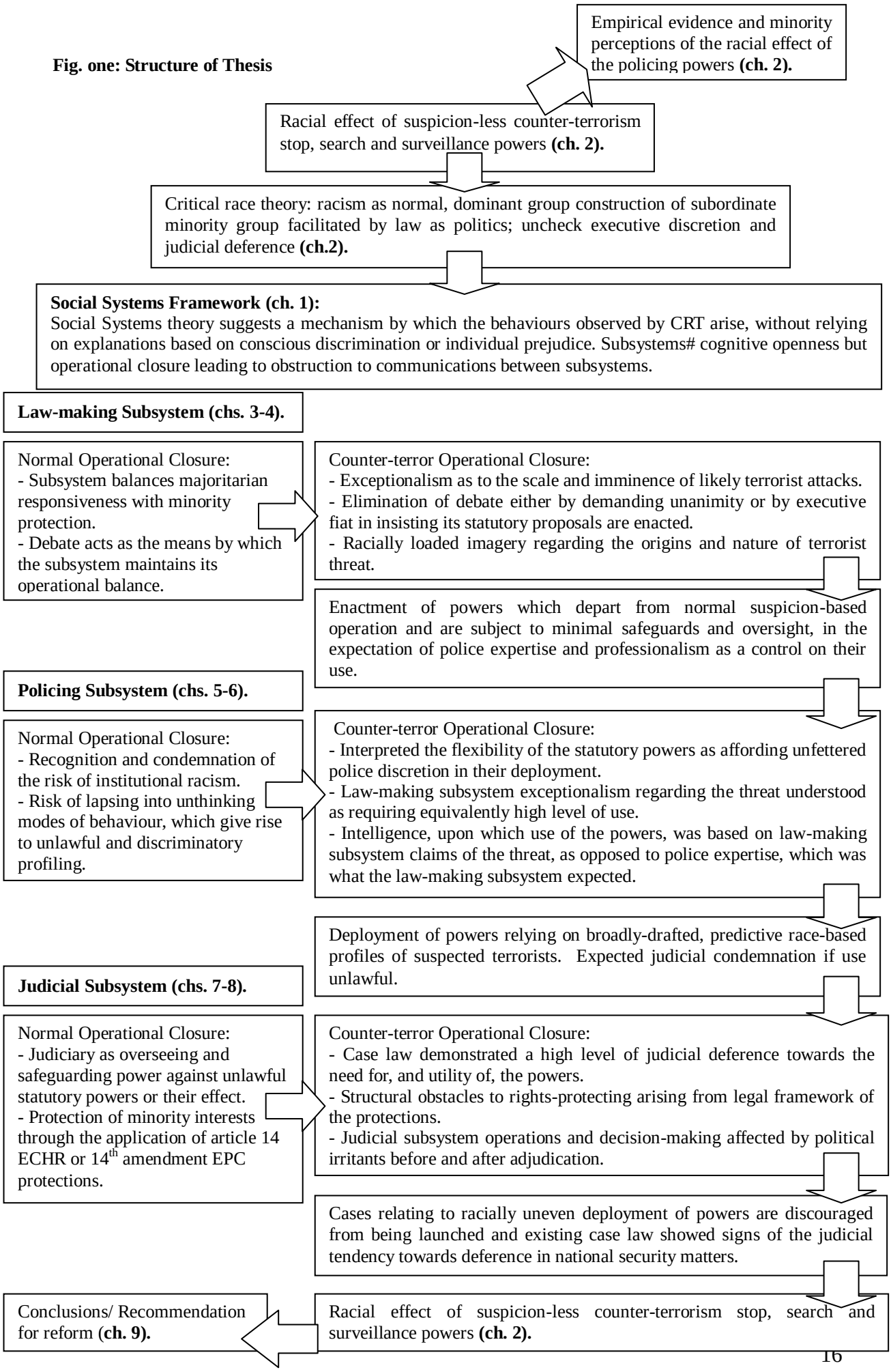
The impact of the broader applicability of this thesis is especially relevant to the recommendations for reform, proposed in chapter nine, and their possible implementation independent from the particular counter-terrorism stop, search and surveillance powers that provide the case study herein. This broader relevance means that the value of the analysis undertaken within this thesis, and the recommendations for reform offered, are not diminished by the fact that the UK stop and search powers have already been repealed and replaced,[23] and the US surveillance and records search powers are set to expire under a statutory sunset clause, in June 2015.[24] The analysis in this thesis is focused on the matrix of communications, and barriers to effective inter-subsystem understanding which

[22] Justice, *The Future of the Rule of Law* (October 2007) 7.
[23] Protection of Freedom Act 2012 (c.9) ss.59-63.
[24] PATRIOT Sunset Extension Act of 2011, s.1 extending the previous renewal within the USA PATRIOT Improvement and Reauthorisation Act of 2005 (Public Law 109-177; 50 USC 1805), s.102(b)(1).

occurred in the enactment, use and review of the stop, search and surveillance powers. These exemplify barriers which exist recurrently within different parts of the legal system, and explored throughout social systems scholarship,[25] and contribute to the distinction between the ideal operation of the rule of law and the reality of its experience, in both the US and UK. Analysing subsystem communications in a systematic and concrete way may help to shed light on the gap between what subsystems think they are doing and what they think other subsystems are doing; and what those other subsystems themselves understand the first subsystem to be doing and its understanding of that subsystems expectations regarding how it should respond to its behaviour. This gap between one subsystem's expectations of the behaviour of another and the behaviour of that subsystem responding in expectation of those expectations, is part of a wide matrix of inter-system expectations and responses throughout the social system. It is in the gaps in understanding arising from these operations that some unexpected effects of legal measures, such as racially uneven counter-terrorism police powers, may have their genesis, as is argued in this thesis.

[25] See chapter one of this thesis.

Fig. one: Structure of Thesis



Chapter One: Theoretical Framework for Thesis Claims

This thesis explores the racial effect of the counter-terrorism stop, search and surveillance powers within s.44 of the TA and ss.214-215 of the PA through the jurisprudential framework of social systems theory. Social systems theory, or 'systems', is an empirical theory of society that was co-opted as a sociological theory from its biological origins,[26] before being developed through the work of Niklas Luhmann[27] and Gunther Teubner.[28] In methodological terms systems offers a 'thick description of society'[29] in which the 'social system', and its constituent subsystems, replace 'society'.[30] In asserting this mode of civilisational functioning Luhmann's version of systems theory makes only two fundamental assumptions: that reality exists and that systems exist.[31] However, the nature of reality, systems, and indeed understanding systems theory itself, are contingent upon their system-derived representation.[32] Systems theory is not used to assess law, or any social system to which it may be applied, against any benchmark of expected behaviour. Instead, the theory offers a primarily mechanistic explanation for the way in which law, and other social systems, operate.[33]

For Luhmann and his theoretical adherents the existence and operation of the social system is a condition of modernity.[34] Modern society is functionally differentiated.[35] This is in contrast to earlier, archaic and pre-modern societies in which the central societal

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[26] Amongst the first proponents of the use of systems within sociology was Talcott Parsons. See, T. Parsons, *The Structure of Social Action* (McCraw-Hill, 1937); T. Parsons, *Essays in Sociological Theory* (Free Press, 1954) and T. Parsons, *Sociological Theory and Modern Society* (Free Press, 1967).

[27] Luhmann in fact worked with Parsons for a year in 1960 at Harvard and became an enthusiastic advocate of Parson's theoretical basis of structural functionalism. See, N. Luhmann, 'Talcott Parsons: The Future of a Theory' in N. Luhmann, *The Differentiation of Society*. See N. Luhmann, *A Sociological Theory of Law* (Routledge and Keegan Paul, 1985); *Law as a Social System*; *Social Systems* (trans S. Holes and C. Larmore) *Differentiation of Society* (Columbia University Press, 1982). See also D. Michailakis, 'Law as an Autopoietic System' (1995) *Acta Sociologica* 323.

[28] See G. Teubner, *Law as an Autopoietic System* (1993); G. Teubner (ed), *Autopoietic Law a New Approach to Law and Society* (Walter de Gruyter, 1998); and *Juridification of Social Spheres A Comparative Analysis in the Areas of Labor, Corporate Antitrust and Social Welfare Law* (Walter de Gruyer, 1987).

[29] Luhmann's descriptions are considered to be 'thick' because they use the theory to account for, both situationally and conceptually, every societal occurrence. See K.A. Ziegert, 'The Thick Description of Law: An Introduction to Niklas Luhmann's Theory of Operatively Closed Systems' in R. Banaker and Travers, *An Introduction to Law and Society*: 55-75; and C. Geertz, 'Thick Description: Towards and Interpretive Theory in Culture' in C. Geertz, *The Interpretation of Culture* (Basic Books, 1973) 3-30.

[30] G. Teubner, *Global Law without a State* (Aldershot, 1997).

[31] N. Luhmann (trans J. Bednarz with D. Baecker), *Social Systems* (Stanford University Press, 1995) 12.

[32] J. Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) *OJLS* 34.

[33] N. Luhmann, *A Sociological Theory of Law* (Routledge and Keegan Paul, 1985) 10-11.

[34] N. Luhmann, *Social Systems* 423-26.

[35] N. Luhmann, *The Differentiation of Society* xii.

units were based around kinship groups, families or tribes, and which were organised primarily on the basis of segmentation which operated according to a clear hierarchical structure.[36] The feudal system provides an example of a segmented society: a vertically constituted order with the king at the top, subject only to divine authority, followed by the nobility, knights and stretching downwards to peasant classes, with landless labourers at the bottom.[37] The evolution of segmentary society into functionally differentiated social systems occurred through the gradual concentration of loose associations into tight functional groups.[38] These functional ties then came to define the social groups, as opposed to the common values and blood ties which previously served this organisational role.[39] This process is a basic feature of social development,[40] and reflective of the increasing complexity of societal organisation.[41] In contrast to pre-modern societies, the functional alignment of modern society means that individuals are not contained within any single subsystem, but can operate within different subsystems depending on the role that they are performing.[42] Systems theory therefore argues against positivist claims of a single hierarchical chain of 'command and rule', which focuses on individual agents operating at different segmentary levels within society.[43] Instead, systems theory is concerned with the operation of separate, heterachically related subsystems, together making-up the social system.[44]

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[36] N. Luhmann, *A Sociological Theory of Law* 114-47.

[37] For a basic description of feudal society see C. Stephenson, *Mediaval Feudalism* (Detzer Press, 2007).

[38] The gradual reconstruction of society from one of segmental to functional differentiation builds on Durkheim's description in which segmental society was subdivided into similar units of minimal complexity; whereas functionally organised society was stratified by division of labour into different types of part system performing different functions which both reflected and promoted the increased complexity of society. See. E. Durkheim (trans. L.A. Coser), *The Division of Labour in Society* (The Free Press, 1997); and T. Parsons, 'Durkheim's Contribution to the Theory of Integration of Social Systems' in K.H. Wolff (ed.), *Emile Durkheim , 1858-1970. A Collection of Essays with Translation* (The Ohio State University Press, 1960) 118-53.

[39] J. Priban and D. Nellsen, *Laws New Boundaries. The Consequences of Legal Autopoiesis* (Ashgate Publishing, 2001) 2.

[40] See, e.g., N.J. Smelser, *Social Change in the Industrial Revolution. An Application of Theory to the Lancashire Cotton Industry, 1770-1840* (London, 1959) and T. Parsons, 'Some Considerations on the Theory of Social Change' (1961) 26 *Rural Sociology* 219-39.

[41] N. Luhmann, *A Sociology of Law*: 167-73; D. Michailakis, 'Law as an Autopoietic System' (1995) 38 *Acta Sociologica* 323, 325-27; and J. Priban and C. Nelken (eds.), *Law's New Boundaries The Consequences of Legal Autopoiesis*.

[42] Luhmann suggests that the only single system within which an individual can be considered to be wholly contained is that of the insane asylum! See, S. Holmes and C. Larmore, 'Introduction' quoting N. Luhmann, *Politische Planung: Aufsatze zur Soziologie von Politik under Verwaltung*, in N. Luhmann, *The Differentiation of Society*, 37.

[43] See J. Austin (auth) and W.E. Rumble (ed.), *The Province of Jurisprudence Determined* (first pub 1832, Cambridge University Press, 1995).

[44] Despite this shift, systems theory acknowledges that hierarchical differentiation continues to exist within functionally aligned societies. N. Luhmann, *A Sociological Theory of Law* 109.

As already stated, the emergence of social systems is an effect of increasing social complexity. Systems manage this complexity by developing programmes of operation, which also promote the subsystem's specialised function. Complexity has both an outward and an inward-looking effect on subsystem behaviour. Firstly, looking outward, the distinction between the system and its environment is created by the system selectively interpreting its environment in order to reduce internal subsystem complexity.[45] Conversely, whilst systems *reduce* the complexity of their environment to aid their operation this simplification also enables the system to *increase* its inward-looking, or internal complexity, and thereby increase system functional specificity. Through this process society is transformed from one of unorganised complexity into one of organised complexity.[46] The 'complexity differential' between systems and their environment enables the system to perform tasks, make decisions and consequently to fulfil its function within society.[47] To the extent that complexity enforces selectivity, it also brings with it the corresponding risk posed to the system as a result of an incorrect choice. This risk arises from the possibility that in making any individual choice a system may make a wrong one, and in so doing jeopardise its own operational success. Therefore, an understanding of organised complexity also requires an awareness of its improbability, even precariousness. Luhmann's 'methodological recipe' consequently results in a theory which 'can succeed in explaining the normal as improbable'.[48] The risk of a wrong decision is avoided by the subsystem developing internal safeguards, to protect against their functional failure.[49] These 'stabilisation mechanisms'[50] account for the autopoietic nature of social systems, as will now be explored below.

1.1 Social Systems as Autopoietic Systems

The central theoretical tenet of social systems theory is that systems are self-referential

[45] Luhmann defines complexity as represented in the difference between two types of systems: those in which each element can be related to every other and those in which this is no longer the case. It is out of this latter form of complexity that social systems develop. See, N. Luhmann, *A Sociological Theory of Law* 24-31.
[46] This 'order from noise' principle is found throughout systems theory. See, e.g., H. von Foerster, 'On Self-Organizing Systems and their Environment', in M.C. Rovik and S. Cameron (eds.), *Self-Organizing Systems* (London, 1960) 31-50.
[47] N. Luhmann, *Social Systems* 190-94.
[48] *ibid,* 114 and N. Luhmann, *Essays on Self-reference* (Columbia University Press, 1990) 87.
[49] N. Luhmann, *The Differentiation of Society* 138-65.
[50] G. Teubner, *Law as an Autopoietic System* 59.

and self-creating and that, like biological systems, the initial characteristics of one generation are controlled by properties of preceding generations.[51] Therefore, what distinguishes autopoietic systems from the ordinary linear operation of closed systems is that in autopoietic systems 'everything that is used as a unit by the system is produced as a unit by the system itself'.[52] According to Humburto Maturana, writing in relation to biological systems, autopoietic systems constitute 'networks of production of components that recursively, through their interactions, generate and realize the network that produces them and constitute, in the space in which they exist, the boundaries of the network as components that participate in the realization of the network'.[53] Maturana labelled these systems 'autopoietic' to refer to the 'self-(re)productive operations of organisms that use their own output as input'.[54] Luhmann proposed autopoiesis as a means of accounting for the absence of a unifying set of principles to integrate law, politics, economics and other foundational aspects of society.[55] In applying autopoietic systems theory to society Luhmann suggested that a number of different subsystems exist within the social system, including law,[56] the economy and politics.[57]

Within an autopoietic framework a system's function represents its relationship with other systems; whilst the self-reflexive nature of the system is illustrative of its relationship with its self.[58] In this way the functional separateness of each system from the environmental noise surrounding it[59] is confirmed by the internal self-reflection inherent in system operation, which proceeds along the lines of system-specific rules and terms of operation.[60] This aspect of systems behaviour is described as showing that autopoietic systems are 'operationally closed'.[61] Consequently, the conventional explanation of

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[51] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed., Sweet & Maxwell, 2001) 700.
[52] N. Luhmann, 'The Autopoiesis of Social Systems', in N. Luhmann, *Essays on Self-Reference* 3.
[53] H.R. Maturana, 'Autopoiesis' in M. Zeleny (ed.), *Autopoiesis: A Theory of Living Organization* (New York, 1981).
[54] *ibid*; and H.R. Marturana and F.J. Varela, *Autopoiesis and Cognition* (Reidel, 1980).
[55] N. Luhmann, *A Sociology of Law* 282-83. See also N. Luhmann, 'The Autopoiesis of Social Systems' in N. Luhmann, *Essays on Self-Reference* (New York, 1990) and G. Teubner, *Law as an Autopoietic System*.
[56] N. Luhmann, 'Unity of the Legal System' in G. Teubner, *Autopoietic Law* 19.See also A. Podgorecki, C.J. Whelan and D. Kosha (eds.), *Legal Systems and Social Systems* (Croom Heln, 1985).
[57] N. Luhmann, *The Differentiation of Society* 138-65 (political subsystem); and 190-335 (economic subsystem).
[58] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239, 272.
[59] The precise definition systems theorists apply to operational closure is, however, somewhat elusive, A. Beck, 'Is Law an Autopoietic System?' (1994) 14 *Oxford Journal of Legal Studies* 401, 405.
[60] See J. Priban and D. Nelken, *Law's New Boundaries. The Consequence of Legal Autopoiesis* (Ashgate, 2001).
[61] See G. Teubner, *Law as an Autopoietic System* 32-34 and H.R. Maturana and F. Varela, *Autopoiesis and*

input-output based systems is replaced by a version of systems in which their output comes from the system itself.[62] As well as the self-producing nature of autopoietic systems they must also be self-maintaining, so that self-produced behaviour feeds back into the system, guaranteeing the conditions of its on-going production. This process is referred to as 'hyper cycle'.[63] Systems theory does not assert that social systems are wholly impervious to environmental influences. Instead, systems align their operational behaviour with these irritants in accordance with their own self-created modes of operation. This is described by systems theorists as demonstrating that social systems are 'cognitively open'.[64] Autopoiesis, therefore, proposes a multi-dimensional model of societal organisation incorporating interaction between the system and its environment, as formed by other systems and also within the system itself. The fundamental building block of these system behaviours is communications.

1.2 A Theory of Communication

The basic element of social systems, as distinct from living systems, is communications:[65] social systems only exist, and are only able to function and interact with their environment, through communications.[66] Consequently, instead of defining systems in terms of human agency the social system emerges from the communication within and between systems.[67] Communication is accordingly not a separately functioning subsystem, acting upon individuals, but a vital constituent part of all systems.[68] Similarly, whilst language is not a separate subsystem it is an important medium through which

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Cognition: The Realization of the Living (D. Reidel Publishing, 1980) 127.

[62] Luhmann, *Social Systems* 9. See also, J. Paterson and G. Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998) *Social and Legal Studies* 457.

[63] G. Teubner, *Law as an Autopoietic System* 23.

[64] See G. Teubner, *Law as an Autopoietic System* 32-34 and H.R. Maturana and F. Varela, *Autopoiesis and Cognition: The Realization of the Living* (D. Reidel Publishing, 1980) 127.

[65] The focus on communications represents a distinction between the theories of Habermas, Parsons and Luhmann: Habermas and Parsons both focus on action as the primary constituent of systems; while Luhmann and subsequent systems theorists focus on communication. See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1999); and T. Pasons, *The Structure of Social Action* (The Free Press, 1937).

[65] N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991-92) 13 *Cardozo Law Review* 1419 and G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

[66] N. Luhmann (trans. K.A. Ziegert), *Law as a Social System* (OUP, 2004) 80-86.

[67] This emphasis on communications to the neglect of the role of agency has, however, resulted in criticisms of systems theory, see A.J. Jacobson, 'Autopoietic Law: The New Science of Niklas Luhmann' (1989) 87 *Michigan L. Rev* 1647-84.

[68] M. Luhmann, *Social Systems* 137-75.

communication may occur.[69]

Luhmann defined communication as a synthesis of three selections: information, which comprises of a selection from a repertoire of referential possibilities; utterance, which comprises of a selection from a repertoire of intentional acts; and understanding, which comprises of the subsystem observation of the distinction between utterance and information.[70] In accordance with systems theory an utterance leads to understanding through the system's selection from a 'repertoire of possibilities' or varieties.[71] Systems, therefore, do not respond to all facets of their environment, but only to those with relevance to system function, as determined by established patterns of system behaviour, so-called 'communicative redundancies'.[72] Communicative redundancies are the way in which each subsystem seeks to fulfil its particular function through the development of shortcuts. These shortcuts dictate how subsystems understand, and respond to, environmental irritants. This 'coordinated selectivity'[73] determines what becomes a communication, and how that communication is interpreted, as well as what remains environmental noise undetected by the system.[74] Communicative redundancies, therefore, enable systems to deal with complex environmental irritants and fulfil the subsystem function. The development of communicative redundancies reinforces system specificity of function and system-specific interpretation of irritants. As well as being the foundation of the efficiency of subsystem operations, therefore, communicative redundancies are also at the foundation of subsystem communication constraint.

The role of communicative redundancies in entrenching the autopoietic nature of subsystem behaviour does not, however, mean that a subsystem response to a particular irritant can be predicted with absolute certainty. Systems theorists use the notion of

[69] J. Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) *OJLS* 39.
[70] N. Luhmann, *Social Systems* 140-45.
[71] *ibid*, 140.
[72] G. Teubner, *Law and an Autopoietic System* 136.
[73] N. Luhmann, *Social Systems* 154.
[74] To give an example, if an individual goes into a café for lunch they will notice the cakes and sandwiches on the counter, but many other aspects of the café interior remain unnoticed. This is not because these additional details do not exist in a material sense but, because they are not relevant to the individual's objective of getting lunch. If the individual represents the social system the system function would be to get lunch and its operational programme would involve taking the requisite steps to achieve this. In such a situation the food on offer would form the environmental irritants, whilst other contextual details would remain as unobserved environmental noise as they are irrelevant to the system programme. See also R. Nobles and D. Schiff, 'Why Do Judges Talk they Way they Do?' (2009) 5 *International Journal of Law in Context* 25, 27-30.

variety to account for this indeterminacy. Whilst redundancies are established modes of responding to externally and internally-generated communications variety refers to the range of options available which provide for flexibility in the nature of the response.[75] In other words, there may be a variety of possible redundancies from which the system can choose,[76] based on its reapplication of existing subsystem rules.[77] This process of attaching a value-judgement to a subsystem redundancy is referred to as 'coding'. System-based coding is applied, and gives value, to the system programme and determines what is and is not of relevance to the system.[78]

A further aspect of inter-subsystem communications observed by system theory is that of 'structural couplings'.[79] Structural couplings occur where the external environment irritates the system triggering its self-regulatory mechanisms. The detecting subsystem interprets the irritant and aligns its own development to its expectations of the operation of the originating subsystem. This process is a means by which one subsystem can intervene strategically in the operation of another, resulting in the formation of a stable pattern of interaction between the systems.[80] Couplings, therefore, taking effect against 'a continuous influx of disorder', are the means by which the system maintains or changes its operational programme.[81] Luhmann distinguished operative couplings from structural couplings, suggesting that structural couplings require that a system presupposes certain features of its environment on an on-going basis and relies on them structurally.[82] The interaction between separate systems, the 'structural couplings', comprise of irritation and a self-referential response. In this way, structural couplings constitute a parasitic relationship between subsystems enabling inter-subsystem cooperation, and account for the way in which autopoietic systems respond to bigger societal developments notwithstanding their operationally closed nature. As well as

[75] G. Teubner, *Law and an Autopoietic System* 144.
[76] To continue the previous example (fn 74 above), if the individual getting their lunch was a vegetarian redundancies would be analogous to their pre-determined and, therefore, automatic rejection of a meat option. By contrast, variety would describe the choice available between several meat-free options – all of which would form communicative redundancies in accordance with the system's programme.
[77] To finish the lunch analogy (fn. 74 and 76 above) the autopoietic response to variety would be determined by the individual choosing between the several vegetarian options on the basis of which is their favourite choice.
[78] N. Luhmann, *A Sociological Theory of Law* 173-210.
[79] N. Luhmann, *Law as a Social System* 381-422; and N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Rev* 1419, 1432-3.
[80] N. Luhmann, *A Sociological Theory of Law* 381-422.
[81] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.
[82] N. Luhmann, *A Sociological Theory of Law* 382.

normative closure, therefore, systems possess cognitive openness, so that: '[t]he norm quality serves the autopoiesis of the system, its self-continuation in deference to the environment. The cognitive quality serves the coordination of this process with the system's environment'.[83] Cognitive openness means that systems are capable of responding to their environment. The *cognitive* nature derives from the necessity that such responses are an inevitable simplification of the real world, and operate as a form of cognition; whilst also learning from the interaction by making communications that alter the possibilities of what will, in future, constitute an intra-system communication.[84]

Whilst systems theory maintains the separateness of different subsystems Anglo-American approaches to law have typically emphasised a greater degree of continuum between law, politics, economic and other social functions. Systems theory has consequently attracted criticism for overemphasising subsystem closure, despite the fact that systems can respond to external pressures and influences.[85] In apparent support of such arguments the legal system has obliged with occasional radical changes in rules in response to social and political pressures.[86] Systems theory resists the claim that such behaviours diminish the extent to which different systems can be seen as separate and self-determining by maintaining that the decision to change subsystem rules is fundamentally determined by the subsystem itself, on the basis of its pre-existing communicative redundancies.[87] To this extent even radical departures from previous modes of behaviour support the hypothesis of system cognitive openness and normative closure, because it is only when the system itself detects environmental irritants, and they are interpreted through the systems' own modes of understanding, that they affect the subsystem's programme of operation. According to systems' claims, therefore, operational closure does not prevent the legal system, or any other social system, from incorporating other influences into its operation.[88] This claim is, however, caveated by

[83] N. Luhmann, 'Unity of the Legal System' 20.
[84] N. Luhmann, *Social Systems* 321-25.
[85] E.g. Sharon Herzberger poses the question of whether social science research should not have, and does not have, a relevant role within the judicial function of the courts, S. Herzberger, 'Social science contributions to the law: Understanding and predicting behaviour' (1993) 25 *Connecticut Law Review* 1067. See also A.L. James, 'An Open or Shut Case? Law as an Autopoietic System' (1992) 19 *Journal of Law and Society* 271, and systems theorist reply, M. King, 'The Truth about Autopoiesis' (1993) 20 *Journal of Law and Society* 218.
[86] *Plessy v Fergusson* 163 US 537 (1896) and *Brown v Board of Education* 347 US 483 (1954); *Roe v Wade* 410 US 113 (1973).
[87] See R. Dworkin, 'The Interpretive Attitude' in *Law's Empire* (Harvard University Press, 1986).
[88] G. Teubner, *Law as an Autopoietic System* 13.

the need for this incorporation to be determined by the system, and checked by the usual references to subsystem rules.[89]

Communicative redundancies and the establishment of structural couplings, therefore, provide a means by which the receiving system turns what is, to it, meaning*less* environmental noise into a meaning*ful* communication, coded in accordance with its own rules.[90] However, because the system from which the communication originates has modelled the communication on its own system-specific interpretation of its observations relating to the receiving system; while the receiving subsystem interprets the communication through its own understanding and expectations of the originating subsystem, different system-specific understandings of the communication arise.[91] On forming the structural coupling, therefore, the values attached to the system's own behaviour are entirely internal to the system itself. This behaviour is referred to as 'self-steering' and represents the system's attempt to minimize differences between the situation faced and the desired one, which is one incorporating the external communication.[92] Systems, therefore, exist and create their own boundaries in relation to their environment (autopoiesis); systems organise, reproduce, maintain possibilities, and conditions for other possibilities, through their operation; and the possibilities that are provided by systems operations are determined by their function.[93] However, the system-specific nature of system behaviour and its interpretation of communications mean that no single system can declare its view as representing a fundamental truth and as binding on all other systems.[94] This 'essential circularity'[95] of systems means that they face significant difficulties in successfully engaging in inter-system communication, and difficult to account for radical change.

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[89] See N. Luhmann, 'Operational Closure and Structural Coupling'. See also, N. MacCormack, 'Why Cases Have Ratios and what these Are', in L. Goldstein (ed), *Precedent in Law* (Clarendon Press, 1987) 166-82.

[90] Luhmann offers the example of walking: 'Walking presupposes the gravitational forces of the earth within very narrow limits, but gravity does not contribute any steps to the movement of bodies. Communication presupposes awareness of states of conscious systems, but conscious states become social and do not enter the sequence of communicative operations as part of them; they remain environmental states for the social system', N. Luhmann, 'Operational Closure and Structural Coupling' 1426.

[91] G. Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18 *Law and Society Review* 291, 299; and N. Luhmann, 'The Self-Reproduction of Law and its Limits' in G. Teubner, *Dilemmas of Law and the Welfare State* (Walter de Gruyter, 1986)113.

[92] N. Luhmann, 'Limits of Steering' (1997) 14(1) *Theory, Culture and Society* 41-57.

[93] K.A. Ziegert, 'The Thick Description of Law: An Introduction to Niklas Luhmann's Theory of Operatively Closed Systems' in Banaker and Travers, *An Introduction to Law and Society* 58.

[94] H. Willke, 'Societal Regulation through Law?' in G. Teubner and A. Febbrajo (eds.), *State, Law, Economy as Autopoietic Systems* (Guiffre, 1992) 383.

[95] G. Teubner, *Law as an Autopoietic System* 3.

1.3 Obstacles to Inter-System Communication and the Regulatory Trilemma

The lack of a common understanding of communications between systems can lead to the development of 'double contingency'.[96] Double contingency is a consequence of the confrontation of at least two autonomous systems that make their own selections in relation to one another, but that, because of the complexity of subsystems, are unable to fully and reciprocally understand each other.[97] Consequently, systems 'concentrate on what they can observe as input and output in the other … They can try to influence what they observe by their own action and can learn further from the feedback'.[98] The development of a theory of inter-system communication represents a key formative period within autopoietic legal theory, marked particularly by the Habermas-Luhmann dialogue of the early 1970s. By way of a jointly published work the two theorists criticised each other's approach as an inadequate response to the complexity of highly functionally differentiated post-industrial societies.[99] For Luhmann, the extent of the functional differentiation meant that effective communication between different systems was impossible.[100] By contrast, for Habermas it remained possible, contingent upon the removal of certain pre-existing barriers to inter-subsystem operations.[101] For Luhmann and other social systems theorists the obstacles to inter-system communications are inherent within the nature of the systems themselves, and there is no 'ideal speech pattern', as proposed by Habermas, which enables effective communication.[102]

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[96] T. Parsons, 'Social interaction', in David L. Sills (ed.) *International Encyclopaedia of the Social Sciences*, Vol. 12 (Macmillan/Free Press, 1968) 429-40.

[97] N. Luhmann, 'Generalized Media and the Problem of Contingency' in J. J. Loubser, R.C. Baum, A. Effrat and V.M. Lidz (eds) *Explorations in General Theory in Social Science: Essays in Honor of Talcott Parsons* (Free Press, 1976) 507-32.

[98] N. Luhmann, *Social Systems* 110.

[99] J. Habermas and N. Luhmann, *Theory of Society or Social Technology: What Does Systems Research Accomplish?* (Suhrkamp, 1971).

[100] Luhmann, *Essays on Self-reference* (Columbia University Press, 1990) 87.

[101] J. Habermas (auth) W. Rehg (trans), *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996) 192. Julia Black suggests that whilst systems theory may at times overstate the difficulties of communication Habermas understated the problems of translating out of systems-specific codes or logic into a language that other systems can understand, J. Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) *OJLS* 33, 41. See also the discussion in S. Lash, *Another Modernity, A Different Rationality* (Blackwell, 1999) 157.

[102] Habermas proposed the 'ideal speech pattern' as representative of the ideal of democratic discourse that if achieved would enable effective cross-system communication. See E. Gilder, 'Towards a Critical Paradigm for Change: Habermas '"Ideal Speech Situation" as a Meta-Model of Development Communication', paper presented at the Annual Meeting of the Speech Communication Association (73rd, Boston, MA, November 5-8 l987). http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED292146, accessed

Luhmann saw the solution to system-based contingency as the development of a pattern of behaviour so that future indeterminacy would be responded to within a framework of pre-determined rules.[103] Such a framework would enable each system to hold a firm expectation of the nature of another system's behaviour. This expectation involves presenting to that system a pattern which provides them with a similar firmness of expectation.[104] In other words it is the successful expectation of expectations by one system in relation to another that enables stable systems of operation.[105] Luhmann offers the regular pattern of irritation between the political system and the mass media system as an example of such subsystem behaviour. Luhmann suggests that political actors attempt to be mentioned in the media, while what is constructed by the media as politicians often respond to political news.[106] In modern, functionally differentiated societies, however, there is too great a degree of system complexity for such assurance.[107] The esoteric nature of communications consequently means that both in-coming and out-going communications face apparently unassailable obstacles in terms of effective, trans-system understanding.[108]

A key consequence of the obstacles to successful inter-system communication, observed by systems' theorists, is the 'regulatory trilemma'.[109] The regulatory trilemma describes the over-extension of structural couplings between autonomous social systems, and is specifically used to account for the failure of regulation to act as a successful means of

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[103] It is in addressing the problem of double contingency that Parsons' and Luhmann's theories diverged. For Parsons the problem of double contingency is solved by reference to a prior social consensus concerning cultural norms and rules of conduct. By contrast, for Luhmann, the indeterminacy of self-referential systems means that the achievement of any such consensus is impossible. See, Luhmann, *Social Systems*: 103.

[104] N. Luhmann, *A Sociological Theory of Law* 26.

[105] This aspect of social systems is closely related to Anthony Giddens' essays in social theory; see A. Giddens, *The Constitution of Society. Outline of a Theory of Structuration* (Polity Press, 1984) and *Central Problems in Social Theory: Action Structure and Contradiction in Social Analysis* (MacMillan, 1979).

[106] N. Luhmann (auth) and K. Cross (trans), *The Reality of the Mass Media* (Polity Press, 2000) 67-68.

[107] H. Wilke, 'The Types of Legal Structure: The Conditional, the Purposive and the Relational Program' in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1985) 282.

[108] Sandra Fredman offers an example of this failure of systems to effectively communicate with each other in the attempt of the legal system to implement positive duties as a means of achieving equality, see S. Fredman, *Human Rights Transformed. Positive Rights and Positive Duties* (OUP, 2003).

[109] G. Teubner, 'After Legal Instrumentalism? Strategic Models of Post-regulatory Law' in G. Teubner (ed.) *Dilemmas of Law in the Welfare State* (De Gruyter, 1985). See also G. Teubner, 'After Privatization: The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems*; and G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed.), *Juridification of Social Spheres* (Walter de Gruyter, 1987) 19-21.

coordinating cross-system understanding.[110] Development of the regulatory trilemma can have three outcomes, in terms of the fate of the obstructed communication or regulation. The communication may 'disintegrate', in the sense that it is ignored by the intended receiving subsystem. Alternatively, the regulation could damage the ability of the targeted subsystem to reproduce itself, and therefore its ability to function. Finally, the intervention might damage the originating subsystem and result in a crisis of legitimacy for that subsystem.[111] For Teubner there is no solution to the regulatory trilemma,[112] but only the hope for more flexible self-regulation of reflexive subsystems.[113] Teubner specifically applied his hypothesis to the legal system and proposed the adoption of a new model of law. This model adjusts itself in the hope of inducing adjustment in other systems and by working with the dynamics of other subsystems as opposed to prescriptively imposing its rules and goals on other system, reinstates legitimacy in the legal system.[114] Teubner's proposal represents a development of systems theory and inhabits something of a midway between the approaches adopted by Habermas and Luhmann, in that it recognises that deliberation may be a mediating strategy to facilitate effective communications between different social systems.[115]

Teubner explains the regulatory trilemma in the context of competition law.[116] In the context of law enforcement one example is provided by police disciplinary processes and the interaction between these processes and the inaccessibility of the police to underrepresented groups.[117] Here, the Law is trying to micromanage human resources within the police. However, the fact that antidiscrimination law creates an environment in

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[110] G. Teubner, *Law as an Autopoietic System* 72.
[111] *ibid* 62-63. See also G. Teubner, 'After Privatization: The Many Autonomies of Private Law' 51 *Current Legal Problems* (1998): 393-424. The impact of the regulatory trilemma on the criminal justice system has been explored in N. Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in C. Parker, C. Scott, N. Lacey and J. Braithwaite (eds,), *Regulating Law* (OUP, 2004) 144-67.
[112] G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed.), *Juridification of Social Spheres* 27.
[113] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239, 254 and R.M. Buxbaum, 'Legitimation Problems in American Enterprise Law' in Teubner, *Juridification of Social Spheres* 261-66.
[114] C. Scott, 'Regulation in the Age of Government: The Rise and Fall of the Post-Regulatory State' in J. Jordan and D. Levi-Faur (eds.), *The Politics of Regulation* (Edward Elgar, 2004) 9.
[115] U. Beck, A. Gidden, and S. Lash (eds.), *Reflexive Modernization* (Polity Press, 1994); U. Beck, 'Risk and the Provident Society' in S. Lash, B. Szerszynski, and B. Wynne (eds.), *Risk, Environment and Modernity* (Sage, 1996).
[116] G. Teubner, 'General Aspects' in G. Teubner, *Juridification of Social Spheres A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter, 1987).
[117] For an analysis of this without an express focus on social systems see: G. Smith, 'Why Don't More People Complain Against the Police?' (2009) 6 *European Journal of Criminology* 3; and G. Smith, 'Rethinking Police Complaints' (2004) 44(1) *British Journal of Criminology* 15.

which minorities and women can bring a cause of action against the police if their discipline issues are mishandled risks creating an unintended incentive for the police to shunt all minorities and women into the formal system straight away, whilst they deal with white men through traditional informal means. This is an example of the regulatory trilemma, because the regulated system does not receive communication, only irritation, from the law, it does not seek to give effect to what the law is trying to do, it either ignores the law, is destroyed by the law, or destroys the law. In this case the police discipline system is being corrupted by a law that sends unintended messages, because of the ways in which the two subsystems do not match up, but this is in part because the intent, and often even the true substance of the law, is being ignored by the police disciplinary system.

Teubner's emphasis on the regulatory role of law, arising from the 'juridification' of society,[118] has been further explored by academics including Julia Black and Nicola Lacey.[119] Black and Lacey use the obstacles to inter-systems communications as an explanation for the failure of regulatory legislation to achieve parliamentary goals, when laws are implemented within specialist subsystems. The application of autopoiesis to regulatory law illustrates how each system shifts its behaviour in order to render what is happening within one system meaningful to another. The legal system has a mediating role in facilitating these regulatory communications,[120] although Black suggests that deliberations themselves may require mediation.[121] This conclusion thus reasserts the long-standing theoretical concern with issues of difference in cognition and perception between social subsystems.[122] Regulatory scholarship does not conceptualise society as a top down social order but instead adopts a 'heterarchical conception of control', citing a diverse range of influences on regulation caused by the nature of system behaviour.[123] For example, the limited data-gathering capabilities of courts mean that they frequently

[118] See Teubner, *Juridification of Social Spheres*; and G. Teubner, *Law as an Autopoietic System* 14.
[119] See, e.g., J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103.
[120] See C. Parker, C. Scott, N. Lacey, J. Braithwaite, *Regulating Law* (OUP, 2004) 82-100.
[121] J. Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) *OJLS* 34.
[122] See J. Cohen, 'Deliberation and Democratic Legitimacy' in A. Hamlin and P. Pettit (eds.), *The Good Polity* (Blackwell, 1989); I. Young, 'Justice and Communicative Democracy' in R. Gottlieb, *Radical Philosophy: Tradition, Counter-tradition, Politics* (Temple University Press, 1993) 130; and I. Young, 'Communication and the Other: Beyond Deliberative Democracy' in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton Paperbacks, 1996) 128.
[123] J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulating Work' (2001) 54 *CLP* 103.

defer on such matters to other branches of government.[124] In addition, sometimes courts will decline to hear a particular claim, or its judgment may fail to address an issue within a claim, thereby influencing the shape and contents of judicial precedents.[125]

This latest stage in the development of social systems theory also advocates the application of the theoretical tenets to non-standard subsystems. Luhmann himself applied the theory to a range of subsystems including science, religion, art and even love.[126] What is central for each of these subsystems, and at the root of their autopoietic nature, is their self-referentiality, which means that where externally and internally generated communications are responded to, it is in a system-specific way. The description of a system as 'autopoietic' can, therefore, be applied to any system which is able to respond to and engage with its environment, but which remains distinct from it, so that a definitional line can be drawn between the system and its context. Within their analysis of regulatory law Black, Lacey and others apply the systems theory ideas, which were discussed by Luhmann and Teubner at a very general, macro level, to individual industries and areas of legal regulation.[127] In the scheme of systems and subsystems while law is a second order autopoietic system, within society as the first order autopoietic system,[128] such subsystems would be considered as third and fourth order subsystems.

1.4 Social Systems Theory within the Law Subsystem

Although Luhmann's claims about autopoiesis in the social system apply to all subsystems, his work, along with that of many social systems theorists, focuses upon the legal subsystem. Law, especially the common law, offers a particularly clear example of the workings of communicative redundancies, self-referential rule-making and operational closure/ cognitive openness, as compared to other social systems because the subsystem operates through the activities of lawyers and courts in discussing matters of

[124] J. Black, 'Law and Regulation: The Case of Finance' in C. Parker, C. Scott, N. Lacey, J. Braithwaite, *Regulating Law* (OUP, 2004) 33-59.
[125] J. Stapleton, 'Regulating Torts' in Parker *et al*, *Regulating Law* 137-38.
[126] See N. Luhmann, *Love as Passion: The Codification of Intimacy* (Polity Press, 1986).
[127] Including, employment law, environmental regulation, corporate governance. See J. Priban and D. Nelken, *Law's New Boundaries. The Consequences of Legal Autopoiesis* (Ashgate, 2001) and Parker *et al*, *Regulating Law* (OUP, 2004).
[128] G. Teubner, *Law as an Autopoietic System* 25.

definition and precedent.[129] These represent the formalised mechanics of self-referential rule-making, built on useful, but constraining communicative redundancies.

An example of a communicative redundancy found within the Law subsystem is its understanding of the distinction between questions of law and questions of fact. This is a hugely influential distinction within the Law subsystem. However, outside the Law the distinction is either not recognised or means something completely different. A 'non-law' observer of a criminal trial will see the question of whether someone is guilty or not guilty as a factual question, yet for lawyers it is a purely legal question determined by the fact-based answers to several purely legal questions, articulated in jury instructions.[130] For Nobles and Schiff, this latent difference in the functioning of the legal subsystems compared with other subsystems, such as the media, can generate hostile views of the legal system, based on the legal system's inability to reproduce the media's understanding of convictions based on a factual finding of guilt.[131] From the perspective of the media, appeals which succeed on procedural grounds are 'technical acquittals' after which, in the media's eyes, the defendant remains guilty; while appeals which fail in the face of widespread media reporting of the defendant's innocence represent miscarriages of justice. Both outcomes can result in a reduction in public confidence in the criminal justice system, linked to the media's understanding and report of the case. For the Law subsystem, which centres its operation on criminal justice and procedure, the media's irritations can jeopardise the routine operations of the system and consequently its ability to perform its subsystem function, whilst retaining popular legitimacy.[132] So for lawyers 'law' and 'fact' incorporate a complex and established set of understandings about the different facets of legal decision-making; in that sense they are useful redundancies that do a completely different job within law than they do in other subsystems. Communicative redundancies are also constraining in that they result in communication with the environment, but this communication does not incorporate all the nuanced understandings associated with the terms when the communication was formed, within the Law subsystem.

[129] N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Rev* 1419. See also, N. Luhmann, 'Law as a Social System' (1989) 83 *Nw U.L. Rev* 136, 140.
[130] N. Luhmann, *A Sociological Theory of Law* 111-15, 473.
[131] R. Nobles and D. Schiff, *Understanding Miscarriages of Justice* (OUP, 2000).
[132] *ibid*, ch 4.

Rules of evidence are a further communicative redundancy upon which the Law subsystem bases its behaviour, but which give rise to communicative barriers between the Law subsystem and other parts of the social system. One recurrent issue within criminal law, and also in terrorism law, is the fact that people who are known to be criminals cannot be charged and convicted. From a non Law perspective this is a failure of the legal system: if it is a known and demonstrable fact that an individual is guilty of criminal conduct then, by definition, subsystems such as the media would expect that the individual is charged with an offence and convicted. However, within the legal system a charge and conviction are contingent upon satisfying rules of evidence and the requirement of proof beyond a reasonable doubt. Internal rules within the Law subsystem built on communicative redundancies about what counts as evidence and presumptions of innocence, such as the need to protect sources in vulnerable positions; the inability to introduce evidence procured by certain suspect means; the fact that the prosecution can have enough information that would persuade a reasonable person that the individual in question is guilty of the criminal conduct but not have enough to persuade a jury beyond a reasonable doubt, shape the legal subsystem's operations. However, these mean nothing outside the legal subsystem, which only observes that the individual engaged in legally prohibited conduct.

Just as Law subsystem communications are not understood in the same way when they are received outside the subsystem as they are understood when formed within the subsystem, when the Law subsystem is required to interpret situations in the real world which do not easily fit into the legal subsystem's own distinctions, the Law subsystem's communicative redundancies operate as a constraint on its response. Decisions made, for example, by employment tribunals about whether a dismissal was 'reasonable' defy categorisation as either fact or law. When faced with such situations, therefore, the legal system incrementally redefines its operational terms or builds new factors into the existing analysis, but does so in a way consistent with or analogous to some earlier decision on another issue. The Law subsystem may, for example, resort to arguments over definitions, or to developing hybrid concepts like the notion of 'mixed questions of law and fact'. In this way the law openly builds on its own redundancies, is constrained by the need to fit within existing understandings or build modifications based on previously accepted logic, and ends up describing the world in a way that would not be

understood outside the legal system.[133]

Another example, of a disjunct between the legal subsystem's own workings and how they are understood by other subsystems, as well as the influence of this on subsystem autopoietic behaviours, is the law/equity distinction. The Law subsystem maintains a self-created distinction between courts acting in equity and in law. To non-law observers this is unsatisfactory: they want the Law to tell them the rules within which they must act. For such, 'non-law' observers, equity rulings serve that function and are made by courts. Consequently, they are understood by other subsystems as constituting "Law". However, the legal system itself maintains that they are merely equitable decisions. A situation may arise, for example, when another subsystem, such as business of economy, wants to know whether someone has a legal right to some money. In the case of a trust the law subsystem will determine that the trustee a *legal* interest in the money, but the beneficiary has an *equitable* interest in the money. This distinction is unhelpful for the non-legal subsystem, which understands only that the beneficiary is legally entitled to the money.

The theoretical background of social systems theory will be used to analyse the operations and communications of the law-making, policing and judicial subsystems in the US and UK in an effort to understand the racial effect of the counter-terrorism stop, search and surveillance powers in both countries. This analysis will compare the self-determined patterns of subsystem behaviour upon which each subsystem founded its operational legitimacy with the actual behaviour in response to the environmental irritants and communications arising from the threat of terrorist attack. Before embarking on this analysis, the next chapter sets out the legal powers and empirical evidence which provide the case study for the social systems-based analysis.

[133] N. Luhmann, *A Sociological Theory of Law* 473 and N. Luhmann, *A Sociological Theory of Law* 167-73.

Chapter Two: Legal Powers and Racial Effect

Having set out the theoretical framework for this thesis this chapter sets out the legal and empirical context for this analysis. This chapter, therefore, provides a detailed description of the legal powers that are used as the case study for the claim of the unintended racial effect of the counter-terrorism powers, before setting out some key pieces of evidence upon which these claims are premised.

2.1 Legal Powers

This analysis uses the stop and search powers within s.44 of the Terrorism Act and the surveillance and records search provisions in ss.214-15 of the Patriot Act as case studies through which to suggest a systems-based explanation for one form of undesired outcome of the operations of subsystems which feed into the legal system. These powers have been chosen because, despite the fact that the powers differ, the use of both powers has given rise to claims of racially uneven policing.[134] The use of different powers helps to separate the claims regarding the origins of the racial effect of counter-terrorism policing, from a specific type of police behaviour. Instead, it suggests that there are particular factors and circumstances which cause some statutory provisions, to have a discriminatory effect. This thesis considers the implementation and operation of the two police powers in a parallel analysis of the two powers as a means of uncovering what these additional factors are, how they arise, and, therefore, how this effect may be avoided in future.

2.1.1 UK Power: Stop and Search

The stop and search powers within s.44 of the Terrorism Act replaced the latest of what had been a succession of temporary powers.[135] Following their enactment the powers were extended to the British Transport Police ('BTP'), the Civil Nuclear Constabulary

[134] M. Sidel, *More Secure Less Free? Antiterrorism Policy and Civil Liberties after September 11* (The University of Michigan Press, 2007) 145-47.
[135] Section 44 replaced the Criminal Justice and Public Order Act 1994 (c.33) s.81, which had amended the Prevention of Terrorism (Temporary Provisions) Act 1989 (c.4), s.13A; and the Prevention of Terrorism (Additional Powers) Act 1996 (c.7), which had amended the Prevention of Terrorism (Temporary Provisions) Act 1989, s.13B.

and the Ministry of Defence Police.[136] Following the ECtHR decision in the case of *Gillan and Quinton v The United Kingdom*,[137] the UK Government announced the suspension of s.44.[138] The powers have subsequently been repealed and replaced,[139] providing a natural chronological end point with the case study of s.44 offered herein. Despite the repeal of the s.44 power the use of this statutory provision as a case study for the racial effect of counter-terrorism police powers remains relevant because of what it reveals about the understanding of each subsystem with regard to its own behaviour and its effect, as compared to the understanding of this from the perspective of other subsystems. The permanent enactment of the power followed a review of counter-terror legislation conducted by Lord Lloyd of Berwick.[140] Whilst recommending the passage of permanent powers Lord Lloyd acknowledged that such powers should not be given lightly or used freely.[141] Section 44, like its predecessor powers, enabled police officers to stop and search individuals without individualised suspicion of wrong-doing, as a means of countering the threat of terrorist attack within the country.[142]

Section 44 provided that, subject to obtaining a relevant authorisation, a police constable in uniform could stop and search any vehicle, its driver, passenger(s) and anything in or on the vehicle or carried by the driver or passenger within the area or place specified in the authorisation.[143] Authorisations under s.44 also permitted any constable in uniform to stop and search a pedestrian, and anything carried by the pedestrian, in an area or at a place specified in the authorisation.[144] The s.44 powers could be utilised irrespective of any suspicion on the part of the officer that the individual subject to the search was in any way involved in terrorist activities. Indeed, in the event of such officer suspicion the s.44 power was usurped by the suspicion-based stop and search powers in s.43 of the Terrorism Act, which provide for the stopping and searching of an individual whom a constable reasonably suspects of being a terrorist.[145] The whole purpose of s.44, therefore,

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[136] Anti-Terrorism, Crime and Security Act 2001 (c.21) sch. 7, para 31 and the Energy Act 2004, s.57.
[137] *Gillan and Quinton v The United Kingdom*, Application No. 4158 (12 January 2010).
[138] A. Tavis, 'Anti-terror Stop and Search to be Scrapped' *The Guardian* (8 July 2010).
[139] Following a Governmental review of counterterrorism power s.44 was replaced with provisions in the Protection of Freedoms Act, ss.59-63. See also H.M. Government, *Review of Counter-terrorism and Security Power: Review, Findings and Recommendations*, Cm 8009 (The Stationery Office, 2011).
[140] Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol. I (October 1996).
[141] *ibid* paras 10.19 and 10.22.
[142] Terrorism Act 2000, s.44.
[143] *ibid*, s.44(1).
[144] *ibid*, s.44(2).
[145] *ibid*, s.43.

was to enable officers to stop and search an individual in the absence of any objectively determined grounds for doing so. The policing freedom arising from the suspicion-less nature of s.44 was counter-balanced by the limited scope of the search that could be conducted. These limitations included the fact that when exercising the power an officer could not require a person to remove any clothing in public, except for headgear, footwear, an outer coat, a jacket or gloves.[146] Stops and searches carried out under s.44 were also restricted to searching for articles of a kind which could be used in connection with terrorism,[147] although its suspicion-less nature meant that there was no requirement that the searching officer had any grounds for suspecting that articles of this kind were present.[148] The officer conducting the search was authorised to seize and retain any article discovered during the search which he reasonably suspected was intended to be used in connection with terrorism.[149] Following a stop and/ or search the individual targeted was provided with a written statement as evidence of the stop and search that had been carried out.[150]

The written authorisation necessary for use of the suspicion-less stop and search power had to be sanctioned by a police officer of at least the rank of chief constable, or equivalent, in the area that the authorisation related to.[151] The authorisation could be given orally, provided that it was confirmed in writing as soon as reasonably practicable.[152] Aside from the seniority requirement the only other pre-condition for the grant of an authorisation was that the individual granting the authorisation considered it to be expedient for the prevention of acts of terrorism.[153] Once granted authorisations had to be confirmed by the Secretary of State within 48 hours,[154] and the authorising officer was required to inform the Secretary of State of the grant of the authorisation as soon as it was reasonably practicable to do so.[155] If the authorisation was not confirmed within 48 hours it ceased to have effect, although the lawfulness of any actions carried out whilst it was

[146] *ibid*, s.45(3).
[147] *ibid*, s.45(1)(a).
[148] *ibid*, s.45(1)(b).
[149] *ibid*, s.45(2).
[150] *ibid*, s.45(5).
[151] *ibid*, s.44(4).
[152] *ibid*, s.44(5).
[153] *ibid*, s.44(3).
[154] *ibid*, s.46(4).
[155] *ibid*, s.46(3).

active were unaffected.[156] Authorisations could be granted for a maximum period of 28 days,[157] although the authorisation could be cancelled by the Secretary of State at any time during this period.[158] Despite the maximum duration, the authorisation could also be renewed an unlimited number of times, so that it could take effect as an indefinite, rolling authorisation.

Under the Terrorism Act it was an offence for an individual to fail to submit to a stop or search when required to do so by an officer exercising the s.44 power, or to wilfully obstruct an officer in the exercise of that power.[159] The penalty for committing such an offence was imprisonment for a term not exceeding 6 months; a fine or both.[160] However, the mere act of an individual refusing to be subject to an s.44 stop and search could provide the officer with reasonable suspicion to conduct the stop and search under an alternative provision, such as s.43, or even to arrest the individual on suspicion of being a terrorist.[161] Once targeted for an s.44 stop and search, therefore, there was no means by which an individual could guarantee avoiding police attention.

The requirement that s.44 had to be used in connection with counter-terrorism policing, made the definition of 'terrorism' important in determining when and how the powers could be utilised. The Terrorism Act 2000 defined 'terrorism' as the use or threat of action which involves: (a) serious violence against a person; (b) damage to property; (c) endangers a person's life, except that of the individual committing the action; (d) creates a serious risk to health or safety of the public or a section of the public or (e) is designed seriously to interfere with or seriously disrupt an electronic system,[162] if the use or threat is designed to influence the government and is made to advance a political, religious or ideological cause.[163] For the purposes of s.44, the definition included any person who had committed an offence under the Act,[164] or was, or had been, concerned in the commission,

[156] *ibid*, ss.46(4)(a) and (b).
[157] *ibid*, s.46(2).
[158] *ibid*, s.46(5).
[159] *ibid*, s.47(1).
[160] *ibid*, s.47(2).
[161] *ibid*, s.41.
[162] *ibid*, s.1(2).
[163] *ibid*, s.1(1). This is a departure from the previous definition of terrorism which referred to 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear', Prevention of Terrorism (Temporary Provisions) Act 1989 (c.4), s.25 and Northern Ireland (Emergency Provisions) Act 1996 (c.2), s.58.
[164] Terrorism Act 2000, ss.11, 12, 15-18, 54, and 56-63.

preparation or instigation of acts of terrorism.[165] This definition afforded the meaning of 'terrorist' and 'terrorism' a very wide scope, not simply referring to specifically pre-ordained offences, but also including the 'catch-all' provision relating to any form of involvement in 'acts of terrorism'.[166] Parliamentary focus on the definition of 'terrorism' during the debates concerning the draft Terrorism Act[167] reflects something of its politically charged nature.[168] This is further indicated by the difficulty experienced in achieving a consensus regarding what was the appropriate definition, a difficulty also reflected within international law.[169] The legislature's debate about the definition voiced a concern that it should not be drawn too broadly[170] or in a way that would cast 'long and dark shadows over the nature of democratic society and open government'.[171] In responding to concerns over the breadth of the definition the Government sought to 'make it clear that the new definition will not catch the vast majority of so-called domestic activist groups'.[172] This assurance acknowledged that wholly domestic activities would be differentiated from international activities, and subject to the catch all 'domestic extremism' label.

2.1.2 US Power: Surveillance and Records Searches

The US powers within ss.214-15 of the USA Patriot Act of 2001 enable electronic surveillance and records searches to be conducted by federal law enforcement officers, without the need for individualised suspicion, provided that the operations may be relevant to a foreign intelligence investigation.[173]

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[165] *ibid*, s.40(1).
[166] *ibid*.
[167] HL Debs (1999-00) 611, cc.215-45. See also, *ibid* Lord Glentoran, c.1080, Lord Goodhart, cc.1439-42, Lord Lloyd of Berwick, c.1444, Lord Mayhew of Twysden, c.1449; and Baroness Miller of Chilthorne Dormer, cc.1452-53.
[168] D. Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (OUP, 2007) 23.
[169] See B. Saul, *Defining Terrorism in International Law* (OUP, 2006); A. Schmid, 'Terrorism: the Definitional Problem' (2004) 36 *Case Western Reserve Journal of International Law* 375; A. Schmid and A. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts and Databases, Theories and Literature* (Transaction Books, 1998); and R. Baxter, 'A Skeptical Look at the Concept of Terrorist' (1974) 7(2) *Akron Law Rev*. 380.
[170] E.g., Alan Simpson considered it to be 'utterly perplexing that we should apparently be wedded to a definition that threatens to undermine so sweepingly civil liberties and the credibility of governance itself', HC Debs (1999-00) 346, c.399. See also, *ibid*, c.394.
[171] Alan Simpson, *ibid*, c.358.
[172] Jack Straw, HC Debs (1999-00) 341, c.154. See also M. Tushnet and L. Yackle, 'Symbolic Statutes and Real Laws: the Pathologies of the Antiterrorism and Effective Death Penalty and the Prison Litigation Reform Act' (Oct 1997) 47 *Duke Law Review Journal* 1-86.
[173] Patriot Act 2001, Title II, ss. 214-215.

Section 214 amended pre-existing FBI surveillance powers, within the Foreign Intelligence Surveillance Act of 1978,[174] by expanding the range of information which could be captured through the use pen registers[175] and trap and trace devices,[176] as well as by extending the powers to apply to electronic communications, including the Internet and email.[177] Section 214 prohibits the capture of the contents of the communication, but does enable the surveillance of unique data that provides detailed information regarding the use of these forms of communication, such as URLs generated while using the Internet.[178] Under s.214 pen registers and trap and trace devices may be authorised for any investigation to obtain foreign intelligence information to protect against international terrorism.[179] The power applies to both US citizens and non-citizens, although activities of US citizens which are protected by the First Amendment are excluded from the remit of the authorisation.[180] Prior to the enactment of the Patriot Act the use of pen registers and trap and trace devices could only be used against non-citizens.[181] The Patriot Act also removed previously existing geographical limitations to the judicial authorisations, and in so doing made it easier for the FBI to undertake surveillance and monitor an individual, without any suspicion of their involvement in terrorist activities.

As well as broadening the potential use of pen registers and trap and trace devices the Patriot Act also removed the warrant requirement that had previously existed. Instead of a warrant being required for the implementation of a pen register or trap and trace device applications only need to include a certification by the applicant that the information

[174] Foreign Intelligence Surveillance Act of 1978 (50 USC ss1842). In making this change the clause changed 50 USC ss1842(a) to include US citizens, except in First Amendment activities; changed 50 USC ss1842(c)(2) so that the information gathered did not need to be in relation to ongoing investigations; and deleted 50 USC ss1842(c)(3) so that it was no necessary to believe that the device is being used, has been, or is about to be used by individuals involved in terrorism.
[175] 18 USC defines a pen register as 'a device or process which records or decodes routing, addressing, or signalling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication', ss4127(3).
[176] 18 USC defines a trap and trace device as 'a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialling, routing, addressing, and signalling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication', ss3127(3).
[177] See B.A. Howell, 'Seven Weeks: the Making of the USA Patriot Act' (2004) 72 *Geo. Wash. L. Rev* 1145.
[178] G. Horn, 'Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines' [2005] 60 *NYU Annual Survey of American Law* 735.
[179] Patriot Act 2001, Title II, ss.214.
[180] *ibid*, s.214(a).
[181] 50 USC, ss1842.

likely to be obtained is foreign intelligence information not concerning a US citizen, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.[182] The power, therefore, may be used on the basis of the low standard of 'relevance', as opposed to the more generally applicable constitutional standards of either reasonable suspicion or probable cause.[183] In addition, the 'relevance' does not need to relate to a particular national security-related investigation or crime. Instead, it is sufficient that the information is likely to be relevant to the general threat from terrorism. Consequently, s.214 combines expanded surveillance methods with a lower threshold requirement for their use. Finally, the 'relevance' of the information that may be obtained is assessed by the federal officer seeking the authorisation. Therefore, not only is the standard low, but it is applied on the basis of the subjective assessment of the police applicant, without any objectively applied test or oversight. The suspicion-less use of the surveillance powers is a departure from the normal statutory and common law standards for police surveillance, and has led to the power being described as probably the most significant change to police powers occasioned by the Patriot Act.[184]

Section 215 of the Patriot Act amended Title V of the Foreign Intelligence Surveillance Act by replacing ss.501-03 to permit the US Government to access private personal records of citizens and non-citizens, which are held by third parties.[185] The statutory revision means that, upon obtaining a court order, the Government may search and seize 'any tangible things for an investigation to protect against international terrorism',[186] including records held by bookshops and libraries.[187] Businesses and organisations from which the records are obtained are prevented from notifying the individual to whom the records relate meaning that such searches can be conducted without any knowledge of their occurrence.[188] External information concerning the use of the power is limited to a semi-annual report by the Attorney General to the Committee on Intelligence of the

[182] 50 USC ss.1842(c)(2).
[183] *Chandler v Miller* 520 US 305 (1997) at 308, cited by *City of Indianapolis v Edmond* 531 US 32 (2000) at 37. See also *United States v Martinez-Fuerte* 428 US 543 (1976) at 560.
[184] S. Freiwald, 'Online Surveillance: Remembering the Lessons of the Wiretap Act' (2004-05) 56 *Ala. L. Rev.* 9, 68.
[185] Foreign Intelligence Surveillance Act, title V, ss.501-03. In making this change the section deleted the original 50 USC ss.1861-63, and inserted the new clause from the Patriot Act.
[186] H.R. 3162, 107th Congress (2005), s.215(a).
[187] See C. Doyle, *Libraries and the USA Patriot Act* (CRS Report for Congress, 2005).
[188] D. Lithwick and J. Turner, *A Guide to the Patriot Act, Part 1*, Washington Post Newsweek Interactive Co. LLC (8 September 2003), http://www.slate.com/id/2087984/, accessed 03.03.11.

House of Representative and the Senate detailing the number of requests made under the provision.

Section 215 is subject to a sunset clause that is currently due to expire on 31 December 2015. Its temporary nature was retained when many other surveillance powers under the Patriot Act were made permanent under the Patriot Act Improvement and Reauthorisation Act of 2005.[189] This may be attributable to the controversy surrounding the very low threshold test for use of s.215.[190] If an application for use of s.215 demonstrates, through a statement of facts, that the 'tangible things' to be searched are relevant to an authorised investigation this threshold is surpassed. Further, the requirement is automatically satisfied if the records pertain to a foreign power or an agent of a foreign power; the activities of a suspected agent of a foreign power; or an individual who is in contact with, or known to, a suspected agent.[191] Because there is no need to show probable cause, that the records are related to terrorist activities, the FBI does not need to believe that the individual targeted is actually involved in terrorism, either directly or indirectly.[192] In addition use of the s.215 power can be based partially on the First Amendment activities of a US citizen or permanent resident, or solely on such activities of non-citizens.[193]

As in the UK the scope of the Patriot Act's surveillance and records search powers are affected by the definition of 'terrorism', adopted. Within the statute "terrorism" is defined as any act that 'appears to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, [or] affect the conduct of a government'. [194] The definition of "terrorism" includes a new crime of 'domestic terrorism', which is defined as activities that: (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a

[189] Patriot Act Improvement and Reauthorisation Act of 2005.
[190] Patriot Act, s. 215 See also S.L. Bowers, 'Privacy and Library Records' (2006) 32(4) *The Journal of Academic Librarianship* 377.
[191] 50 USC ss.1861(b)(2), as amended by s.106(b) PL109-177. See also CRS, Report for Congress, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and US Foreign Intelligence Surveillance Court and US Foreign Intelligence Surveillance Court of Review Decisions* (15 February 2007).
[192] ACLU, *Unpatriotic Acts. The FBI's power to rifle through your records and personal belongings without telling you* (July 2003) 2-3.
[193] Patriot Act, s.215(a).
[194] *ibid.*

government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.[195] The breadth of the definition necessarily increases the level of discretion involved in determining whether the powers are applied, especially because, due to resource considerations, officers must make operational decisions as to where to target the powers.

Congressional debate concerning the definition of terrorism is revealing in what it shows about the relative governmental priorities in tackling terrorism.[196] The key US reference to the definition of terrorism used within the Patriot Act was during the meeting of the House Committee on the Judiciary. During the discourse congressman Robert Scott noted that the definition of domestic terrorism was too broad and unclear, and would include activities that 'few of us would define as domestic terrorism'.[197] To emphasise his point Scott stated that it was essential to 'make certain that only those individuals who had the traditional means to do a terrorist act are investigated and prosecuted as terrorists, not the protestor at an abortion, nor the student protestor who is sitting out in the dean's office'.[198] In response to these concerns James Sensenbrenner, acting as Chairman, merely replied that 'terrorism is terrorism'.[199] Conversely, in the UK supporters of the definition of terrorism sought to assure its critics that there was no intention to use the powers against individuals who could, but would not previously have, come within the definition.[200] This distinction indicates that while from the outset the UK law-making subsystem was crafting 'terrorism' with a particular type of activity in mind, no such limitation was accepted in the US. These types of subsystem assumption suggest that dominant group assumptions were already shaping the operations of the law-making subsystem and the way in which the statutory powers were shaped and expected to be used. This thesis argues that one effect of these assumptions was the racial effect of the powers. Chapters three to eight explore the systems behaviours which contributed to this effect, but the next section sets out some of the evidence of the occurrence of this effect.

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[195] *ibid*, s.802.
[196] C. Bergorre-Bret, 'Symposium: Terrorism, Globalization and the Rule of Law: The Definition of Terrorism and the Challenge of Realitivism' (2006) 27 *Cardozo Law Rev.* 1987.
[197] Robert Scott, Committee on the Judiciary: Minutes of Meeting (3 October 2001).
[198] *ibid* 145.
[199] James Sensenbrenner, *ibid*, 145-6.
[200] C. Gearty, 'Terrorism and Morality' (2003) *European Human Rights Law Review* 377, 380.

2.2 Evidence of Racial Effect

The broad drafting of the s.44 and ss.214-215 powers and the low evidential standard for their use were described as being nothing more than pragmatic, necessary legislative choices.[201] However, this thesis asserts that each of the powers have been disproportionately utilised against individuals on the basis of their religion and/or their ethnic or racial origin.[202] Against this disproportionality, claims pertaining to the neutrality of the powers can only be sustained by those who maintain that racial equality is achieved through identical treatment and, therefore, that racially-silent legislation is racially equal legislation.[203] 'Racial' here is used to denote a visible, though possibly heterogeneous, minority community, as opposed to a group whose members belong to a single race or share a common ethnic background. It is acknowledged that the terrorist threat against which s.44 of the Terrorism Act and ss.214-215 of the Patriot Act were predominantly used may be characterised as existing along religious lines. However, the nexus between religion and the implementation of the stop, search and surveillance powers is imprecise, because of the limited ability to determine a person's religion by their physical appearance, with race consequently acting as a proxy for religion.[204] It was 'Muslim-looking' minorities who bore the brunt of the powers, meaning that the disparate impact can be described as operating along 'racial lines' and giving the powers a racial effect. The powers, therefore, contributed to a 'religioning [of] race'.[205]

The different nature of the counter-terrorism powers in each country necessities that evidence of their racial effect is established differently. In particular, the US powers lend

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[201] See especially chapters 3 and 4 of this thesis.

[202] See, e.g., Bruce Ackerman who describes the current war on terrorism as being 'fraught with anti-Islamic and anti-Arab prejudices', B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1075; and Liberty, 'From "War" to Law. Liberty's Response to the Coalition Government Review of Counter-terror and Security Powers 2010, 'know only too well that section 44 has been used disproportionately against the minority ethnic population', para 72.

[203] Such as Andrew Kull, see A. Kull, *The Colorblind Constitution* (Harvard University Press, 1992).

[204] This blurring between Muslims and Asian and Arab minorities is a similar process to that experienced when immigrants are the targets of legal provisions, but leads to the targeting of individuals on the basis of the racial and ethnic origins, as opposed to their nationality status. See K.R. Johnson, *'The Huddled Masses Myth: Immigration and Civil Rights* (Temple University Press, 2003) 51 and 162; K.R. Johnson, 'September 11 and Mexican Immigrants: Collateral Damage Comes Home' (2002-03) 52 *DePaul Law Rev.* 849; and R. Aldana and S.R.L. Vargas, '"Aliens" in Our Midst Post 9/11: Legislating Outsiderness within the Borders' (2004-05) 38 *U.C. Davis L. Rev* 1683, 1698-99.

[205] M. Chon and D.E. Arzt, 'Walking while Muslim' (2004-05) 68 *Law and Contemporary Problems* 215, 216. This process has previously been referred to as the racialization of religion, see I.F. Haney Lopez, 'The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice' (1994) 29(1) *Harvard Civil Rights-Civil Liberties Law Review.*

themselves to covert use, meaning that, unlike UK stop and search data, published statistics concerning the nature of the implementation of the powers are very limited. It is therefore necessary to build up a picture from other available evidence to explore whether the powers have a racial effect, as is considered in the following sections.

2.2.1 Racial Effect of UK Stop and Search

A number of tests have been widely used to show the racial effect of UK counter-terrorism stop and search powers. One such test is the disproportionality ratio, which indicates how much more likely racial minority individuals are stopped and searched than white individuals. Disproportionality is assessed by comparing the proportion of individuals subject to stops and searches from each ethnic and racial group, compared to their proportion of the local resident population, as established by returns from the national census. A second test is the number of excess searches, which reveals how many more stops and searches are conducted against racial minorities than would be the case if they were targeted at the same rate as white individuals.[206] The disproportionate and excessive use of stop and search powers against a particular 'suspect community'[207] has been a consistent, statistically established characteristic of this form of policing, albeit that the identity of the community has changed in line with contemporary political and policing priorities.[208] Indeed, Paddy Hillyard and Janie Percy-Smith predicted that the recommended extension of the Prevention of Terrorism (Temporary Protections) Act 1989, to include international terrorism as well as domestic terrorism,[209] would mean that racial minorities would receive disproportionate police attention in a comparable way to that experienced by the Irish.[210] The crudeness of the created 'suspect community' is suggested by the targeting of Sikh individuals, mistakenly associated with the threat from international terrorism

[206] Equality and Human Rights Commission, *Stop and Think. A Critical Review of the Use of Stop and Search Powers in England and Wales* (ECHR, 2010) 5. See also JCHR, 'Demonstrating Respect for Rights? A Human rights approach for policing protest' (March 2009) para 93; and EHRC, Submission of the UK's Sixth Periodic Report under the International Covenant on Civil and Political Rights (June 2008).
[207] P. Hillyard, *Suspect Community. Peoples' Experiences of the Prevention of Terrorist Acts* (Pluto Press. 1993).
[208] See C. Pantazis and S. Pemberton, 'From the "old" to "new" suspect communities: Examining the Impacts of Recent US Counter-terrorism Legislation' (2009) *British Journal of Criminology* 646 considering the change in "suspect community" from Irish to Asian and Arabic Muslims.
[209] See Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol. 1, Cm. 3420 (October 1996) para 36(1).
[210] P. Hillyard and J. Percy-Smith, *The Coercive State: The Decline of Democracy in Britain* (Fontana, 1988).

because of their turbans, after 9/11.[211]

Statistics collected and published by the Home Office[212] indicate that since its implementation s.44 was consistently deployed disproportionately and excessively against individuals belonging to ethnic minority groups, as compared to white individuals.[213] Between 2001 and 2003 the proportion of white individuals subject to suspicion-less stopping and searching fell from 72 per cent to 63 per cent.[214] Figures published in 2004 showed that Asian and black people were four and five times more likely, respectively, to be stopped and searched than white people.[215] The disproportionate targeting of Asian people increased further following 7/7, demonstrating the ease with which the pre-existing statutory provisions enabled the targeting of minorities.[216] More recently, the disproportionate use of the powers continued, so that in the data year covering 2008/9, of 185,086 individuals stopped and searched by the MPS under s.44, 58 per cent were self-described as white; around 16 per cent as Asian and around 11 per cent black.[217] In 2010, a report by human rights group Liberty concluded that black and Asian individuals were between five and seven times more likely to be stopped under s.44 than their white counterparts.[218] That this increase was at least partially attributable to broad-brush, race-based profiling was apparently accepted by a member of the Metropolitan Police who stated that 'intelligence cannot lead to a 1,100% increase; this is just random stop and search'.[219] When the 'random' searches are consistently focused on Asian and Arabic individuals in circumstances where such bias is known it must be questioned how truly random this result is or whether it is a manifestation of racially biased policing.

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[211] See N.S. Gohill and D.S. Sidhu, 'The Sikh Turban: Post 9/11 Challenges to this Article of Faith' (2007-8) 9 *Rutgers Journal of Law and Religion* 1.
[212] PACE, s.1.
[213] See Home Office Statistical Bulletin, *Statistics on Terrorism Arrests and Outcomes Great Britain, 11 September 2001 to 31 March 2008* (13 May 2009) and Home Office Statistical Bulletin, *Operation of Police Powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches, Great Britain 2008/09* (26 November 2009).
[214] Home Office, *Statistics on Race and the Criminal Justice System – 2003* (2004), tables 4.9 and 4.10.
[215] *ibid.*
[216] According to MPS figures, e.g., in 2005 2,405 Asian and black people were stopped while walking, compared with 296 in the previous year, see MPS, *Stop and Search Equality Impact Assessment* (October 2008).
[217] Home Office, *Operation of Police Powers under the Terrorism Act 2000, 2008-9* (2009) table 2.2.
[218] Liberty, *From "War" to Law. Liberty's Response to the Coalition Government's Review of Counter-terrorism and Security Powers* (2010) 52.
[219] Peter Herbert, quoted in V. Dodd, 'Surge in Stop And Search of Asian People after July 7' *The Guardian* (24 December 2005) 7.

In the event that police use of s.44 had resulted in the discovery of significant numbers of terrorists or the uncovering of planned terrorist attacks then there may be grounds for arguing that, despite their racially uneven use the powers were a justifiable response to the need to safeguard public security.[220] However this argument is negated by the particularly low 'hit rate'[221] arising from use of the powers[222] as compared to the ordinary hit rate arising from police stops and searches.[223] The persistently low arrest and conviction rates arising from use of s.44 are exemplified by the fact that in the year 2004/5, with only five individuals, all of whom were white, were arrested, a hit rate of 1.2 per cent.[224] Further, out of over 100,000 s.44 stops and searches conducted in 2008/9 there were no terrorism-related convictions.[225] Indeed, in the period between April 2007 and April 2009 there were no successful prosecutions for terrorism-related offences arising from the use of s.44, despite almost 450,000 such stops and searches having been carried out.[226] As well as failing to secure arrests or convictions the Independent Reviewer of counter-terrorism powers, in 2010 Lord Carlile, expressed his doubts that anything more than 'morsels of intelligence', at best, had been obtained from use of the suspicion-less powers.[227] These are arguments against the efficacy of the powers themselves but also serve to counter any possible suggestion that racial disproportionality in the deployment of the powers could be justified by their use in safeguarding national security.

Faced with growing evidence of the racial effect of s.44 the Government specifically sought to separate statistical disproportionality from consciously or unconsciously discriminatory police behaviour.[228] On top of the purely statistical evidence of the racial

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[220] Of course, within UK law there is no possibility of justification for directly discriminatory treatment. Therefore, this justification would not be achieved in terms of UK discrimination law. However, the powers may have been justified in the sense that they maintained a balance between rights and national security.

[221] 'Hit rate' means the proportion of stop and searches that result in a successful criminal action.

[222] See B. Bowling and C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *MLR* 936, 958.

[223] Between 2002/3, e.g., the 'hit rate' under suspicion-based stop and search was 13 per cent, whereas for stops and searches carried out under s.44 it was only 1.7 per cent, A. Kundani, 'Analysis: the war on terror leads to racial profiling' *IRR News* (7 July 2004).

[224] Home Office, *Section 95 Statistics on Race and the Criminal Justice System – 2004* (2005).

[225] T. Whitehead, 'No Arrests in over 100,000 Stops and Searches' *The Telegraph* (28 October 2010) http://www.telegraph.co.uk/news/uknews/law-and-order/8093163/No-terror-arrests-in-100000-stop-and-searches.html, accessed 17.03.2011.

[226] Human Rights Watch, *Without Suspicion. Stop and Search under Terrorism Act 2000* (July 2010).

[227] Lord Carlile, 'Terrorism, Pragmatism, Populism and Libertarianism – The Inaugural John Creaney Memorial Lecture', (3 March 2010), http://www.policyexchange.org.uk/assets/Carlile_Transcript.pdf, accessed 03.05.2011.

[228] Home Office, *Stop and Search Action Team, Stop and Search Manual* (2005) 32. See also MPS, *Stop*

effect of the powers, however, these claims are also made out through evidence from a number of different sources, including: governmental comments; [229] individual testimonies; [230] official reviews; [231] rights groups' surveys; [232] police reports; [233] and anecdotal evidence.[234] The empirical basis for the perception of disproportionality is also supported by the findings of a House of Commons Home Affairs Committee.[235] Police sources themselves also increasingly voiced concerns regarding the disproportionate use of s.44. [236] A report by the MPA, for example, acknowledged that such uneven deployment of the powers could 'only be fully understood as perhaps the most recent manifestation of this long legacy and historical relationship between the police and Black people', and described it as a concerning reflection of police culture and practice. [237] Further, in 2006, the Deputy Assistant Commissioner of the Metropolitan Police, Peter Clarke, was quoted as saying that the s.44 powers must be 'much more tightly focused' to

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and Search Equality Impact Assessment (October 2008) which states that 'disproportionality is not the same thing as discrimination, but it may be an indicator'.

[229] See Hazel Blears, House of Commons Home Affairs Committee, *Sixth Report of Session 2004-05: Terrorism and Community Relations*, HC 165-I, 46 (2005). See also D. Moeckli, 'Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v Police' (2007) 70(4) *MLR* 661.

[230] See, e.g., B. Spalek, S. El-Awa, and L.Z. McDonald, *Engagement and Partnership Work in a Counterterrorism context* (Birmingham, 2009); D. Casciani, 'Muslim anger over stop and search' BBC News, 2 July 2004, www.news.bbc.co.uk/l/hi/uk/3860505.stm, accessed 05.04.2011 and the testimonies cited by L.Z. McDonald, *Engagement and Partnership Work in a Counterterrorism Context* (University of Birmingham, 2009). See also Home Office, *From Neighbourhood to the National: Policing Our Communities Together* (July 2008) Cm 7448.

[231] See, e.g., JCHR, *Review of Counter-terrorism Powers, 18th Rep of Sess 2003-04*, HL 158/HC 713, (2004) para 47 which states that 'we remain concerned about the discriminatory impact of the measures which have been taken to counter terrorism'. See also the European Commission against Racism and Intolerance, *Third Report on the United Kingdom* (December 2004) which states that 'Muslims have, since then [9/11] suffered in particular from their association in public perception with terrorism', para 66 and recommends that action is taken to 'address the disproportionate number of ethnic minorities who are subject to "stop and searches"', para 83; and Equality and Human Rights Commission, *Stop and Think. A Critical Review of the Use of Stop and Search Powers in England and Wales* (ECHR, 2010).

[232] See, e.g., Liberty, *Liberty's Response to the Home Office Consultation on the Draft Manual on Stop and Search* (March 2005); Liberty, *Liberty's Response to the Pace Codes of Practice (April 2004); Liberty's Committee Stage Briefing on the Crime and Security Bill in the House of Commons Stop and Search Amendments* (January 2010) 11-12; and Justice, *Home Office Review of Counter-terrorism and Security Powers*, Written Submission of Justice (August 2010) 16.

[233] See, e.g., MPS, *Scrutiny on MPS Stop and Search Practice* (May, 2004), para 143 which concluded that the use of stop and search in London had a disproportionate impact on Black and minority ethnic people.

[234] See MPA, *Counter-terrorism: The London Debate* (February 2007) 47; Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (June, 2009) para 140; and BBC News, 'Terror Watchdog in Search Warning' (17 June 2009), http://news.bbc.co.uk/1/hi/uk/8105093.stm, accessed 06.05.2011.

[235] House of Commons, Home Affairs Committee, *Terrorism and Community Relations*, at 153.

[236] See MPA, 'Stop and Search', www.mpa.gov.uk/scrutinies/stop-search/, accessed 25.08.2010 and MPA, *Counter-terrorism: The London Debate* (2007). See also *Home Office, Stop and Search Interim Guidance* (Home Office, 2005) which states that 'ministers believe that disproportionality is too high', para 1.2 and Lord Carlile, *Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1of the Terrorism Act 2006* (July 2010) para 177.

[237] MPA, *Report of the MPA Scrutiny on MPS Stop and Search Practice* (2004) 8-9.

remove their discriminatory and alienating effect.[238] It is on the basis of a range of statistical and other evidence that this thesis contends that s.44 was used in a racially uneven and discriminatory manner.

2.2.2 Racial Effect of the US Records Searches and Surveillance

The covert nature of the surveillance powers within ss.214-15 of the Patriot Act means that direct statistical information about their use is not readily available.[239] In addition, the US Government has been guarded in releasing any such information,[240] claiming that doing so would compromise national security,[241] although such claims have been criticised.[242] The information that has been released is limited and even directly contradictory.[243] The limited statistical evidence regarding use of ss.214-15 does not, however, mean that the powers are any less rights-infringing than overtly deployed powers, such as s.44. In fact, covert methods have long been recognised as being more likely to intrude on political and religious activities, than powers used in full view of the

[238] Quoted in A. Travis, 'Use of 'Stop and Search' Terror Law 'Alienating Muslims', Warns Yard' *The Guardian*, (17 February 2006) at 4.

[239] There is some limited information indicating that the powers were used, without giving any indication of how the powers were used. E.g., in 2008, published figures demonstrate that there were 2,082 applications for electronic and physical searches sunder the Patriot Act, of which 1 was denied. Further, in the same year there were 13 applications for use of s.215, all of which were approved, and in 2007 there were 17 application and approvals. See US Department of Justice, *Report pursuant to Sections 1807 and 1862 of the FISA and s. 118 Patriot Act* (14 May 2009) 1-2.

[240] See US Department of Justice, *Report from the Field: The USA Patriot Act at Work* (July 2004) stating that use of s.214 remains 'classified', but it has 'provided intelligence and law enforcement officials with the tools that they need to fight terrorism', 26 and 29. This tendency was particularly clear in the case of *Johnston v Tampa Sports Authority* in which the court recognised that there might have been additional information which could have justified the searches, but that its sensitive nature means that it was not presented at trial, 442 F. Supp 2d 1257, 1267 nn14-15 (M.D. Fla 2006), rev'd on other grounds, 490 F. 3d 820 (11th Cir 2007).

[241] A. Goldstein and D. Eggen, 'US to Stop Issuing Detention Tallies' *Washington Post* (9 November 2001).

[242] See, e.g., S. Setty, 'No more Secret laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win' [2009] 57 *Kansas Law Review* 579.

[243] This is particularly the case in relation to s.215, which the Justice Department originally denied had been used at all, before recanting this disclosure in the face of contradictory evidence and admitting that a number of applications and approvals had been made. See Sensenbrenner Statement on Justice Department's Disclosure of Number of Times Library and Business Records have been Sought under S.215 of the USA-PATRIOT Act (18 September 2003) and E. Lichtblau, 'Government says it has yet to Use New Power to Check Library Records' *NY Times* (19 September 2003) at A16 which stated that the power had not been used. However, conflicting evidence demonstrates that the power had been used prior to this disclosure, from a survey of libraries conducted by the University of Illinois, which showed that shortly after 9/11 4.1 per cent of libraries surveyed had been asked for patron records and this had risen to 10.7 per cent one year later. See Library Research Center, University of Illinois at Urbara, *Public Libraries Responses to September 11, 2001* (2001) at 6 and Library Research Center, University of Illinois at Urbara, *Public Libraries Responses to Events of 9/11/2001: One Year Later* (2002).

public.[244] However, the inherent difficulty in employing statistical measures to establish the racial effect is that the powers are covertly deployed and published information regarding the extent and nature of their use remains limited. Individual case studies and testimonies offer an insight into specific instances where the powers have been apparently deployed based on nothing more than an individual's ethnic or religious affiliation. This has included reports concerning the surveillance of Muslim communities, organisations and charities.[245]

The use of electronic surveillance to monitor Muslims, particularly those from minority racial groups, has included checking telephone calls, emails and internet use, credit card charges and travel routes.[246] Such investigations have extended to places of work, homes and universities as well as friends and family of the targeted individual.[247] This discriminatory focus is apparently sanctioned by FBI guidelines which, despite undergoing a number of revisions in the post-9/11 period, have consistently allowed federal agents to use an individual's race and religion as relevant considerations when deciding where to commence surveillance.[248] The Patriot Act provides unequal *de facto* protection against the misuse of powers that exist under the Act, particularly in relation to the enhanced surveillance clauses.[249] Although it is clear that police counter-terror racial profiling extends beyond the powers in ss.214-15 of the Patriot Act,[250] evidence of the disproportionate impact of these powers on people of Asian, Arabic and Muslim origins provide a case study through which to analyse the racial effect of the powers.

Academic comment in the US has vociferously condemned a range of counter-terror surveillance powers for their race-targeting nature.[251] The Lawyers Commission for

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[244] J.E. Ross, 'The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany' (2007) 55 *American Journal of Comparative Law* 493, 533, 566-68.
[245] ACLU, *Race and Ethnicity in America: Turning a Blind Eye to Injustice* (2007); D. Lyon (ed.), *Surveillance as Social Sorting: Risks and Automated Discrimination* (Routledge, 2002).
[246] P. Shenon and D. Johnston, 'Threats and Reponses: The Investigation; seeking terrorist plots. FBI is tracking hundreds of Muslims' *NY Times* (6 October 2002); and L. Bergman, 'Post 9/11 Tips to FBI Often Lends to Dead Ends: NSA Forwarded Flood of Eavesdropping Data' *San Diego Union Tribune* (17 January 2006).
[247] J. Turner, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"* (ACLU, 2009) 14.
[248] Most recently permitted by Office of the Attorney General, US Department of Justice, *The Attorney General's Guidelines for Domestic FBI Operations* (2008).
[249] The Institute for Social Policy and Understanding, *The USA Patriot Act Impact on the Arab and Muslim American Community. Analysis and Recommendations* (2004) 7 and 18-25.
[250] P. Shenon, 'Report on US Antiterrorism Law Alleges Violations of Civil Rights' *NY Times* (21 July 2003).
[251] See, e.g., E.C. Hagopain, *Civil Rights in Peril: The Targeting of Arabs and Muslims* (Haymarket Books,

Human Rights, for example, has claimed that through use of the powers 'the US has lost something essential and defining: some of the most cherished principles on which the country is founded have been eroded or disregarded'.[252] Other human rights groups, such as ACLU, Arab American Anti-Discrimination Committee, and the Council on Islamic Relations, have campaigned specifically against the discriminatory nature of ss.214-15.[253] The potential for the misuse of policing powers to exacerbate, as opposed to lessen, the threat from terrorism has also been recognised. The FBI, for example, has noted, with concern, that 'distorted and inflammatory linkages between Islam and terrorism can convince Muslims that the West is their enemy'.[254] Such official acknowledgement of the detrimental effect of the surveillance and records search powers echoes a more widespread public sentiment condemning the racial effect of the powers.[255] A further suggestion of the Patriot Act's racially uneven and ineffective nature is that a number of states, cities and communities have adopted ordinances and resolutions expressing their opposition to the Act and its rights-infringing surveillance powers.[256] Even some individuals responsible for implementing the powers have subsequently criticised their ineffective and racially targeted nature.[257]

The racial effect of the Patriot Act's vague and broadly-drafted counter-terrorism power is also evident in the enforcement of counter-terrorism laws against American Muslim charities. These powers are, of course, different in their nature and effect to the surveillance and records searches powers, but their racial effect demonstrates the implications of comparably broadly defined powers to those granted in ss.214-215.[258] A report by the ACLU quotes a Department of Treasury official suggesting that an

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2004).

[252] Lawyers Committee for Human Rights, *A Year of Loss: Re-examining Civil Liberties Since September 11* (September 2002).

[253] ACLU, 'Unpatriotic Acts. The FBI's power to rifle through your records and personal belongings, without telling you' (July 2003) 17-18.

[254] A. Smith, 'Words Make Worlds. Terrorism and Language' (December 2007) 76(12) *FBI Law Enforcement Bulletin* 12, 13.

[255] See, e.g., ACLU, *Race and Ethnicity in America: Turning a Blind Eye to Injustice*; ACLU, *Blocking Faith, Freezing Charity. Chilling Muslim Charitable Giving in the "War on Terrorism"* (2009); Amnesty International, *Threat and Humiliation. Racial Profiling, Domestic Security and Human Rights in the United States* (October 2004) 2-20; ACLU, *Sanctioned Bias: Racial Profiling Since 9/11* (February 2004); and ACLU, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society* (January 2003).

[256] States include Alaska, Vermont and Hawaii. See ACLU, *Independence Day 2003. Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Power 9/11 Era* (3 July 2003) 7.

[257] J. McGee, 'Ex-FBI Officials Criticize Tactics on Terrorism' *Washington Post* (28 November 2001) and ACLU, *Reclaiming Patriotism. A Call to Reconsider the Patriot Act* (March 2009) 5.

[258] ACLU, *Blocking Faith, Freezing Charity. Chilling Muslim Charitable Giving in the "War on Terrorism"* (2009) 59-67.

unquestioned, commonsense link could be drawn between race and terrorism, saying that: 'We are not going into Irish bars looking for people who support the IRA…There is a greater proportion of Muslims engaged in ethnic terror than other groups. Everybody knows [targeting Muslim charities is] not baseless'.[259] Individual case studies also offer specific instances of where counter-terrorism powers appear to have been deployed on nothing more than an individual's ethnic or religious affiliation.[260] Some such examples are set out in a 2003 report by the Office of the Inspector General which stated that out of 762 cases reviewed many of the tips and leads on which the police acted were based on ethnic profiling, by both the police and the public. In all of the 762 cases reviewed the individuals came from countries in the Middle East or Pakistan, and none were ever charged with participating in, or lending support to, terrorist activities. The report found that individuals were on occasion arrested merely on the basis of their presence in a particular vicinity, coupled with their own ethnic background.[261] Further case studies showing evidence of racially uneven policing have been collected and published by the American-Arab Antidiscrimination Committee, Amnesty International and the American Civil Liberties Union.[262]

One example of police use of ethnicity-based profiling is the treatment of Tariq Ramadan. Ramadan, a Swiss native and Muslim scholar, had his US visa revoked in August 2004 on the basis that the Department of Homeland Security was permitted to do so, wherever the Government believes an individual to 'endorse or espouse terrorist activity'.[263] The Government had no grounds for believing Ramadan had either espoused or endorsed terrorist activity, except that he was a Muslim of Egyptian descent. A further case study is that of Sami Al-Hussayen, a Saudi Arabian born student who had been studying in the US since 1994. Al-Hussayen was charged with running a website which supported terrorism.[264] Again the government had no grounds for targeting Al-Hussayen – except his racial and religious background, although he was later deported by immigration

[259] *ibid* 60.
[260] See, e.g., ACLU, 'House to Hear Testimony on Racial Profiling Today' (17 June 2010).
[261] Report of Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) 16-17.
[262] See, e.g., Amnesty International, *Threat and Humiliation. Racial Profiling, Domestic Security and Human Rights in the United States* (October 2004) 2-20; ACLU, *Sanctioned Bias: Racial Profiling Since 9/11* (February 2004); and ACLU, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society* (January 2003).
[263] ACLU, *Reclaiming Patriotism. A Call to Reconsider the Patriot Act* (March 2009).
[264] *United States of America v Sami Omar Al-Hussayen,* US District of Idaho (March 2004).

authorities on grounds that he had breached the terms of his student visa by working. Whilst there is no suggestion that the publicised case studies are entirely representative of the way that the powers have been used neither are they unique, and as such do suggest that the counter-terrorism powers have been deployed on the basis of racial profiles. Alongside anecdotal evidence[265] and further individual case studies[266] the media's support of profiling[267] also gives a strong indication of popular support for racially deployed counter-terrorism surveillance powers.[268] Although the covert nature of the surveillance and record search powers make it difficult to establish the full extent of their use or race-based targeting, therefore, a range of evidence suggests that such targeting was a part of their deployment by the police in the US.

2.2.3 Criticisms of the Empirical Evidence of Racial Effect

Having set out the evidence pertaining to the racial effect of counter-terrorism stop, search and surveillance, it is necessary to address the critics of such claims.

In the UK the statistical evidence of the racial effect of stop and search is disputed on the basis of how disproportionality is assessed and the limitations of compiling evidence of racial effect from police data.[269] In particular, studies of stop and search powers, not specific to s.44, have criticised the assessment of disproportionality by comparing numbers of stops and searches with the ethnic make-up of the resident population, based on the most recent census returns.[270] This measure has been described as 'profoundly

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[265] D.A. Harris, *Profiles in Injustice – Why Racial Profiling Cannot Work* (The New Press, 2002); Amnesty International, *Threat and Humiliation – Racial Profiling, Domestic Security and Human Rights in the United States* (New York, 2004); and ACLU, 'Freedom under Fire: Dissent in Post-9/11 America' (2003); A. Beeson and J. Jaffer, 'ACLU: Unpatriotic Acts. The FBI's Power to Rifle through your Records and Personal Belongings without Telling You' (2003).

[266] See A. Marvasti and K.D. McKinney, *Middle Eastern Lives in America* (Rowman and Littlefield, 2004) which includes interview with Middle-Eastern Americans carried out post 9/11 and informal sources of empirical data such as surveying magazine articles demonstrating the racial configuration of the 'war on terror and the racial effect of the surveillance powers.

[267] Supporting the use of racial profiling see, e.g., P. Sperry, 'It's the Age of Terrorism: What Would You Do? *NY Times* (28 July 2005) at A25; S. Taylor, Jr., 'Politically Incorrect Profiling: A Matter of Life or Death' (2001) 33 *National Journal* 3406; and C. Page, 'Only Smart Profiling Makes Sense' *Balt. Sun* (23 August 2005) at 11A.

[268] D. Lyon, *Surveillance after September 11* (Polity Press, 2005) 145-46.

[269] P.A.J. Waddington, K. Stenson, D. Don, 'In Proportion. Race and Police Stop and Search' (2004) 44 *British Journal of Criminology* 889; and M. Fitzgerald and R. Sibbitt, *Ethnic Monitoring in the Police Forces: A Beginning* (Home Office, 1997).

[270] See, e.g., pre-s.44 studies of disproportionality such as C.F. Willis, *The Use, Effectiveness and Impact of Police Stop and Search Powers*, Home Office Research and Planning Unit Paper 15 (HMSO, 1983); D.J.

misleading' as it is not adjusted to take into account the growing ethnic population structures.[271] In addition, attempts to assess the ethnic make-up of the people actually 'available' to stop and search, have found that this can differ significantly from that of the resident population, against which disproportionality is assessed.[272] In particular, because s.44 was predominantly used within London, critics of the disproportionality thesis, such as Sveinsson, have argued that it should be judged by comparing the racial breakdown of individuals stopped and searched with the specific ethnic composition of the capital city. Sveinsson's revised figures do result in a reduction of the disproportionality, but across all stop and search powers Asians remain 1.3 times more likely than white individuals to be stopped and searched (from five and a half time more likely under the national census figures).[273] Aside from the specific criticisms, the data relating to stop and search has been described as 'simplistic' and as unable to give any useful indication of whether or not use of the powers was discriminatory.[274]

Claims of disproportionality have also been opposed based on suggestions that police officers are more likely to record a minority individual's ethnic origin than the ethnic origin of a white individual,[275] as a result of police sensitivity to issues surrounding disproportionality.[276] Conversely, the police have been accused of stopping white individuals as a means of balancing statistical racial disproportionality,[277] a practice that was confirmed by a member of the BTP, in 2010.[278] Therefore, while comparisons between the number of recorded stops and searches and the numbers in the resident population remain important in describing the different experiences of stop and searches

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Smith and J. Gray, *Police and People in London* (Gower/Policy Studies Institute, 1985); M.V.A. Miller and J. Miller, *Profiling Populations Available for Stops and Searches*, Police Research Series Paper 131 (Home Office, 2000).

[271] J. Miller, 'Stop and Search in England. A Reformed Tactic or Business as Usual?' (2010) 50 *Brit. J. of Criminology* 954, 955.

[272] See J. Miller, P. Quinton, and N. Bland, *Police Stops, Decision-making and Practice* (Police Research Series Paper 130, HMSO 2000). See also MPS, *Stop and Search Equality Impact Assessment* (October 2008) and the NPIA, *Practice Advice on Stop and Search in Relation to Terrorism* (2008) para 2.3.1.

[273] K.P. Sveinsson (ed.), *Ethnic Profiling. The Use of 'Race' in Law Enforcement* (Runnymede, 2010).

[274] Comments of the Police Federation in Home Affairs Committee, *Terrorism and Community Relations*, HC165-I, para 149; and HC165-II, Ev.85.

[275] M. Shiner, *National Implementation of the Recording of Police Stops* (Home Office, 2006).

[276] See M. Fitzgerald and R. Sibbit, *Ethnic Monitoring in Police Forces: a Beginning*, Home Office Research Study 173 (Home Office Research and Statistics Directorate. 1997).

[277] R. Ford, 'Police Stop and Search Innocent People to Balance Race Figures, Terror Watchdog Says' *The Times* (18 June 2009).

[278] See Human Rights Watch interview with Philip Trendall, Superintendent of the Counter-terrorism Support Unit and Robert Noddings, Chief Inspector of the British Transport Police, London, 10 February 2010, cited in Human Rights Watch, *Without Suspicion* (2010) 45.

for different ethnic communities, they may provide a poor overall indication of the existence of any police bias in the deployment of the powers.[279] By contrast, despite the limitations of the statistical evidence, other studies have maintained that the pattern of use of stop and search, and in particular suspicion-less stop and search, bears out its racial effect.[280]

In the US the lack of published data regarding use of the surveillance powers has led to criticism of arguments regarding their racial effect.[281] Further, what published figures there are suggest that their deployment is so numerically insignificant that any effect, even if present, is minimal.[282] This in turn has led to claims that any such effects are justifiable in light of the severity of the terrorist threat.[283] In addition, some sources concede that the powers have been deployed in a racially uneven manner, but support use of profiling as the best means of countering the terrorist threat.[284]

The data in both the US and UK are inevitably imperfect,[285] and in themselves reveal little of either the depth of feeling around the stop, search and surveillance powers,[286] or 'the significant and multi-layered emotional, psychological and other impacts on those stopped and searched'.[287] However, they remain an important indication of racially uneven policing. For example, arguments which cite the ethnic composition of the on-street population as removing any apparent disproportionality ignore the recurrent trend

[279] See, e.g., the evidence of the Association of Chief Police Officers which rejected the claims of the MPA that the use of s.44 had a disproportionate impact on minority ethnic groups in Home Affairs Committee, *Terrorism and Community Relations*, HC161-II (6 April 2005), para 144.
[280] B. Bowling and C. Philips, *Racism, Crime and Justice* (Pearson Education Limited, 2002).
[281] R. O'Harrow, *No Place to Hide. Behind the Scenes Our Emerging Surveillance Society* (Free Press, 2005).
[282] P.J. Spiro, 'Explaining the End of Plenary Power' (2001-02) 16 *Geo. Immigr. L.J.* 339, 363. See also B. Haden, 'Arab-Americans are Finding New Tolerance Amid the Turmoil' *NY Times* (22 September 2001) at B1.
[283] See H. Philips, 'Libraries and National Security Laws: an Examination of the USA Patriot Act' (2005) 25 *Progressive Librarian* 28, 34-35.
[284] See, e.g., E. Kim, 'The New York City Police Department's Random Bag Search Policy: Withstanding Fourth Amendment Scrutiny is Only the First Step in Combating Terrorism' (2006-7) 37 *Seton Hall Law Review* 561.
[285] Although, the critics of the disproportionality thesis themselves have been challenged, see, e.g., Home Office, *Stop and Search Action Team Strategy, 2004/05* (2005) 9 which states that the different between street and populations and residential populations 'certainly cannot explain the current level of disproportionality, nor the marked regional differences' in disproportionality apparent in use of s.44.
[286] L. Lustgarten, 'The Future of Stop and Search' (2002) *CLR* 603, 604.
[287] B. Spalek, 'Counter-terrorism Policing and Section 44 Profiling – Ethnographies of Anger and Distrust' in K.P. Sveinsson (ed.), *Ethnic Profiling. The Use of Race in UK Law Enforcement* (Runnymede, 2010) 27. See also J. Garland, B. Spalek and N. Chakrabourti, 'Hearing Lost Voices: Issues in researching "hidden minority ethnic communities' (2006) *British Journal of Criminology* 423, 425.

by which these are the very areas in which stop and search use is concentrated, without this necessarily corresponding with local crime rates or a geographically specific high threat of terrorist attack.[288] Once such a factor is accepted, even if police officers acted entirely neutrally with regard to race their actions would still have a disproportionate racial effect,[289] arising from the operational decisions which led to the use of stop and search in a particular location.[290] Decisions which involve focusing police resources in public spaces as opposed to less visible offending, which is predominantly committed by more affluent groups, have also been linked to a particular, politically informed focus on reducing crime in a way which weighs most heavily on racial minority groups.[291]

Instead of disproving the disproportionality thesis, therefore, arguments against the racially uneven use of police counter-terrorism powers may simply indicate that the origins of the racial effect of policing are elsewhere than simply residing in conscious officer behaviour.[292] A further factor of the stop and search statistics which casts doubt on the validity of the 'available population' thesis is that there is less marked disproportionality in stop and account figures based on reasonable suspicion of criminal behaviour, as compared to suspicion-less stop and search.[293] This discrepancy supports the idea that disproportionality is not simply about who is available but also reliant upon operational decisions as to how to deploy stop and search powers. Some critiques of statistical arguments of racial disproportionality offer some relevant points, regarding their limitations. However, this thesis maintains that the more persuasive argument is that when government actions and statutory powers adhere to endemic discriminatory assumptions, which are difficult to explain on race-neutral grounds, [294] racialized

[288] See S. Hallsworth and M. McGuire, *Assessing the Impact of the City of London Police Exercise of Stop and Search. Report for City of London Police* (City of London Police, 2004); M.V.A. Miller and J. Miller, *Profiling Populations Available for Stops and Searches*, Police Research Series Paper 131 (HMSO, 2000); and M. Fitzgerald and R. Sibbitt, *Ethnic Monitoring in Police Forces: A Beginning* (Home Office, Research and Statistics Directorate, 1997).
[289] See A. Bolton and P. Wiles, 'Environmental Criminology' in M. Maguire et al (eds.), *The Oxford Handbook of Criminology* (Clarendon Press, 1997) 305-59.
[290] Home Office, *Stop and Search Manual* (HMSO, 2004) 33.
[291] K. Stenson, 'Making Sense of Crime Control' in K. Stenson and D. Cowell (eds.) *The Politics of Crime Control* (Sage, 1991) 1-32.
[292] See Equality and Human Rights Commission, *Stop and Think. A Critical Review of the Use of Stop and Search Powers in England and Wales* (ECHR, 2010) which states that arguments concerning street availability do not hold up to scrutiny because they are effectively self-fulfilling in that street availability is influenced by police decisions regarding when and where to carry out stops and searches, and these decisions heavily influence the people available to stop, 52.
[293] See A. Saunders and R. Young, *Criminal Justice* (OUP, 2006); and J. Bennett, *Police and Racism: What Has been Achieved 10 Years after the Stephen Lawrence Inquiry Report* (ECHR, 2009).
[294] B. Bowling and C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police

reasons/motives must be afforded serious consideration as a plausible explanation behind their use.[295]

Irrespective of whether or not one accepts the evidence of a statistically quantifiable racial effect, however, the powers nevertheless have had a detrimental effect on minority communities.[296] This is because their use created, or at least exacerbated, a clear perception amongst minorities of a racial effect.[297] In the US, for example, in a poll recorded that after 9/11, 71.7 per cent of respondents believed that the US Government was monitoring the activities of Muslims in the United States, as compared to only 4.2 per cent who believed that such monitoring was not taking place.[298] Further research indicated that a majority of US Muslims believe counter-terrorism policies to single-out Muslims, a sentiment that was shared, albeit to a lesser extent, by a large minority of the general population.[299] This perception, whether or not it is accompanied by *actual* disproportionality, has had the *effect* of ostracising and alienating certain minority communities from majority society in general and law enforcement powers in particular.[300] The practical effects of the real or perceived racially discriminatory use of stop, search and surveillance has affected how Muslims and racial minorities have

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Stop and Search' (2007) 70(6) *MLR* 936.

[295] See T.W. Joo, 'Presumed Disloyal: Executive Power, Judicial Deference and the Construction Race before and after September 11' (2002-3) 34 *Columbia Human Rts. L. Rev* 1, 4.

[296] See, e.g., Amnesty International, *Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States*, www.amnestyusa.org/racial_profiling/report/index.html, accessed 12.01.2011.

[297] See, e.g., Home Affairs Committee, *Terrorism and Community Relations*, HC 161-I (6 April 2005) para 154; MPS, *Stop and Search Equality Impact Assessment* (October 2008); B. Bowling and C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *The Modern Law Review* 936; B. Spalek, *Counter-terrorism Policing and S.44 Profiling – Ethnographies of Anger and Distrust* (Runnymede, 2010) 27; R. Weizer and S.A. Tuch, 'Racially Biased Policing: Determinants of Citizen Perceptions' (2005) 83(3) *Social Forces* 1009; and L. Lustgarten, 'The Future of Stop and Search' (2002) *Criminal Law Rev*. 603.

[298] D.S. Sidhu, 'The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans' (2007) 7 *U. Md. L.J. Race, Religion, Gender and Class* 375, 390.

[299] See Research Center, *Muslim Americans. Middle Class and Mostly Mainstream*, (22 May 2007) 36.

[300] E.g., Massoud Shadjareh, chair of the Islamic Human Rights Commission described the effect of the powers and the comments of Hazel Blears as 'demonising and alienating our community. It is a legitimisation for a backlash and for racists to have an onslaught on our community', *The Guardian* (2 March 2005). See also Sadiq Khan, Hansard HC Debs (2005-06) 438, c.398. The 'alienation factor' was also acknowledged by Sir John Quinton, but justified on the basis of the deterrent effect of use of the powers, see Home Affairs Committee, Minutes of Evidence, Oral Evidence taken before the Home Affairs Committee on 8 July 2004. See Ontario Human Rights Commission, Paying the Price: The Human Cost of Racial Profiling (2003), http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN/pdf, accessed 05.06.2011; and JCHR, *Counter-terror Policy and Human Rights: Prosecution and Pre-Charge Detention*, 24th Report of Session 2005-06 (HL240/HC1576)(1 August 2006), esp. para 150; and D.A. Harris, 'Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities after 9/11' (2010) 34 *NYU Rev. L. and Soc. Change* 123.

behaved in their daily lives – from their attendance at mosque; willingness to take flights; and their use of communications media.[301] These detrimental effects include untold damage to community confidence in the police and law enforcement effectiveness in countering terrorism.[302]

2.3 A Critical Race Theory approach to the Racial Effect

This thesis does not argue that the racial effect of the counter-terrorism powers was the result of conscious prejudice on the part of the police, or any individual officer. Instead, this thesis approach the statistical evidence of racial disproportionality from the perspective advanced within Critical Race Theory ("CRT").

The CRT movement encompasses a broad range of doctrinal and jurisprudential views regarding racial inequality.[303] Fundamental amongst the various permutations of CRT is the principle that race is a social construct.[304] This claim has effectively become 'a mantra of Critical Race Theory'.[305] Although the CRT movement has yet to have a significant impact in the UK[306] the race-crit claim that race is socially constructed is a strong theme in both US and UK academic discourse, especially in the field of sociology.[307] These sociological and critical race arguments correspond with Du Bois' focus on the importance of race as a socio-historical concept.[308] CRT claims that the construction of race and race-based hierarchies incorporate socially and historically

[301] See, e.g., Plaintiffs' response to Defendants' Motion to Dismiss; Muslim Community Association of Ann Arbor v Ashcroft (ED Mich. 2003)(No.03-729B) at 8 reporting declines in mosque attendance and religiously mandated financial contributions.
[302] MPA, *Counter-terrorism: The London Debate* (February 2007) 3.
[303] A.V. Alifieri, 'Black and White' (1997) 85 *California Law Rev* 1647.
[304] I.F. Haney Lopez, 'The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice' (1994) 29 *Harvard Civil Rights Civil Liberties Law Rev*. See also R. Brubake and M. Lorman et al who adopt a CRT approach by arguing that race and ethnicity are 'not things in the world, but perspectives on the world – not ontological but epistemological phenomena', 'Ethnicity as Cognition' (2004) 33 *Theory and Society* 31, 45.
[305] R.S. Chang, 'Critiquing "Race" and its Uses: Critical Race Theory's Uncompleted Argument' in F. Valdes, J. McCristal Culp, A.P. Harris (eds.), *Crossroads and a New Critical Race Theory* (Temple University Press, 2002) 88.
[306] M. Moschel, 'Color Blindness or Total Blindness – The Absence of Critical Race Theory in Europe' (2007) 9(1) *Rutgers Race and the Law Review* 57. CRT is, however, starting to have a presence in UK scholarship, see, M. Cohen, 'Critical Race Theory Comes to the UK: A Marxist Approach' (2009) 9 *Ethnicities* 246.
[307] K. Smith, 'Some Critical Observations on the Use of 'Ethnicity'' in Modood et al, 'Ethnic Minorities in Britain' (2002) 36(2) *Sociology* 399-417.
[308] W.E.B. Du Bois, 'The Conservation of Race' in P. Foner (ed.), *W.E.B Du Bois Speaks: Speeches and Addresses 1890-1919* (Pathfinder Press, 1988)75-76. See also, W.E.B. Du Bois, (H.L. Gates, Jr. and T.H. Oliver (eds.)), *The Souls of Black Folk* (Harvard University Press, 1993).

contingent ideas of racial dominance and subordination,[309] so that while 'race is only skin deep…white supremacy runs to the bone' and pervades societal organisation.[310] Race-based social hierarchies conceal the privileges enjoyed by majority groups within policies and laws,[311] through claims of objectivity, neutrality and merit.[312] Pursuant to this, CRT maintains that the strength of social construction is in the treatment of 'the external world as if it determines our ideas, ascribing false concreteness to the categories we have in fact identified.[313] Consequently, for race-crits, racism is 'not aberrant but rather the natural order' of life.[314]

CRT is a compelling jurisprudential theory because of the persistence of racial inequality in both the US and UK which remain despite efforts to achieve equality within each country's legal system and society. Racial minority groups in both countries continue to have average earnings that are far below that of the white majority groups.[315] Educational and occupational achievements are also highly stratified along racial lines.[316] Inequality appears to pervade society whilst purportedly having been eliminated within the law. Some race-crits argue that even advances in rights equality, by which minority groups have secured legally-mandated concessions to the racially biased social status quo, are

[309] E.g. Richard Delgado and Jean Stefancic state that for CRTs 'objective truth. Like merit, does not exist, at least in social sciences and politics. In these realms truth is a social construct to suit the purposes of the dominant group', R. Delgado and J. Stefancic, *Critical Race Theory* (New York University Press, 2002) 92.
[310] J.M. Culp, 'To the bone: Race and White Privilege' (1998-99) 83 *Minn L. Rev*, 1637, 1638. See also. D.A. Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992).
[311] S.M. Wildman and A.D. Davis, 'Making Systems of Privilege Visible' in P.S. Rothenberg (ed.), *White Privilege: Essential Reading on the Other Side of Racism* (Worth Publishers, 2005).
[312] C.R. Lawrence III, 'The Word and the River: Pedagogy as Scholarship and Struggle' (1992) 65 *S. Cal. L. Rev* 2231, 2282-83.
[313] M. Kelman and R.M. Unger, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) 269-70.
[314] A. Asch, 'Critical race theory, feminism and disability: reflections on social justice and personal identity' (2001) 62 *Ohio State L.J.* 391, 393.
[315] In the US median income for households where a non-Hispanic white individual was the householder was $55,530 dollars in 2008. By contrast this figure was $37,913 dollars for Hispanic households and only $34,218 for black households. See US Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2008 (September 2009), 11 fig 2 http://www.census.gov/prod/2009pubs/p60-236.pdf, accessed 19.02.2011. There is also a race-based distinction in earning within the UK, see Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002) table T13. http://www.statistics.gov.uk/census2001.pdf
[316] In the US almost double the proportion of black students leaves school annually without a high school diploma than white, non-Hispanic students (21%, as compared to 11.5% of non-Hispanic white students). In addition, nearly four times the proportion of Hispanic students (43%) leave education without completing their high school diploma. See US Census Bureau, 'The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings', *Current Population Studies* P23-210 (2002) http:/www.census.gov/prod/2002pubs/p23-210.pdf accessed 20.02.2011. In the UK, participation in Higher Education differs between racial groups, see Higher Education Statistics Agency, *First year UK domiciled HE students by qualification aim, mode of study, gender and ethnicity 2007/08*, (2009), table 10b.

frequently illusory or primarily serve to further the interests of the dominant group.[317] In such examples of 'Interest Convergence',[318] white elites tolerate or encourage racial advances for minority groups, because doing so promotes the majority's own self-interest.[319] The effect of dominant group interests in constructing and dismantling racial hierarchies also determines the fluid construction of the socially subordinate groups, which race-crits identify.

The shifting and constructed nature of group identity also means that groups with 'honorary majority status' have been vulnerable to having their superior standing withdrawn by the dominant group.[320] Perhaps the most extreme example of the revocation of honorary dominant group standing came in the rounding up and internment of 126,000 Japanese, including 70,000 American-born individuals of Japanese descent, following the Japanese attack on Pearl Harbour in December 1942.[321] These race-based measures were judicially sanctioned in 1944 through the test case of *Koremastu v US*,[322] even though the executive order out of which the action arose made no mention of race.[323] This reclassification of Japanese Americans as an 'enemy within' is labelled by race-crits as one of the most blatant examples of 'crisis racism', and how actions sanctioned by the dominant group can change the status of a minority group.[324] The treatment of Japanese Americans during the Second World War has subsequently been widely condemned;[325] the *Korematsu* judgment has been overturned,[326] and compensation has been paid to

[317] M. Dudziak, 'Desegregation as a Cold War Imperative' (1988) 41 *Stanford Law Review* 61 which considers the decision of the court in Brown v Board of Education to end the racial segregation of education was part of the government's strategy for advancing white interests as it sought to promote Democracy as a preferable political ideology to Communism.
[318] D. Bell. 'Brown v Board of Education and the Interest-Convergence Dilemma' (1980) 93 *Harvard L. Rev.* 518, 524-25.
[319] R. Delgado and J. Stefancic (eds.), *Critical Race Theory: The Cutting Edge* (Temple University Press, 1995) xiv.
[320] See L.S Majaj, 'Arab-American Ethnicity: Locations, Coalitions and Cultural Negotiations, in M. Suleiman (ed.), *Arabs in America: Building a New Future* (Temple University Press, 1999).
[321] K. Alonso, *Korematsu v United States: Japanese-American Internment Camps* (Enslow, 1998); and S.A. Chin and D. Tamura, *When Justice Failed: The Fred Korematsu Story* (Raintree Steck-Vaughan, 1993).
[322] *Koremastu v US* 323 US 214 (1944).
[323] Executive Order 9066, (19 February 1942).
[324] E. Balibar, 'Racism and Crisis' in E. Balibar and I Wallerstein, *Race, Nation, Class: Ambiguous Identities* (Verso, 1991) 217-27.
[325] Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982 and 1983) T. Kashima (frwd), (The Civil Liberties and Public Education Fund and the University of Washington Press, 1997).
[326] Fred Korematsu's conviction for violating the wartime order was later set aside by a federal judge in San Francisco. See *Korematsu v United States* 584 F. Supp. 1406 (1984).

affected individuals.[327] However, condemnation has not ensured the subsequent avoidance of similar patterns of treatment,[328] whereby non-white groups are classified as 'foreign, disloyal, and imminently threatening' when the social context is seen by the dominant group to require it.[329] For race-crits, therefore, the subordination of different racial groups is part of a constructed, flexible and shifting hierarchy which consistently works against people of colour.

Illustrating the control that dominant groups have over constructions of racial hierarchies, in the post-9/11 context critical race theorists have argued that Asians and Arabic groups have been constructed as 'black' both by law and their popular treatment.[330] Race-crits also assert that Asian and Arabic individuals have faced a particular difficulty in resisting laws that subject them to detrimental treatment because they do not constitute protected minorities during 'normal' times, meaning that they fall outside the black/white paradigm within which racial inequality is usually characterised.[331] In fact, in the US the apparent acceptability of the prejudice towards this group has been directly attributed to it not inflaming old wounds of black/ white ethnic division.[332] The 'othering' of Arabs and Asians illustrates how notions of race and religion are increasingly intertwined and because these racial minority groups are those most closely associated with the Islamic faith they are perceived as a legitimate focus for suspicion.[333] For race-crits, therefore, the aftermath of 9/11 provides a further example in a long-standing history of systemic racial inequality.

The broad scope of CRT means that adherents to the movement cite a range of causes of societal discrimination. The most instrumental causes in any given circumstances depend on the form of discrimination under consideration, including whether it is conscious or unconscious. The causes of discrimination cited by race-crits also depend on whether a

[327] The Government authorised the payment of $20,000 to each of the approximately 60,000 survivors of the internment camps on 10 August 1988 (signed by President Regan).
[328] J. Kang, 'Thinking through Internment' (2002) 9 *Asian Law Journal* 195, 197-98.
[329] N.T. Saito, 'Symbolism under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"' (2001) 8 *Asian Law Journal* 1, 12; and F.H. Wu, 'From black to white and back again' (1996) 3 *Asian Law Journal* 185.
[330] A.K. Wing, 'Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism' (2002) 63 *Ia Law Rev* 717.
[331] R. Saloom, 'I know you are, but what am I? Arab-American Experiences through the Critical Race Theory Lens' (2005-6) 27 *Hamline J. Pub. L. and Policy* 55.
[332] L. Volpp, 'Critical Race Studies: The Citizen and the Terrorist' (2002) 49 *UCLA L. Rev* 1575, 1586.
[333] S.M. Akram, 'Scheherazade Meets Kafka: Two Sordid Tales of Ideological Exclusion' (1999) 14 *Geo Immig. LJ* 51.

more or less radical form of the theory is being advanced. Given the multifaceted causes of unequal treatment proposed by CRT this thesis focuses on three race-crit claims. These claims link discrimination against minority groups to: the role of politics in formulating legal provisions; the provision of unfettered executive discretion in applying and using legal powers; and the judiciary's tendency to defer to legislative and executive decisions to the detriment of minority protection. [334]

2.3.1 Law is Politics

Through their engagement with 'the politics of difference' [335] race-crits argue that the issues of paramount importance for law-makers reflect political priorities. [336] Consequently legal doctrine is a form of political power and a means of furthering that power.[337] The connection between politics and law is primarily manifested through the law-making process and means that the popular accountability of political representatives is a primary driving force behind the legislative agenda. Political accountability to public opinion means that politicians need to be seen to react to legislation-triggering situations in a popularly supported way. For race-crits, therefore, ostentatious political overreactions to popular crises results in racialised law. This may include over-reacting to events, to avoid popular censure from under-reacting, and not making controversial statements and policy decisions which can later be turned into political fuel by opposition parties. The political character of law-making means that institutional inattention to the impact of politics on law-making behaviour risks perpetuating racist segregation and subordination.[338] The 'law is politics' sentiment leads to a tendency that in times of crisis political parties unite and avoid divisive debate, whether relating to law-making, its implementation or its review. For race-crits the politicised nature of the law-making process affects the way that laws are debated and enacted and the provisions that they contain, and makes the purported political neutrality and objectivism of Western liberal

[334] These three claims are evident throughout critical race scholarship. See, e.g., N. Gotanda, 'A Critique of "Our Constitution Is Color Blind"' (Nov 1991) 41(1) *Stanford Law Review* 1-68; D.A Bell, 'Racial Realism' (1992) 24(2) *Connecticut Law Review*; C.I. Harris, 'Whiteness and Property' (1993) 106 *Harvard Law Review* 1707-91; L.S. Greene, 'Race in the Twenty-First Century: Equality through Law?' (1990) 64 *Tul L. Rev* 1515; and G. Peller, 'Race-Consciousness' (1990) *Duke L. J.* 758.
[335] A. Harris, 'The Jurisprudence of Reconstruction' (1982) 82 *California Law Rev* 741.
[336] D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (rev'd ed. Pantheon, 1990).
[337] M. Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) 119-33.
[338] R.T. Ford, 'The Boundaries of Race: Political Geography in Legal Analysis' (1994) 81 *Harvard Law Review* 1841.

rule of law a key target for CRT criticism.[339]

Race-crit arguments as to the discriminatory *nature* of law, as opposed to simply its discriminatory *effect*, go further than most civil liberties campaigners who continue to label the laws neutral, but with racially discriminatory effects or results. Instead, for race-crits, racial silence stops being racial neutrality when its uneven effects are known, and accepted as inevitable, by those enacting, implementing, using and reviewing the laws. An example frequently cited by race-crits in the US is the operation of apparently neutral behaviour in jury selection.[340] Whilst juror selection is ostensibly race-blind the underrepresentation of minority groups hints at the existence of structural and institutional bias, whereby 'race-neutral' selection criteria produce a racially uneven effect. Factors contributing to this effect include the use of voter registration rolls as the source for juror selection, so that low registration amongst minority groups disproportionately excludes them from service; and the increasing use of 'blue-ribbon' juries, in which jurists are required to have specialist qualifications and skills, and which therefore disproportionately exclude relatively less-educated minority groups.[341] Historically, a comparable effect arose in the US from the use of 'grandfather clauses' and literacy requirements for voter registration.[342] Even the use of majority decisions and small-size juries in criminal trials have the propensity to weaken the minority voice within the criminal justice system, contributing to the continuing criticism of its racially biased structure and operation.[343] According to race-crits even the doctrine of equal protection, interpreted as necessitating identical treatment, is a tool by which existing patterns of racial hierarchy have been entrenched and reified.[344]

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[339] R.M. Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983) 116.
[340] P.S. Rothenberg (ed.), *White privilege: Essential Reading on the Other Side of Racism* (Worth Publishers, 2005).
[341] H. Fukurai, E.W. Butler and R. Krooth, *Race and the Jury. Racial Disenfranchisement and the Search for Justice* (Plenum Press, 1993) 13 -80.
[342] M.J. Klarman, *From Jim Crow to Civil Rights. The Supreme Court and the Struggle for Racial Equality* (OUP, 2004) 69. The long-term recognition of the impact of such provisions is evident through J.C. Monnet, 'The Latest Phase of Negro Disfranchisement' (Nov 1912) 26 *Harvard Law Review* 42, 43 and J.C. Rose, 'Negro Suffrage: The Constitutional Point of View' (Nov 1906) 1 *American Political Science Review* 17, 29-30.
[343] See, e.g., M.H. Kalstein et al., 'Calculating Injustice: The Fixation of Punishment as Crime Control' (1992) 27 *Harv CR-CL. L. Rev* 575.
[344] See C.R. Lawrence III, 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39(2) *Stanford Law Review* 317 and L.S. Greene, 'Race in the Twenty-First Century: Equality through Law?' (1990) 64 *Tul L. Rev* 1515.

2.3.2 Executive discretion and racial effect

Race-crits also argue that the greater the degree of executive discretion that is incorporated into legal provisions the higher the risk that they will be used in a way which disadvantages minorities, especially racial and other visible minorities.[345] For CRT, the connection between executive discretion and discriminatory behaviour is exemplified by police operations, because although social and legal racism is typically unconscious and hidden it can achieve a concrete form through law enforcement behaviour.[346] This causal link is strengthened where executive discretion is accompanied by heightened executive powers. Race-crits suggest that an important reason that this discretion turns from benign flexibility to a pernicious power has been particularly attributed to the application of the powers on the basis of crude, over-generalised and inaccurate stereotypical views of 'the usual suspects'.[347] CRT asserts that conscious prejudice and individual discriminatory behaviour have a role in constructing and perpetuating racial inequality.[348] Most adherents to CRT, however, also maintain that discrimination and racial injustice is caused by more than consciously discriminatory behaviour: not just about 'individual "bad apple" police officers, but the criminal justice system; not bigoted school-board members, but the structures of segregation and wealth transmission'.[349] The positioning of racism as endemic within society builds upon theories of institutional racism, by which discriminatory treatment can occur without the existence of conscious prejudice, and may be concealed either intentionally or innocently.[350] Race-crits consider unconscious behaviour, including the unquestioning acceptance of the discriminatory status-quo, to be an equally, possibly even more, potent force in the societal subordination of ethnic minority groups, than conscious bias.[351] Such forms of inequality are seen by race-crits

[345] See, e.g., D. Barak-Erez, 'Terrorism Law between the Executive and Legislative Models' (2009) 57 *Am. J. Comp Law* 877 and N.C. Bay, 'Executive Power and the War on Terror' (2005-6) 83 *Denv U.L Rev* 3305.
[346] See Note, 'Developments in the Law-Race and the Criminal Process' (1988) 101 *Harv. Law Rev.* 1472, 1522.
[347] C. Walker, ''Know thine Enemy as thyself": Discerning Friend from Foe under Anti-terrorism Laws' (2008) 32(1) *Melbourne University Law Review* 275, 291
[348] See D. Brown, 'Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action' (2010) 85 *In. L.J.* 1197 which uses empirical evidence to show that overt acts of racism and discrimination continue in the US education system, especially in states where affirmative action has been banned.
[349] F. Valdes, J. McCristal Culp, A.P. Harris, 'Battles Wages, Won and Lost: CRT at the Turn of the Millennium', in Valdes, McCristal Culp, Harris (eds.), *Crossroads and a New Critical Race Theory* 2.
[350] L.L. Knowles and K. Prewitt, *Institutional Racism in America* (Prentice-hall, Inc., 1969) 5.
[351] See D.T. Goldberg *The Racial State* (Blackwell Publishers Ltd., 2002).

as culturally transmitted and a seemingly endemic part of society.[352]

2.3.2 Judicial deference and racial effect

Finally, race-crits cite judicial deference as a key factor contributing to racial bias within the law.[353] Judicial overview of the implementation and use of legislative powers is intended to provide a means of checking and balancing in order to prevent any one government branch from assuming too much power. CRT claims, however, that the judiciary is self-conditioned to defer to the authority of the legislature and/ or executive particularly where minority interests are contrary to those of the majority group and the issue is one of high public importance, such as in matters relating to national security.[354] Such deference has the effect of unbalancing the checks and balances of the separate branches of the legal system, and giving a disproportionate amount of power to the executive, especially when judicial deference is coupled with the legislature affording the executive a high level of unfettered operational discretion.[355]

One example of the type of judicial deference and its impact in the racial effect of the law cited by race-crits is the case of *McCleskey v Kemp*.[356] In his dissenting opinion, Justice Blackmun opined that while judicial constitutional intervention should be 'sparingly employed' it was nevertheless 'the particular role of the courts to hear these [minority] voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life'.[357] The gulf between this and the majority decision that it was institutionally incompetent to adjudicate the equal protection arguments, illustrates the judiciary's preoccupation with its own limitations in reviewing rights-related issues. Even where it is established that race is a significant factor in determining an officer's suspicion the courts have demonstrated a tendency to defer to the law enforcement subsystem regarding the efficacy and legitimacy of such race-based generalisations. In

[352] See, e,g, R. Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling'; and M. Matsuda, Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Mich. L. Rev.* 2320.
[353] L. Arbour, 'In our Name and On Our Behalf' (2006) *EHRLR* 371.
[354] T. Ying, ''I do not think [implausible] means what you think it means': Iqbal v Ashcroft and Judicial Vouching for Government Officials' (2010) 14 *Lewis & Clark L. Rev* 203.
[355] N.C. Bay, 'Executive Power and the War on Terror' (2005-06) 83 *Denv University L. Rev* 3305.
[356] *McCleskey v Kemp* 481 US 279 (1987) at para 319. In this case the Supreme Court upheld the death penalty sentence imposed on McCleskey despite evidence of the racially disproportionate impact of Georgia's death penalty.
[357] *ibid*, at para 343.

the case of *United States v Weaver*, for example, the appeal court upheld the use of race because 'facts are not to be ignored simply because they may be unpleasant – and the unpleasant fact in this case is that Hicks [the police agent accused of engaging in the racially discriminatory behaviour] had knowledge, based on his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine'.[358] A comparable deference to law enforcement claims of operational necessity and validity was demonstrated in the case of *United States v Marquez* where the suspicion-less, random stops and searches were assumed, without further evidence or argument, to have a deterrent factor.[359]

Judicial deference enables the courts to exercise a discretionary level of analysis in its adjudication. Deference is at the heart of the doctrine of the separation of powers in that it requires that where a particular issue falls outside the competence of the courts, and within that of a different governmental branch, the court should show a level of deference to that expertise.[360] Judicial deference is frequently endorsed on grounds of constitutional legitimacy[361] and/or institutional competency.[362] The judicial approach to assessing the proportionality of a measure in the UK and the varying levels of judicial scrutiny in the US are closely related to deference, as the manner in which a court applies these tests affects the level of deference it shows to decisions by other subsystems.[363] Deference can also affect judicial decision-making outside considerations of proportionality, including through fact deference, whereby the judiciary scrutinizes governmental behaviour, but

[358] *United States v Weaver* 636 F.Supp.2d 769 (C.D. Ill., 2009) at para 396.
[359] *United States v Marquez*, 410 F.3d 612 (9th Cir., 2005). See also *United States v Green*, 293 F.3d 855 (5th Cir, 2000).
[360] S. Sayeed, 'Beyond the Language of "Deference"' [2005] 10 *Judicial Review* 111, 111.
[361] For a selection of the views concerning this subject see, e.g., F. Klug, 'Judicial Deference under the Human Rights Act' (2003) 2 *EHRLR* 125; T. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] *Public Law* 306; T.R.S Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65(3) *CLJ* 670; A. Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) *OJLS* 157; Lord Steyn, 'Deference: Tangled Story' [2005] *Public Law* 346; R. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *MLR* 859; P. Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 *LQR* 589; I. Leigh, 'The Standard of Judicial Review after the Human Rights Act' in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007) 174-205; and D. Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' (1998) *Public Law* 545.
[362] See, e.g., M. Hunt, and M. Dennetriou, 'Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?' [1999] *EHRLR* 15, 22; and R.A. MacDonald, 'Postscript and Prelude – the Jurisprudence of the Charter: Eighth Thesis' (1982) 4 *Sup. Ct. L. Rev* 321, 337.
[363] D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M. Taggart (ed.) *The Province of Administrative Law* (Hart Publishing, 1997).

does so only on the basis of the facts presented to it without inquiring into their nature or origins. [364] Deference, therefore, has a multi-faceted influence on the court's adjudicatory function and, with it, the ability of the courts to uphold individual rights in the face alleged infringement.[365]

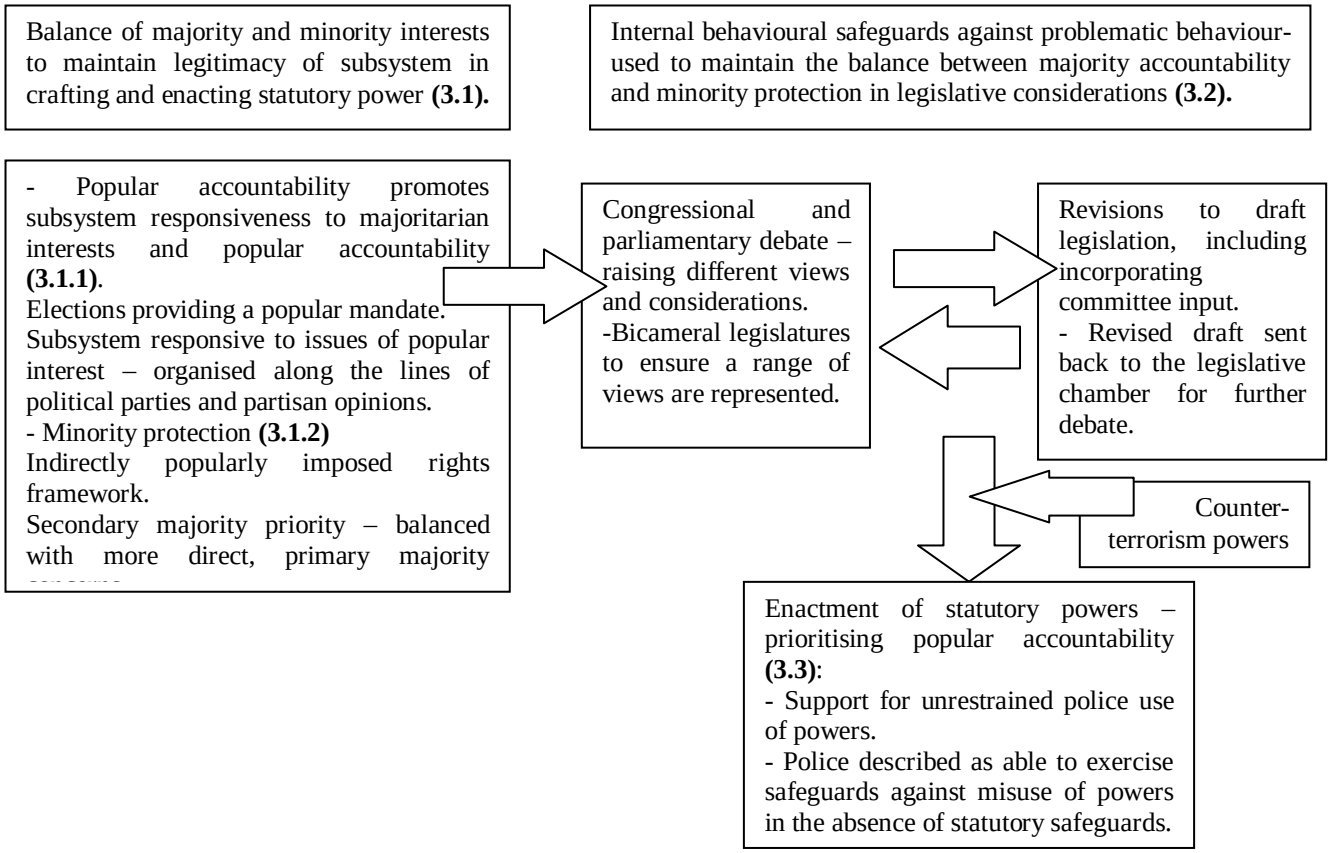
Having set out the legal and factual context of the claims herein, the rest of this thesis explores how the operation of three subsystems which feed into the legal subsystem – the law-making subsystem, the policing subsystem and the judicial subsystem, contributed to the racial effect of these provisions, championed as a necessary policing response to terrorism.

[364] See M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'' in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003). By contrast Lord Lester, Lord Pannick and J. Herberg reject this characterisation, see *Human Rights Law and Practice*, (3rd ed., Butterworths, 2009) para 3.18.

[365] See, e.g., *Secretary of State for Home Department v International Transport Roth* [2002] EWCA Civ 158, [2003] QB 728 at 69-71 (Laws LJ Dissenting); *R (on the application of Limbuela) v Secretary of State for the Home Department* [2004] EWCA CIV 540 [2004] QB 1440 at 66-77 (Laws LJ dissenting).

Chapter Three: The Legislative Standards for Sub-system Behaviour: Normative versus Empirical

Fig two: Law-making subsystem – enactment of legislation.



The role of the law-making subsystem in enacting primary legislation, is a hallmark of the liberal democratic credentials of both the US and UK. [1] Although there is a high level of consensus as to the utility of parliamentary and congressional law-making,[2] this chapter explores whether there is an inherent pre-disposition within each country's law-making subsystem to shape operationally closed law-making standards in response to certain types of external irritants, in a way which produces legislation with characteristics that accommodate or even give rise to detrimental effects, such as racial inequality.[3] This

[1] R. Warner, 'Adjudication and Legal Reasoning', in M.P. Golding and W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishers 2004), accessed 12.11.12.

[2] This is not, of course, to suggest that the legislative process is without its critics and there have been significant calls for reform. See, e.g., House of Lords, Select Committee on the Constitution, fourteenth report of session 2003-4, *Parliament and the Legislative Process* vol I, Report (2004) for an example of such proposals for reform. See also Parliament First, *Parliament's Last Chance* (London, 2003) which declared in its first sentence that 'Parliament isn't working' 5.

[3] N. Gotanda, 'A Critique of "Our Constitution is Colorblind" (November 1991) 41(1) *Stanford Law Review*

contradiction between intention and effect suggest that the internal rules adopted by the law-making subsystem are not what the subsystem itself claims they are; nor are they what other subsystems expect them to be.[4]

In order to understand how law-making sub-system behaviour contributed to the racially uneven effect of the counter-terrorism powers this chapter first considers the basis on which the UK and US legislative branches command their pre-eminent position within the law-making process.[5] In particular this analysis focuses on the self-created attributes of the sub-system that are recognised as being fundamental to the maintenance of even-handed and neutral legislation, synonymous with the rule of law. Operation along the lines of this programme ensures the subsystem's operational legitimacy from the perceptive of other subsystems. This chapter then shows that the potentially detrimental impact of the cognitive openness of the subsystem, in its maintenance of expected law-making standards and, therefore, on legislative output, was recognised within both countries. Despite such awareness, this chapter finally considers how the system-specific approach to law-making adopted in each country, in relation to the counter-terrorism stop, search and surveillance powers, meant that the potential deleterious outcome in terms of legislative powers was realised, through the operation of the subsystem on the basis of an overwhelming prioritisation of popular accountability in counter-terrorism law-making. This section, therefore, suggests that the law-making process within the Terrorism Act and the Patriot Act resulted in the creation of police powers that, whilst utilising 'facially innocent criteria',[6] contained the potential for a racially uneven deployment.[7]

3.1 Why the Legislative Process Inhabits its Pre-eminent Law-Making Position

US and UK law-making institutions reflect the sharply different constitutional set-ups of the two countries, with the legislative existing as institutionally separate from the

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1, making this argument generally.

[4] N. Luhmann, *Social Systems* 10.

[5] In this chapter 'legislative process' refers to 'the complex series of event by which the legal implications of a policy or objective are identified, changes to legal rules are drafted in a form intended to be understood by both lawyers, officials and (perhaps) ordinary people, and both the policy and the proposed new legal norms are subjected to parliamentary scrutiny and amendment before being accepted or rejected', D. Feldman, 'The Impact of Human Rights on the UK Legislative process' (2004) *Statute Law Review* 91, 92.

[6] M.J. Whidden, 'Unequal Justice: Arabs in America and United States Antiterrorism Legislation' (2000-1) 69 *Fordham L. Rev*. 2825, 2838.

[7] See fig. 2.

executive, and often politically opposed to it, in the US; but partially fused with it in the UK, and almost invariably controlled by the same political party. Within these two set-ups each country enacts legislation through distinct processes, whilst also instilling in its legislation different qualities.[8] UK legislation, for example, reflects the so-called 'Westminster model' of parliamentary supremacy;[9] whilst the US law-making subsystem adheres to an approach of 'constrained parliamentarianism',[10] through which the separate, but equal powers of each branch of government, are constrained by a written constitution.[11] These distinct law-making processes have been described as defining 'the gulf that separates our respective approaches to constitutionalism'.[12] These country-specific subsystem peculiarities determine the constitutional context, and therefore the subsystem programme, through which each law-making subsystem codes communications and forms the communicative redundancies which constitute the subsystem-specific programme of operation.

The UK constitutional framework asserts that Parliament is the country's supreme law-making authority. Parliament cannot be bound by any other domestic institution, and freely acts to alter any law.[13] Consequently, while the courts and the executive implement and review the powers set out in, or provided for by, statute it is the legislature which is functionally charged with determining what the law actually is.[14] Parliamentary supremacy has, of course, been eroded from its first articulated parameters,[15] so that the Diceyan principle of the absolute sovereignty of Parliament is increasingly being qualified.[16] One important external influence affecting Parliamentary sovereignty is the UK's membership of the European Union, which acts as an environmental irritant to UK

[8] See generally W. McKay and C.W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (OUP, 2010).
[9] J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, 2010).
[10] B. Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 664-87.
[11] M. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries' [2003] 38 *Wake Forest Law Review* 813.
[12] Lord Irvine of Laing, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' in N. Dorsen (ed), *The Unpredictable Constitution* (New York University Press, 2002) 324.
[13] As outlined by A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan 1996) 92. For a more modern interpretation see T.H. Bingham (Lord), *The Rule of Law* (Allen Lane, 2010).
[14] See *Edinburgh and Dalkeith Railway Co. v Wauchope* (1942) 8 CL & F 710 and *Pickin v British Railways Board* [1974] AC 765. See also Lord Bingham in *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para 36.
[15] W. McKay and C.W. Johnson, *Parliament and Congress* 24.
[16] See, e .g., D. Goldsworthy, *Parliamentary Sovereignty. Contemporary Debates* (Cambridge University Press, 2010) 57-78 which questions the extent to which the idealised Diceyan model of parliamentary sovereignty holds true.

law-making and Parliamentary functions.[17] Judicial concern to determine the will of Parliament, through interpretation of legislative debate,[18] demonstrates that the judiciary recursively looks to Parliament's functional programme so that the judicial subsystem may interpret laws according to Parliament's intention, rather than developing its own judicial understanding of the principles and provisions of any given statute. Despite the doctrine of parliamentary supremacy within the UK government there is no absolute separation of powers,[19] meaning that the executive is represented in, and depends for its continued existence on, the legislature.[20] The UK's approach to the separation of powers is, therefore, marked by relatively fluid boundaries between executive, judicial and legislative functions.[21]

The US Constitutional framework provides for the separate and equal authority of the executive, the legislative, and the judiciary.[22] The constitutional importance of the separation of powers has been asserted as a means of avoiding a 'popular tyranny' holding sway through the legislature.[23] Accordingly, the separation of powers is upheld as one of the deepest political principles of the Constitution.[24] The separation between the executive and legislature within US law-making is also maintained because although the President may propose laws these are experienced by the law-making subsystem as environmental irritants that are responded to by Congress, through it drafting and passing legislation, which is then enacted by way of Presidential signature.[25] In addition, while

[17] European law does not recognise the principle of UK parliamentary supremacy. See *R v Secretary of State for Transport ex parte Factortame* (Case C-213/89) and M. Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2(3) *International Journal of Constitutional Law* 545. In addition, it is arguable that legislation devolving powers away from Westminster, such as the Scotland Act 1998, the Irish Free State (Constitution) Act 1922 and the United Nations Act 1946 are binding on future parliaments and therefore irreversible. These arguments are, however, outside the scope of this chapter. Therefore for further discussion see A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2008).

[18] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, although this decision has been criticised. See, e.g., A. Kavanagh, 'Pepper v Hart and Matters of Constitutional Principle' (2005) 121 (1) *LQR* 243.

[19] *R v Secretary of State for the Home Department ex p. Fire Brigades Union* [1995] 2 AC 513, 567, per Lord Mustill.

[20] W. McKay and C.W. Johnson, *Parliament and Congress* 4.

[21] R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the UK* (CUP, 2011) 17 and generally.

[22] US Constitution Articles I-III. See also *Youngstown Sheet and Tube Co. v Sawyer* 343 US 579, 635 (1952) in which Justice Jackson describes the three branches as separate, but interdependent; autonomous but conditioned by reciprocity, under the Constitution.

[23] James Madison, 'The Same Subject Continued: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection', *Federalist* No. 10 (22 November 1787).

[24] See J.K. Lieberman, *A Practical Companion to the Constitution* (University of California Press, 1999) 457.

[25] Even without Presidential signature, however, a law can become active, and upon gaining two thirds

Congress has the sole functional power of enacting legislation, it is subject to judicial review as part of the constitutional checks and balances between the three branches of federal government.[26] Congress can negate the effect of judicial decisions, by way of subsequent statute,[27] but doing so necessitates the inherently controversial task of enacting a constitutional amendment, which itself may be subject to further judicial review.[28] Consequently, no single branch of US Government has the power to definitively overcome either of the others and, whilst the relative power of each has shifted at certain times,[29] constitutionally-prescribed and self-referentially applied safeguards seek to achieve a model of shared governance.

Whilst the different constitutional backgrounds to each country's law-making subsystem make the institutional contexts of US and UK law-making distinct, both law-making process centre on oral debates within a bicameral legislative,[30] and committee-based structure which scrutinise draft legislation and policy.[31] In particular, the law-making authority of each similarly assumes – or flows from – each institution's ability to enact fair and effective legislation. In order that the principles giving rise to fair and effective legislation are observed in the legislative output of each country's law-making subsystem draft statutes are enacted through specific, self-evolved institutional procedures.[32]

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support of both Houses a bill may become law having previously been returned to Congress by the President for reconsideration, See Federalist No. 69 (A. Hamilton), 'The Real Character of the Executive' *New York Packet* (14 March 1788).

[26] *Marbury v Madison*, 1 Cranch 137 (1803) at 177.

[27] As stated in *Clark v Martinez* 543 US 371 (2005) at 402.

[28] See, e.g., *Dickerson v United States*, 538 US 428 (2000) in which the Court ruled that Congress was not competent to overrule the court's judgment in *Miranda v Arizona*, 384 US 436, stating that 'Miranda, being a constitutional decision of the court, may not be in effect overruled by an Act of Congress … This Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, it may not supersede that Court's decisions interpreting and applying the Constitution', per Rehnquist CJ

[29] In particular the executive has frequently gained a degree of ascendance during times of economic or military pressure, such as during the Great Depression, the Second World War and the Cold War. See, e.g., J. Yoo, *Crisis and Command. A History of Executive Power from George Washington to George W. Bush* (Kaplan, 2010) and K.R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton University Press, 2002).

[30] Consisting of: the House of Lords and House of Commons, which comprise of the UK Parliament; and the House of Representatives and the Senate, which make-up US Congress.

[31] W.J. Keefe and M.S. Ogul, *The American Legislative Process. Congress and the States* (9th ed, Prentice Hall Inc., 1997) 169-202.

[32] The current legislative process in the UK derived predominantly from the reforms instigated by William Gladstone, in 1882, although they had previously been proposed by Sir Thomas Erskine May. There are, however, a number of governmental powers which do not need to go through the parliamentary process to become law. These include, where ministers act under royal prerogative, foreign policy matters, economic policy, defence and in relation to broad policy decisions. See P. Seaward and P. Silk, 'The House of Commons' in V. Bogdanor, *The British Constitution in the Twentieth Century* (OUP, 2003) 139-89. In the

Although these requirements are essentially procedural they are designed to ensure that the final statutory provisions have been widely scrutinised and analysed, and that they demonstrate the fundamental qualities established as necessary for effective legislation.[33] In this way each system's autopoietic behaviour provides legitimacy to its functional operation. The result of procedural checks, in their ideal manifestation, is that Congress and Parliament are responsive to majoritarian considerations,[34] whilst also being protective of minority interests and that these requirements are applied consistently throughout the law-making process, as will now be considered.[35]

3.1.1 Majoritarian Responsiveness

The majoritarian responsiveness of Congress and Parliament helps to secure the democratic credentials of the law-making subsystem because each body is elected by a popular vote.[36] This characteristic means that both law-making institutions are representative of, and responsive to, the views and opinions of the electorate, whilst being charged with constraining and legitimising the actions of government.[37]

Within the UK law-making subsystem the House of Commons seen as deriving its legitimacy directly from its representation of the population. Popular accountability relating to what takes place on the floor of the legislative chamber,[38] via the ballot-box in

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US legislative law originates as a bill or resolution introduced either independently, jointly, or concurrently in the House of Representatives and/or the Senate. After introduction, the bill is sent to the appropriate committee(s) for study. The committee(s) may choose to let the bill "die" by taking no action, or it may report its findings to the full chamber for further action. Any number of bills on the same topic may be introduced into each chamber with different text and each chamber may alter each text of a bill originally introduced for consideration and it may even include the text from several bills, amendments, and/or riders. A bill passed in the House may differ from the version passed in the Senate. When differences arise, they are resolved through the negotiations of a joint committee. Both chambers must agree on an identical form of the bill before it can go to the President for further action. See R. Luce, *Legislative Principles. The History and Theory of Law-making by Representative Government* (The Lawbook Exchange Limited, 2006).

[33] S.A. Walkland, *The Legislative Process in Great Britain* (George Allen and Unwin, 1969) 12-16.

[34] R. Dworkin, *Freedom's Law. The Moral Reading and the Majoritarian Premise* (OUP, 1996).

[35] R. Blackburn and A. Kennon (eds.), *Griffiths and Ryle on Parliament: Functions, Practice and Procedures* (Sweet and Maxwell, 2003) para 6-002.

[36] See J. Griffiths, 'The Political Constitution' (1979) 42 *MLR* 1, 16 and R. Blackburn and A. Kennon (eds.), *Griffiths and Ryle on Parliament: Functions, Practice and Procedures* (Sweet and Maxwell, 2003) para 1-002.

[37] H. Barnett, *Constitutional and Administrative Law* (5th ed., Cavendish, 2004) 379; and J. Waldron, *The Dignity of Legislation* (CUP, 1999).

[38] J.A.G. Griffith and M. Ryle, *Parliament: Functions, Practice and Procedures* (Sweet and Maxwell, 1989), e.g., write that 'It is on the floor of the House that the great events take place, where Ministers should ultimately be brought to account where their political lives may be threatened, where they will be supported or abandoned by their colleagues and held to blame, fairly or unfairly' 518.

general elections held at intervals of not more than five years,[39] encourages legislators to act in accordance with the environmental irritants arising from popular opinion.[40] The need for the law-making subsystem to respond to irritants arising from popular opinion has caused the House of Commons to be portrayed as the sounding board of the nation.[41] By contrast the House of Lords' operational legitimacy arises primarily from its traditional institutional authority and the expertise of its members.[42] The link between popular elections and the make-up of the House of Commons leads to the likely executive dominance of at least one house of the legislature.[43]

In the US, both the Senate and the House of Representatives derive their law-making legitimacy from their directly elected nature. Under the Constitution, therefore, the electorate provides the ultimate check against arbitrary and non-democratic exercises of governmental power.[44] This strengthens the importance of the nexus between the subsystem's functional programme and popular opinion.[45] There are two basic types of elections in the US: primary and general. Primary elections are held prior to a general election to determine party candidates for the general election.[46] In addition to federal, state and local elections held in even-numbered years, many states and local jurisdictions also hold 'off-year' elections in odd numbered years.[47] Members of both House and Senate seek re-election by way of two electoral cycles, so that in any two-year period a

[39] Electoral accountability means that decisions 'must be made by persons whom the people have elected and whom they can remove' if their consequences will be accepted, C. Gearty, '11 September 2001. Counter-terrorism and the Human Rights Act' (2005) 32(1) *Journal of Law and Society* 18, 30.

[40] The link between public opinion and political action has been widely recognised amongst social scientists, including, e.g., J.H. Aldrich, *Why Parties? The Origin and Transformation of political Parties in America* (Chicago University Press, 1995); R.D. Dahl, *Democracy and its Critics* (Yale University Press, 1989); and J.A. Stimson, M.B. MacKuen and R.S. Erikson, 'Dynamic Representation' (1995) 89 *American Political Science Review* 543-65.

[41] J.S. Mill, 'Considerations on Representative Government' (1861) in J.S. Mill, *Utilitarianism, Liberty, and Representative Government* (Wildside Press, 2007) 256.

[42] E.g. the Governmental White Paper 'Rights Brought Home' attributed the democratic mandate of Members of Parliament to the fact that they are elected, accountable and representative, see 'Rights Brought Home: The Human Rights Bill' (Cm 3782, October 1997), para 2.13. See also D. Feldman, 'Human Rights Terrorism and Risk: the Roles of Politicians and Judges' [2006] *Public Law* 364, 374.

[43] Justice, *The Future of the Rule of Law* (October 2007) 1.

[44] M. McClintoch, *A Year of Loss. Re-examining Civil Liberties since September 11* (Lawyers Committee for Human Rights, 2002) 1.

[45] Chief Justice John Marshall in *Gibbons v Ogden* expressed this relationship as meaning that '[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections … are the restraints on which the people must often rely, solely in all representative governments', 22 US 1 (1824) at 197.

[46] Although in a few states, party candidates are chosen in state or local nominating conventions, rather than primaries, either by tradition or at the option of the political parties.

[47] U.S. Department of State, *USA Elections in Brief* (Bureau of International Information Programs, 2012)

proportion of congressional seats are subject to re-election.[48] Senators are elected to represent an entire State, irrespective of the size or population of that State, while Representatives are responsible for a smaller geographical locality which may be revised at ten year intervals to account for changes to State population as indicated by the national census. Senators are elected for six year terms, whilst all Representative face re-election every two years. The different lengths of office for the two congressional bodies tend to reflect the expectation that Representatives are more closely answerable to public opinion than Senators.[49] Consequently, particularly in the House of Representatives, [50] the pressure to secure re-election is a task that begins almost immediately upon taking office.[51] In crafting legislation Congress is expected to use its broad range of flexible legislative tools to 'balance local and national interests in the most responsive and careful manner'.[52] In fact, it was not until 1913 that Senators were appointed by way of direct election.

Another important aspect of the US law-making process is the committee stage, where almost all effective scrutiny of draft statutory powers takes place. Committees are made up of members of Congress chosen by the parties according to seniority and a kind of patronage, with the chair always being a member of the majority party. Consequently, legislators in Congress and within congressional committees are, as a precept of democratic theory and subsystem behaviour, expected to continually respond to irritants from the electorate, aligning the subsystem's programme of operation with these, in order that enacted legislation provides an appropriate structural coupling between the subsystem and its environment.[53]

A crucial structural difference between the US and UK law-making subsystems is that whilst in the UK the Prime Minister has a role within both the legislature and the executive in the US the office of President is separate from the law-making subsystem.[54]

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[48] At the biannual congressional elections one third of Senate seats are up for re-election and all seats in the House of Representatives, US Department of State, *How the United States is Governed* (October 2005) 27-28.
[49] S.S. Smith, J.M. Roberts and R.J. Vander Wielan, *The American Congress* (6th ed., CUP, 2005) 53-86.
[50] US Constitution, Amendment XVII (1913).
[51] W. McKay and C.W. Johnson, *Parliament and Congress* 548.
[52] *Kimel v Florida Board of Regents* 528 US 62 (2000) at 94-95.
[53] W.J. Keefe and M.S. Ogul, *The American Legislative Process. Congress and the States* (9th ed., Prentice Hall Inc., 1997) 67.
[54] US Department of State, *How the United States is Governed* 13.

The separation between the law-making system and the role of President means that the President is elected separately from other members of Congress. Presidential elections take place on the Tuesday after the first Monday of November, following primary elections or caucuses, which are used to choose delegates to the national nominating conventions where the part nominees are selected. The Electoral College method of choosing presidents operates with votes being cast for a group of 'electors' who are pledged to one or another presidential candidate. The number of electors corresponds to the number in a state's electoral delegation. Election to the presidency requires an absolute majority of the 538 electoral votes, thus helping to reinforce the two party system. Whilst it is an established communicative redundancy that Congress will enact presidentially proposed laws they nevertheless retain their separate subsystem origins. By contrast the Prime Minister is part of the UK law-making subsystem and, as such has a role in the parliamentary debate and passage of legislation. The Prime Minister is appointed by the monarch, but by convention is the leader of the majority party within the House of Commons after a general election. The roles of the Prime Minister and President provide an example of the differing delineation of subsystem boundaries, which affect functioning of the law-making subsystem in each country.

Despite the country-specific electoral cycles and the distinct roles of the President and Prime Minister, popular elections mean that US and UK law-making subsystem operations both tend to prioritise short-term goals that will promote re-election. This prioritisation encourages the law-making subsystems to focus on policies with diffuse benefits, as opposed to matters with narrow ones, such as minority group issues.[55] Whilst the strength of the nexus between the actions of elected representatives and opinions of the electorate is a matter of debate[56] there is no doubt that the more homogenous and vociferous public opinion the less scope there is for the law-making subsystem to ignore this irritant, thus demonstrating the subsystem's cognitively open nature can result in its susceptibility to particular environmental irritants.[57] Consequently, in the shadow of a

[55] K. Nash, 'Between Citizenship and Human Rights' (2009) 43 *Sociology* 1067 and R. Delgado, 'Law Enforcement in Subordinated Communities: Innovation and Response' (2007-08) 106 *Michigan Law Rev.* 1193, 1212.
[56] See A.D. Monroe, 'Consistency between Public Preferences and National Policy Decisions' (1979) 7 *American Politics Quarterly* 3-19 and 'Public Opinion and Public Policy, 1980-1993' (1993) 62(1) *Public Opinion Quarterly* 6-28.
[57] M. Gildens, 'Inequality and Democratic Responsiveness' (2005) 69(5) *Public Opinion Quarterly* 778-96

perceived public emergency legislators act to appease public fears and anxiety,[58] and shape the subsystem's functional programme in response to these irritants. The emphasis placed on majoritarian responsiveness within the subsystem programme, therefore, often shifts in inverse proportion to the second characteristic of the law-making subsystem's self-determined and self-referential behaviour: that of the protection of minority interests. Whilst it is not automatic that concerns surrounding minority interests are diametrically opposed to the issues of interest to the majority of the electorate, they are by definition less likely to represent key, vote-winning concerns as compared to other issues, such as economy, health care or national security. Despite this tendency, the ability of the legislative process to enact fair and even-handed laws is secondarily premised on the requirement that the law-making process considers and protects minority interests and rights, as will now be considered.[59]

3.1.2 Minority Protection

The law-making process institutionalises minority protection in legislation, through congressional and parliamentary debate and legislative scrutiny by reference to statutory rights protections, within the law-making chambers and in the legislative committees which make up the subsystem.

In the UK, parliamentary scrutiny of proposed legislative provisions is a fundamental characteristic of the law-making subsystem's operational programme. In shaping the debate different elements of the subsystem, most notably the Government and Parliament, inhabit subtly different roles. The Government is charged by the electorate with developing policy and implementing new legislation; whilst Parliament is expected to examine legislative proposals through parliamentary debates, and redefine their contents and scope.[60] Parliament acts as a check on the law-making aspirations of the Government. This is particularly the case with the House of Lords, where the Government frequently

[58] David Bonner observes this pattern of legislative behaviour in relation to both the Prevention of Terrorism (Temporary Provisions) Act 1974 and the Prevention of Terrorism Act 2005, see D. Bonner, 'Responding to Crisis: Legislating against Terrorism' (2002) *LQR* 602.
[59] C.A. Gearty and J.A. Kimbell, *Terrorism and the Rule of Law. A Report in the Law Relating to Political Violence in Great Britain and Northern Ireland* (Civil Liberties Research Unit, 1995) 14-16; and T. Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* (1801), section 1, http://www.constitution.org/tj/tj-mpp.htm, accessed 30.03.2012.
[60] House of Lords, Select Committee on the Constitution, 6th Report of Session 2004-5, *Parliament and the Legislative Process: The Government's Response* (April 2005) 4, para 3.

needs the support of opposition and independent members to pass legislation. It is rare for this to be the case in the House of Commons, in which governments normally have large majorities, as a result of the first past the post electoral systems, and thus do not need to seek cross-party consensus in law-making.[61]

Parliamentary debate, in both the pre-legislative and post-legislative stages, promotes a structured and transparent communicative process.[62] This public discourse allows oppositional voices to comment on government bills, often with the objective of enabling the enacted legislation to represent the interests of a wider range of individuals than are reflected in the original proposals.[63] In discussing and publically airing a range of minority interests the subsystem programme of operation chooses between a variety of redundancies to select those which best reconcile its own programme with environmental irritants it detects. The adversarial nature of Parliamentary discourse is, therefore, fundamental to law-making subsystem operations.[64] Indeed, debate itself has long been considered 'the main task of Parliament' and the means by which it 'secure[s] full discussion and ventilation of all matters'.[65] The role of parliamentary debate in protecting minority interests is frequently cited as one of the key values of the UK system of Parliamentary law-making: 'fundamental to the work of Parliament',[66] and leading to the enactment of better legislation.[67] Persistent critiques are made regarding the effectiveness of minority protection within parliamentary law-making given the nature of the electoral system, which frequently returns large majorities, thus reducing opposition ability to challenge Government proposals.[68] Despite this system behaviour, requirements such as the statement of compatibility between the legislation and individual rights protected by

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[61] R. Blackburn and A. Kennon (eds.), *Griffiths and Ryle on Parliament: Functions, Practice and Procedures,* (Sweet and Maxwell, 2003) paras 6-131-39.
[62] See Hansard Society Briefing Paper, *Issues in Lawmaking: Pre-legislative Scrutiny* (The Hansard Society, 2005) 5.
[63] H. Fenwick, *Civil Rights, New Labour, Freedom and the Human Rights Act* (Pearson Education Limited, 2000) 420.
[64] S.A. Walkland, 'Committees in the House of Commons' in J.D. Lees and M. Shaw (eds.), *Committees in Legislatures: A Comparative Analysis* (Martin Robertson, 1979) 242-87, 254. See also S.A. Walkland, *The Legislative Process in Great Britain* (George Allan and Unwin Ltd, 1968).
[65] L.S. Amery, *Thoughts on the Constitution* (OUP, 1953) 12.
[66] House of Lords, Select Committee on the Constitution, 14th Report of Session 2003-4, 'Parliament and the Legislative Process', vol. I (2004) 8, para 1.
[67] House of Lords, Select Committee on the Constitution, 6th Report of Session 2004-5, 'Parliament and the Legislative Process: The Government's Response' (April 2005) 4, para 2.
[68] House of Lords, Select Committee on the Constitution, 14th Report of Session 2003-4, 'Parliament and the Legislative Process', vol. I (2004) 10, para 11.

the ECHR, [69] have also helped to internalise within government proposals and parliamentary debate the assessment of the human rights implications of legislative initiatives.[70] Parliamentary means of securing minority protection, therefore, constitute an engrained system-specific rule conditioning its law-making programme, imposed by the irritants arising from democratic society.

The UK's law-making subsystem operations are also affected by the role of the House of Lords in the law-making process. One perceived benefit of this second legislative chamber is that it is able to examine the effectiveness of the executive through questions and committees and to provide a forum for debate, as well as being able to be representative of different views and interests from the House of Commons.[71] Following government reforms in 1999 the House of Lords removed the majority of hereditary peers in favour of government-appointed members.[72]

The US law-making subsystem is part of a complex federal system of government where the national government is central but state and local governments exercise authority over matters that are not reserved for federal government. Federal law-making in the US has a number of characteristics that are distinct from the equivalent process in the UK. One key difference is that debate of the legislative proposals within the two congressional chambers primarily comprises of pre-written speeches, without spontaneity or intervention, and often without eliciting any direct response.[73] These deliveries may be subject to subsequent amendment, before being placed on the permanent Congressional Record. The impact of such amendments can significantly change the contents of the statement that cross references, which can further discourage the congressional debates from having a dialogic character.[74] Committee-based, pre-legislative scrutiny is also an

[69] Human Rights Act 1998, s.19.
[70] C. Gearty, '11 September 2001. Counter-terrorism and the Human Rights Act' (2005) 32(1) *JLS* 18, 22. See also J. Wadham, H. Mountfield and A. Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (3rd ed., 2003) 10.
[71] HM Government, *The House of Lords: Reform* Cm 7027(The Stationery Office, February 2007) 22.
[72] The House of Lords Act 1999. Of the 92 hereditary peers that remained, 75 were elected by and from amongst the existing party groups in the Lords in proportions which matched the total sitting membership of hereditary peers and 15 were elected from across the House, with the remaining two positions were hereditary office holders.
[73] W. McKay and C.W. Johnson, *Parliament and Congress* 163-65.
[74] See H. Mantel, 'Congressional Record Fact or Fiction of the Legislative Process' (1959) 12(4) *The Western Political Quarterly* 983.

important means of establishing and responding to subsystem priorities[75] and provides the opportunity to ensure that legislation upholds constitutional and popular interests, whilst also representing a balanced response to a subject, as judged against the repertoire of possibilities which constitute the normative subsystem rules of behaviour.[76]

Despite the institutional differences in how minority interests are reflected in and shape US and UK law-making subsystem behaviour minority protection is nevertheless a central part of each subsystem's programme of operation. In the US the key protectors of minority interests, in terms of shaping the substance of congressional and committee-based scrutiny, are the Constitution and the Bill of Rights, application of which are designed to afford minorities 'extraordinary protection from the majoritarian political process'.[77] In order to protect minority interests subsystem behaviour balances the communicative redundancies forged through majoritarian responsiveness with those relating to minority protection, through the structural coupling of the Constitution. In the US, consideration of the impact of draft statutory provisions on minority groups is mainly undertaken through legislative committees, as opposed to within the legislative chambers. These arguably represent a more effective means of assimilating conflicting redundancies within subsystem behaviour than is frequently encountered in the executive-dominated chambers.[78] This process seeks to assure minority groups of their right to be heard, and to have their interests represented in legislation, sometimes to the significant consternation of the majoritarian preferences of Congress.[79]

In the UK protection of minority interests in parliamentary law-making is based on the structural coupling between minority rights and law-making, currently focused on the Human Rights Act 1998 ('HRA').[80] Although the HRA had not yet commenced when the Terrorism Act 2000 was being debated, the compatibility between the counter-terrorism legislation and the human rights statute was nevertheless a theme within parliamentary discourse. The human rights-related scrutiny has affected the way in which government

[75] In particular this importance is increased by the technical and complicated nature of most legislation which necessarily demands a level of expertise for effective scrutiny, see W.J. Keefe and M.S. Ogul, *The American Legislative Process: Congress and the States* (10th ed., Prentice Hall, 2000) 170-72.
[76] J.V. Sullivan, *How our Laws are Made,* House of Representatives, 110th Congress, Doc. 110-49 (revd ed. July 2007)18-19.
[77] *San Antonio School District v Rodriguez* 411 US 1 (1973) at 28.
[78] W.J. Keefe and M.S. Ogul, *The American Legislative Process* 170.
[79] *ibid* 448.
[80] Human Rights Act 1998, s.3.

department and parliamentary bodies take account of the ECHR in carrying out their work.[81] The direct enactment of the ECHR provisions, through the HRA, sought to strengthen the law-making subsystems' majoritarian responsiveness, alongside its protection of minority interests.[82]

The HRA came into force in October 2000 and gave 'further effect' to the substantive rights,[83] within the ECHR by allowing domestic courts to employ the principles within the ECHR, and relevant ECtHR case law, when determining disputes raising individual Convention rights. In so doing the government sought to reduce recourse to Strasbourg through the increased domestic resolution of right-based cases.[84] Under the HRA, therefore, UK domestic courts are required to review allegations of rights infringements and afford aggrieved individuals an effective domestic remedy.[85] The HRA has three key effects on the role of the UK courts in safeguarding individual rights. Firstly, it enables the domestic courts to officially take account of the ECHR in their judgments. Secondly, the HRA gives UK courts additional powers of interpretation to ensure that, to the fullest extent possible, legislation is compatible with the Convention protections. Section 3 of the HRA states that: "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[86] This means that the Act 'may require a court to depart from the unambiguous meaning that legislation would otherwise bear',[87] providing the judicial subsystem with 'generous and purposive' interpretation techniques.[88] Thirdly, the HRA enables domestic courts to declare legislation incompatible with the Convention if it is "satisfied that the provision is incompatible with a Convention rights". Lord Steyn has described this power as a "measure of law resort". This aspect of the Act has been

[81] R. Blackburn, 'A Human Rights Committee for UK Parliament: The Options' (1998) *European Human Rights Law Rev* 534-55 and I. Brynoe and S. Spencer, *Mainstreaming Human Rights in Whitehall and Westminster* (Institute for Public Policy Research, 1995).
[82] However, even where this is the case it is seen as an obstacle to parliamentary work. See, e.g., Gerald Howarth who said that 'The Human Rights Act must not be allowed to stand in the way of the human rights of the great majority of people in this country who support the Government in their determination to eradicate this particularly pernicious form of international terrorism from our midst', HC Debs (2001-02) 372, c.722.
[83] The HRA came into force on 2 October 2000, see The Human Rights Act 1998 (Commencement No. 2) Order 2000, no.1851 (c.47).
[84] Home Office, *Rights Brought Home: The Human Rights Bill* (1997) Cm 3782, para 2.13.
[85] ECHR, art.13.
[86] HRA, s.3.
[87] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, per Lord Nicholls.
[88] See *R v DPP, ex p. Kebeline* [1999] UKHL 43, per Lord Hope; and *Brown v Stott* [2003] 1 AC 681 at para 703, per Lord Bingham.

criticised for its uneasy,[89] if not antagonistic, relationship with parliamentary sovereignty.[90] The HRA purports to balance its 'further effect' with the maintenance of the doctrine of parliamentary sovereignty by stopping short of its entrenchment and denying the courts the power to overturn legislation.[91] It therefore remains Parliament's decision whether to revise the provision or not.[92] Indeed, following a declaration of incompatibility Parliament is under no compulsion to review the relevant issue or legislative provision.[93] Ian Leigh and Roger Masterman have referred to this as the 'escape-hatch' that the HRA has left for parliamentary sovereignty.[94]

Both US and UK legislatures shape their operational programme and law-making legitimacy by balancing majority interests with minority protection. The bicameral nature of each law-making subsystem and the quality and focus of the debates within each have evolved to ensure that this balance is instilled in the statutory provision passed through the processes and the US and UK law-making systems are committed to limiting instances where legal provisions weigh more heavily on minority individuals than the majority of the population to a closely scrutinised and justifiable minimum. The importance of maintaining these patterns of behaviour not only in protecting minority interests but also in preserving the legitimacy of the subsystem is shown in the next section, which demonstrates that commentators and legislators understood the risk of departing from normal subsystem patterns of behaviour in terms of its impact on the nature of the legislation enacted.

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[89] M.J. Beloff, 'The Concept of Deference in Public Law' (2006) 11 *Judicial Review* 213, 213.

[90] See Lord Hope of Craighead, 'The Judge's Dilemma' (2009) *International and Comparative Law Quarterly* 753, 755. See also F. Klug, 'The Human Rights Act – A Third Way or a "Third Wave" Bill of Rights' [2001] *EHRLR* 361, 370; and K. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79.

[91] K. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79; D. Feldman, The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165; W. Wade (Lord), 'The UK's Bill of Rights' in *Constitutional Reform in the UK* (1998) 61-68; and G. Marshall, 'Patriating Rights – With Reservations: The Human Rights Bill' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing, 1998) 73-84.

[92] HRA, s.15.

[93] HRA, s.4. Considering the inevitable tension between the courts and Parliament see Lord Irvine of Lairg, HL Debs (1997-98) 582, c.1234; and C. Gearty, *Principles of Human Rights Adjudication* (OUP, 2004), esp. ch.2 and 4 and T.R. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act' [2005] *Public Law* 306.

[94] I. Leigh and R. Masterman, *Making Rights Real* (Hart Publishing, 2008) 19.

3.2 Appreciation of the Risks Inherent in Legislating for Counter-terrorism Powers

Recognition of the inherent difficulty of crafting legislation which acts as an effective structural coupling between law-making and policing subsystems, particularly in the context of a specific threat or terrorist attack,[95] is apparent in both the US and UK law-making subsystems.[96] This awareness demonstrates that the subsystem behaviour which contributed to the enactment of powers with a potential racial effect was not simply an unforeseen consequence of unique laws passed in exigent circumstances.[97] Instead, each law-making subsystem recognised that exactly when legislative protections against the misuse of statutory powers are most essential, such as amidst threats to national security, are the sorts of circumstances in which the autopoietic behaviours giving-rise to 'good' law-making are lost or unbalanced.[98] The implications of this departure are not simply experienced in terms of the mechanism by which statutes are enacted, but can also have an effect on the contents of the legislation enacted, such that the normal subsystem programmes of operation are overextended, to the detriment of the legitimacy of the powers and the originating and receiving subsystems.

Whilst both the US and the UK legislatures clearly understood the potential implications of departing from normal law-making principles each subsystem perceived the problems as originating from different changes in behaviour. This affected the way each subsystem sought to regulate subsystem law-making. The UK law-making subsystem focused on the procedural shortcuts that had previously been experienced including the reduced parliamentary debates afforded to national security law-making. The US law-making subsystem affirmed the imperative that the substance of the legislative scrutiny continued to adhere to the standard subsystem programme, irrespective of the nature of the environmental irritants to which it was responding. This difference may be attributed to

[95] O. Gross, 'Chaos and Rules: Should Response to Violent Crisis always be Constitutional' (2002-03) 112 *Yale L. Journal* 1011, 1019.
[96] This pattern of subsystem behaviour had also previously been recognised, e.g., by L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon Press, 1994); C. Gearty and J.A. Kimbell, *Terrorism and the Rule of Law* (Civil Liberties Research Unit, 1994); International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1993); and H.P. Lee, *Emergency Powers* (Law Book Company, 1984); and K. Ewing and C. Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, 1990) ch. 7.
[97] Inquiry into Legislation against Terrorism (1996) Cm 3420 at 7.
[98] P.A. Thomas, 'Emergency and Anti-Terrorism Powers 9/11: USA and UK' (2002-03) 26 *Fordham Int. L.J.* 1193, 1196 and 1199-203.

the existence of country-specific constitutional backgrounds and their impact on the nature of the operational closure and cognitive openness of each subsystem. Therefore, whilst both countries recognised the difficulty of effectively addressing such exceptional context the manner in which each sought to avoid such damaging subsystem behaviour differed, as is considered in the following paragraphs.

3.2.1 The UK's Criticism of Procedural Shortcuts

Appreciation of the inherent risk that counter-terrorism powers can be used in ways which infringe civil liberties is evident throughout the debate concerning the Terrorism Act 2000.[99] Criticism was directed at the statutory approaches previously adopted in countering terrorism,[100] and in particular the powers instituted by the Prevention of Terrorism (Temporary Provisions) Act 1974.[101] These powers were condemned as 'fundamentally wrong'[102] and as having a 'sinister role' arising from their rights-infringing effect.[103] Such problems were described as giving rise to a long history of 'ill-considered' emergency legislation.[104] A key explanation offered for problems within the 1974 statute was the atmosphere of panic, fear and intimidation in which it was enacted.[105] In 1974 legislators had opined that it would 'be sad… if we were to worry now too much about the curtailment of liberties and later to have upon our consciences the deaths of our fellow citizens'.[106] Further, MPs had previously agreed that there would

[99] See, e.g., HC Debs (1999-00) 341 Kevin McNamara, cc.173-75, Simon Hughes, c.183, Jeremy Corbyn, cc.192-94. See also Lembit Opik who emphasised the need to ensure 'that the legislation is not introduced on a wave of hysteria, following widespread revulsion aroused by a particular atrocity. We need to be sober when such serious legislation is introduced, and not act in impulse', HC Debs (1998-99) 327, c.1011. See also Standing Committee, Ken Maginnis, 18 January 2000 who warns that 'a Government with a huge majority can create anomalies that will result in much of our legislation and many of the procedures and protocols within the House being substantially undermined'.

[100] For an overview of the past legal response to terrorism see B. Brandon, 'Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's legal response to terrorism' (2004) *Criminal Law Review* 981.

[101] Prevention of Terrorism (Temporary Measures) Act 1974.

[102] Simon Hughes, HC Debs (1999-00) 341, c.185.

[103] Jeremy Corbyn, HC Debs (1999-00) 341, c.190.

[104] See P. Hillyard, 'The "War on Terror": Lessons from Ireland' (2005) 2-3; M. O'Rawe, 'Ethnic Profiling, Police and Suspect Communities: Lessons from Northern Ireland' in Open Society Justice Initiative, *Ethnic Profiling in Europe* (2005) 88-99; B. Simpson, *In the Highest Degree Odious. Detention without Trial in Wartime Britain* (OUP, 1994); and B. Simpson, 'The Devlin Commission (1959): Colonialism, Emergencies and the Rule of Law' (2002) 22 *OJLS* 17, 37.

[105] Kevin McNamara, HC Debs (1999-00) 341, c.174.

[106] Kevin McNamara, HC Debs, 28 November 1974, c.700 and quoted by Jack Straw, HC Debs (1999-00) 341, c.156. Kevin McNamara, however, later recanted his words and stated that '[h]ad I known then what I know now, I would not have voted for that Bill, given its effects on our legal system and the injustices that it has brought', HC Debs (1995-96) 275, c.189. This may at least in part explain McNamara's voicing of the problems created, as opposed to solved, by the 1974 Act, during the debate over the Terrorism Act 2000.

be a 'greater danger of justifiable criticism if we do too little than too much'.[107] The manner of parliamentary reaction to the environmental irritants in enacting the earlier counter-terrorism legislation, therefore, resulted in the rapid and extensive implementation of sweeping powers that were later criticised as ineffective and even counter-productive.[108] The legislative impact of not adhering to normal law-making processes in 1974, and on other occasions,[109] was the passage of counter-terrorism powers used to target and 'alienate a whole community', [110] without the powers constituting an effective or appropriate means of fighting terrorism.[111] This resulted in the enactment of powers 'used to harry and hinder law-abiding people' instead of securing terrorist convictions and preventing terrorist attacks.[112] Such insight suggests a subsystem understanding of the importance of maintaining normative subsystem behaviour despite the extraordinary context within which the process may be operating.[113]

Amidst condemnation of both the process by which the 1974 Act was enacted and the impact this had on its provisions, in debating the 2000 Act MPs maintained the imperative of avoiding such modes of behaviour.[114] The Government also maintained the importance of upholding established law-making principles in formulating and enacting the new

[107] National Archive Catalogue, CAS/129/180/13, para 8: 3.

[108] E.g., the PTA 1974 completed most of its passage through Parliament in one day, see HC Debs 28 November 1974 cc.634-943; HL Debs, 20 November 1974, cc.1500-70; and HL Debs 29 November 1974, cc.1573-74, and the Criminal Justice (Terrorism and Conspiracy) Act 1998 was enacted over two days following the Omagh bombing in 1998, see HC Debs (1997-98) 317, cc.12-932 and 3 September 1998, cc.3-156. In addition, the parliamentary process surrounding the 1974 Act was also criticised for the sheer breadth of ineffective measures that it incorporated into the legislation suggesting that the subsystem was unable to appropriately select from amongst the variety of possible communicative redundancies in response to environmental irritants, see, e.g., Alan Beith, HC Debs (1998-99) 333, c.1393.

[109] Popular accountability was also a factor in prompting a legislating fervour in 1939, see O.G Lomas, 'The Executive and the Anti-Terrorist Legislation of 1939' [1980] *Public Law* 16, 21-32, and in 1914, see J. Eaves Jr., *Emergency Powers and the Parliamentary Watchdog: Parliament and the Executive in Great Britain: 1939-1951* (1957) 8-9.

[110] Kevin McNamara, HC Debs (1999-00) 341, c.175.

[111] E.g., one of the driving factors in creating and implementing the PTA 1974 was to assuage public opinion in order to prevent any violent backlash against the Irish community following the Birmingham bombings. See D. Bonner, 'Responding to Crisis: Legislating against Terrorism' (2002) *LQR* 602, 629; and S. Bailey, D. Harris and D. Ormerod, *Civil Liberties, Cases and Materials* (5th ed., 2001) 574.

[112] Kevin McNamara, HC Debs (1999-00) 341, c.174. See also *ibid* cc.175-7.

[113] E.g. the Bill which became the Prevention of Terrorism (Temporary Provisions) Act 1974 was taken through all of its Committee Stages in an 18 hour session spanning 28 to 29 November 1974, followed by an early sitting of the House of Lords which took the Bill almost automatically. It was therefore introduced only 180 hours after the proposal was first put forward. See C. Scorer, *The Prevention of Terrorism Acts 1974 and 1976: A Report on the Operation of the Law* (1976) 1.

[114] E.g., in the House of Lords debate concerning the 2000 Act Lord Jenkins quoted with disappointment the difference between his own statement in 1974, that 'I do not think anyone would wish these exceptional powers to remain in force a moment longer than is necessary' (HC Debs 25 November 1974, c.642) and the subsequent successive renewals of the legislation so that it effectively had a permanent status, HL Debs (1999-00) 611, c.1428.

counter-terror legislation,[115] and in his review of counter-terrorism legislation Lord Lloyd emphasised the importance of adhering to these principles.[116] The risks inherent in enacting counter-terror legislation both in terms of subsystem legitimacy and minority protection were, therefore, a noted consideration in formulating the new Act.[117] Having recognised this past system failing, Lord McNally noted that 'for the first time we [Parliament] shall be able to examine anti-terrorism legislation with a cool ear to see what is needed', as opposed to legislating as a knee-jerk reaction to a catastrophic event.[118]

3.2.2 US Awareness of the Importance of Substantive Rights Protections

Congressional awareness of the risks inherent in legislating in response to an acute threat to national security is apparent throughout consideration of the Bills which were later enacted as the Patriot Act.[119] Concern for upholding normative subsystem behaviour is particularly evident in the congressional focus on the need to uphold constitutionally protected rights in the statutory provisions enacted.[120] The law-making subsystem's response to these needs was evident on two levels: one which recognised the general need to balance security interests with rights in enacting the legislation; and another which focused on the particular risk posed to the interests of minority racial groups in circumstances of acute national security pressure. Therefore, whilst Parliament focused on achieving a paced and considered process by which the anti-terrorism legislation was enacted, the US legislature showed a greater level of concern for the qualitative substance of the provisions within the proposed legislation.

The subsystem's operational emphasis on the need to weigh up the competing interests of

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[115] Jack Straw, HC Debs (1999-00) 341, c.152.

[116] Namely: (i) the legislative response from Parliament must approximate as closely as possible ordinary criminal law and procedure; (ii) additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat and strike an appropriate balance between security and rights; (iii) the need for additional safeguards should be considered alongside any additional powers; and (iv) the law should comply with the UK's obligations in international law, *Inquiry into Legislation against Terrorism*, Cm 4178, (1998), para 3.1.

[117] Jack Straw, HC Debs (1999-00) 341, c.153.

[118] See Lord McNally, HL Debs (1999-00) 611, cc.1476-78. See also N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Era* (Butterworths, LexisNexis, 2003).

[119] The draft anti-terrorism legislation was first introduced into the House of Representatives as the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, HR2975.IH and in the Senate as the USA Act of 2001, S1510.IS. These were reconciled into bill 3165, the Uniting and Strengthening America by Providing Appropriate Tools Require to Intercept and Obstruct Terrorism Act of 2001.

[120] See B. Ackerman, 'Don't Panic' *London Review of Bo*oks (7 February 2002) 15.

protecting security and constitutional rights was demonstrated by successive members of Congress, who cautioned against allowing 9/11 to act as the catalyst for any invasion of individual liberties.[121] This echoes pre-existing recognition of the propensity within the system's self-referential behaviour of sacrificing minority rights in favour of appeasing majority concerns.[122] Reconciling the twin aspirations of protecting rights and safeguarding national security was a prominent and recurrent theme throughout the debate concerning the legislative response to 9/11. Representative Tom Udall stated that '[a]s we continue to take further actions and investigate those that have taken place we must be vigilant in defence of both our safety and our freedom'.[123] The repetition of the importance of adhering to pre-established norms of subsystem behaviour suggests that Congress sought to maintain its self-reflexive nature and balance minority protection with majoritarian responsiveness.

Assurances were sought from the executive that no comparable use would be made of the post 9/11 threat to national security to facilitate such 'unsavoury activities by the government',[124] or cause any repeat 'nation's unfortunate experience with domestic surveillance abuses'.[125] Representative John Conyers, for example, noted, during a meeting of the House Committee on the Judiciary, that '[p]rotecting civil liberties and fighting terrorism in the wake of a national tragedy is not an easy thing to do'.[126] Even more explicitly, reference was made to the past misuse of intelligence powers, such as its use to gather 'embarrassing information' about Martin Luther King.[127] In relation to the general need to balance interests Barney Frank stated that 'much of this bill is going to be an effort to give authority and then have safeguards to prevent abuses'.[128]

In addition to the importance of balancing protection with freedom the heightened risk particularly posed to the rights of racial minority groups by national security legislation was also acknowledged. The consequences of failing to protect minorities were illustrated by reference to the US' treatment of Japanese Americans during the Second

[121] See, e.g., HR Congressional Record, 12 October 2001, comments by Jerrold Nadler, H6774; Butch Otter, H6762; Bob Barr, H6766; and Carolyn Kilpatrick, H6771.
[122] Note, 'Blown Away? The Bill of Rights after Oklahoma City' (1996) 109 *Harv L. Rev* 274, 2091.
[123] HRCR, article 5 of 7, 25 September 2001, E1735.
[124] Patrick Leahy, SCR 11 October 2001, S10556.
[125] See Patrick Leahy, SCR 25 October 2001, S10992 .
[126] John Conyers, House Committee on the Judiciary, Business Meeting (3 October 2001) 99.
[127] Barney Frank, *ibid*, 106.
[128] *ibid*.

World War,[129] whereby 'thousands of loyal Americans were imprisoned…simply because they had Japanese parents.'[130] This departure from the constitutional requirement of equal treatment, through measures targeted at a group on the basis of their ethnic background, and which included US citizens, was uniformly condemned and provoked a strong consensus within the subsystem that such behaviour must not be repeated.[131]

Acknowledgment of the problems arising from departing from normative law-making standards sent a clear message about the sub-system's intentions to adhere to a balanced programme of self-referential behaviour in responding to the threat to national security. The citation of previous problems in maintaining balanced and non-discriminatory law-making also demonstrates subsystem awareness of the deleterious impact of any over-responsiveness of subsystems to environmental irritants, to the extent that they then depart from self-defined subsystem behaviour. Despite such awareness, in both the US and UK law-making subsystems each subsystem embarked on a form of self-referential behaviour that produced potentially rights-infringing legislation. These departures are particularly evident in the unbalancing of minority protection and popular accountability so that majority expectations were prioritised and each legislature enacted powers infused with the potential to have a deleterious effect on minority groups.

3.3 Prioritisation of Popular Accountability

Whilst popular accountability has been championed as a positive redundancy for both the US and UK law-making systems, emergency situations have frequently been described as turning its beneficial characteristics into problematic ones, by generating a 'something must be done' mentality. This relationship was explicitly acknowledged by Roy Jenkins who said that '[a]t a time of threat, to be seen to be doing something, rather than nothing is a natural human – and perhaps particularly ministerial – reaction',[132] and has been

[129] See previous discussion of this case in chapter 2 of this thesis.
[130] Bob Barr, HRCR, 24 September 2001, cited in D. Goldberg, V. Goldberg and R. Greenwald (eds.), *It's a Free Country Personal Freedom in America after September 11* (RDV Books, 2002). See also section 2.1.2 of this thesis.
[131] Hon. Joseph R. Pitts, HR Additional Remarks Congressional Record, article 1 of 4, 14 September 2001, E1655-56.
[132] HL Debs (2001-02) 629, c.200. See also Adam Ingram who said, in relation to the Government's response to the Omagh bombing in August 1998, '[i]f the Government had done nothing, we would have been accused – rightly – of standing back and watching that group's development taking off apace without any attempt to provide the police with additional powers to bring those responsible to justice. That was the

linked to pressure on the law-making subsystem to create new offences and grant more powers to law enforcement in response to terrorist threats.[133] Despite the law-making subsystems' operationally closed programme of balancing majoritarian responsiveness with minority protection, in enacting the counter-terror stop, search and surveillance powers, the environmental irritant of popular accountability morphed into the necessity to be seen to be advocating an instantaneous and extreme legislative response to the terrorist threat.[134] This effect is a testament to the role of context in shaping parliamentary and congressional law-making.[135]

In the aftermath of 9/11 as shown in chapter one, political, media and popular communication placed a disproportionate emphasis on individuals from Asian and Arabic backgrounds, perpetuating a popular association between these groups and national security threats.[136] This focus reinforced popular and media stereotypes of these minority groups as suspect, as demonstrated by their separation from mainstream culture and values.[137] This link contributed to the unbalancing of majoritarian responsiveness and

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motivation for the decision to recall Parliament', Standing Committee (3 February 2000). In the US a comparable form of action is evident in the passage of draconian immigration laws in response to the Oklahoma bombing, see N. Strossen, 'The Current Assault on Constitutional Rights and Civil Liberties: Origin And Approaches' (1997) 99 *W. Va. L. Rev* 769, 771; and K.R. Johnson, 'The Anti-Terrorism Act, the Immigration Reform Act and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Non-Citizens' (1997) 28 *St. Mary's L.J.* 833, 839.

[133] D. Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' [2006] *Public Law* 364, 382-83.

[134] B. Ganor, *The Counterterrorism Puzzle: A Guide for Decision Makers* (Transaction Publishers, New Brunswick, 2005) 297.

[135] House of Lords Select Committee on the Constitution, Report of Session 2003-4, 'Parliament and the Legislative Process', vol. I. Report (2004) 53, para 5.

[136] This association is hinted at by the sharp increase in hate attacks against individuals from these ethnic and racial groups following 9/11 which meant that between 9/11 and 28 November 2001 the American-Arab Anti-Discrimination Committee investigated over 450 hate crimes, Cong.Rec. E2150 Daily Ed., 28 November 2001. Further between 9/11 and 8 February 2002 over 1,700 anti-Muslim incidents were reported to the Council on American Islamic Relations, The Council of American Islamic Relations, Anti-Muslim Incidents. See also M. Welch, *Scapegoats of September 11th: Hate Crimes and State Crimes in the War on Terror* (Rutgers University Press, 2006); Human Rights Watch, *'We are Not the Enemy' Hate Crimes against Arabs, Muslims and those Perceived to be Arabs or Muslims after September 11* (November 2002) 15; B.O. Hing, 'Vigilante Racism: The De-Americanization and Subordination of Immigrant America' (2002) 7 *Mich. J. Race and Law* 441.

[137] See, e.g., J. Shaheen, *Reel Bad Arabs: How Hollywood Vilifies a People* (Interlink Publishing Group, 2004); J. Shaheen, 'Media Coverage of the Middle East: Perception and Foreign Policy' (1985) 482 *Annals of American Academic Policy and Social Science* 160; N. Saito, 'Symbolism under Siege. Japanese American Redress and the "Racing" of Arab-Americans as "Terrorists"' (2001) 8 *Asian Law Journal* 1, 12; E.W. Said, *Covering Islam: How the Media and the Experts Determine how we see the Rest of the World* (2nd rev.ed., Vintage, 1997); E.W. Said, *Orientalism* (Vintage,1978) 28; A. Lankford, 'Re-examining the 'War of Ideas' and 'Us-Them' Differentiation: Implications for Counter-terrorism' (2009) 3 *Homeland Security Review* 1; R. Jackson, 'Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse (2007) 42(3) *Government and Opposition* 394; R. Delgado and J. Stefancic, 'Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills' (1992) 72

minority protection,[138] and indicates the extent to which fundamental civil liberties are not presumptively safe in democratic institutions,[139] but instead represent one approach the law-making subsystem can take to its achieving its functional programme.

Following 9/11, the UK Parliament responded to its assessment of popular expectations of its behaviour by advocating the uncompromising deployment of the pre-existing powers within the Terrorism Act, thus repeating established subsystem behaviour of using legislative powers to respond to public sentiment, as opposed to effectively addressing the problem at its source.[140] In other words, the strength of the irritant of popular opinion shifted subsystem operational behaviour away from the normal programme in favour of the political tendency to 'rally round the flag' in accordance with public fears.[141] The use of counter-terrorism powers as a symbol of security through which to appease public anxiety was confirmed by Lord Jenkins who conceded that whilst these powers 'helped to steady a febrile state of opinion at the time and to provide some limited protection … I doubt it frustrated any determined terrorist'.[142] Repeating this mode of subsystem operation in the aftermath of the 9/11 attacks popular accountability encouraged the 'unreserved condemnation of the atrocities carried out in the US',[143] together with an unbridled demand for an immediate reaction.[144] Although the s.44 powers were passed in advance of 9/11, and apparently with a measured consideration and debate,[145] the ways in which they departed from standard statutory safeguards, such as the requirement for reasonable suspicion and oversight, meant that the context in which the powers came to be used shaped called for widespread, racially uneven of the powers.

The new subsystem programme is evident in the reaction of MPs to 9/11 which reveals a

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Cornell L. Rev. 1258, 1259; E. Poole and J. Richardson, *Muslims and the New Media* (Tauris, 2006); K. Hafez (ed.), *Islam and the West in the Mass Media: Fragmented Images in a Globalizing World* (Hampton Press, 2000); and J. Richardson, *(Mis)Representing Islam: The Racism and Rhetoric of British Broadsheet Newspap*ers (John Benjamin, 2004).

[138] D. Feldman, 'Human Rights, terrorism and risk: the role of politicians and judges' (2006) *Public Law* 364, 379.

[139] G. Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act' (2007) *CLP* 40, 76.

[140] P.A. Thomas, 'Emergency and Anti-terrorism Powers 9/11: USA and UK' (2002-03) 26 *Fordham International L.J.* 1193, 1196.

[141] A. Vermuele, 'Emergency Lawmaking after 9/11 and 7/7' (2008) 75 *U. Ch. L.R.* 1155.

[142] Lord Jenkins of Hillhead, HL Debs (2001-02) 629, c.1999.

[143] Khalid Mahmood, HC Debs (2001-02) 372, c.612.

[144] Tony Blair, e.g., stated that it was necessary to 'take any action necessary to deal with this new phenomenon in the world', HC Debs (2001-02) 372, c.613.

[145] See chapter 4 of this thesis.

perceived need not simply to show their understanding of public demands for action,[146] but to stand at the forefront of condemnation of the attacks.[147] MPs used the strong emotions that the attacks elicited to show an acute personal empathy with those directly affected by the events.[148] Illustrative of this response are the successive personal vignettes, relayed with an almost story-telling like quality,[149] by which individuals sought to closely associate themselves with the attacks,[150] and with the US.[151] Even where the personal connections were relatively remote they were used to demonstrate politicians' credentials to represent the public in commenting on, and condemning, the attacks.[152] When such connections were unavailable a strong emotional connection was created by MPs recounting stories from the attacks,[153] including near-misses[154] and examples of

[146] See, e.g., John Wilkinson who expresses his pleasure that 'I do not believe that my constituents will feel in any sense let down by our proceedings', *ibid*, c.644.

[147] See e.g. HC Debs (2001-02) 372, John Hume (cc.613-14), Iain Duncan Smith (cc.607-8), Charles Kennedy (cc.609-10), and David Trimble (cc.611-12).

[148] See, Richard Smith who suggests that a legislator's public comments are designed to show how he is representing the electorates views, which includes empathising with the issues that they are concerned about, R.A. Smith, 'Advocacy Interpretation and Influence in the US Congress' (1984) 78 *Am. Pol Sci Rev* 44, 46.

[149] See, e.g., David Heath who contrasts the 'cloudless blue sky' in Washington on the morning or the attacks with the later scene of 'smoke rising from the Pentagon, across the Potomac river', HC Debs (2001-02) 372, c.649. Also after the 7/7 attacks in London John Reid states prosaically that, 'The sun that set law night on joyous and happy celebrations in London this morning rose to a day of awful, criminal savagery', HC Debs (2005-06) 436, c.471. Daniel Filler makes a similar observation in relation to the debate concerning Megan's Law in the US and suggests that its effect is to provide powerful and emotional narratives which encourage the listener to humanize the problem and helps to justify a severe response to a particular problem. D. Filler, 'Making a Case for Megan's Law: A Study in Legislative Rhetoric' (2001) 76 *Indiana Law Journal* 315. See also D. Filler, 'Random Violence and the Transformation of the Juvenile Justice Debate' (2000) 86 *Va. L. Rev*. 1095, 1109-16 discussing the role of activist media and legislative rhetoric in transforming juvenile justice debate into a campaign for gun control.

[150] E.g., Julian Lewis detailed the presumed final moments and biographical details of two cousins of his constituency chairman who were presumed to have died in the Twin Towers, HC Debs (2001-02) 372, c.637 and John Battle expresses his fear for his daughter who 'was travelling in America and was due to visit New York', *ibid* c.642. In addition, David Heath, Michael Connarty, Patsy Calton and a number of other Members of Parliament mention their presence in Washington during the attack on the Pentagon, *ibid*, cc.649, 654,739. A further example is that of Sarah Tether who demonstrates a connection with one of the victims of the 7/7 attacks from her constituency by describing her as being of around the same age, (2005-06) 436, c.1268.

[151] E.g., Charles Kennedy recounted a story about his own student experiences of America, HC Debs (2001-02) 372, c. 609, and Bernard Jenkin described himself as a tourist in New York 'marvelling' at the twin towards of the World Trade Center, *ibid*, c.662.

[152] E.g., George Osborne quoted an email from a friend in New York whose husband worked for the firm Morgan Stanley who were, at this stage, believed to have lost around 500 employees, *ibid*, c.652.

[153] E.g. a number of different MPs return to the image of the four year old child who was on one of the flights hijacked by the terrorists. Particular emphasis is put on the detail that it was the child's first time in an aeroplane. See *ibid*, Ian Paisley (c.631), David Heath (c.650), Stuart Bell (c.658), Menzies Campbell (cc.703-04) and Tony Lloyd (c.727). Another example is an emergency services chaplain who was killed whilst administering the last rites to one of the victims; see Ernie Ross, *ibid*, c.682.

[154] E.g. Gordon Marsden described how a college friend from the time he studied in America saw the impact of the first aeroplane and then 'dragged her daughter away' from her school just by the World Trade Center, see HC Debs (2001-02) 372, c.660.

individual heroism.[155] The highly emotive discourse exacerbated the sense of tragedy and the human cost of 9/11,[156] and subsequently 7/7.[157] These subsystem communications demonstrate openness to its environmental irritants, which shaped the subsystem's understanding of the need for uncompromising support for police use of their counter-terror powers.[158]

Against the backdrop of the horrific images relating to 9/11, and the need to demonstrate to the public that the most severe response possible would be directed at terrorist suspects,[159] no attempts were made to secure a reaction that was not strongly driven by emotions. By contrast the pre-legislative scrutiny of the Terrorism Act occurred in advance of 9/11 and, therefore, without its imagery in the debate. In this context an emotionally neutral approach to legislative powers was agreed as being essential to maintaining the legitimacy of subsystem operation, even if this was not wholly achieved in reality.[160] Following 9/11, politicians specifically demanded that the images and reality of the attacks be kept at the forefront of police considerations, instead of separating use of the counter-terrorism powers from emotion-led responses.[161] Despite knowing, and acknowledging, the negative implications of succumbing to emotion-led responses to shocking events the importance of being seen to be acting in response to popular opinion

[155] Iain Duncan Smith, *ibid*, c.607.

[156] On successive occasions MPs emphasised that the events were a human tragedy by portraying the victims as 'ordinary people going about their ordinary daily lives'. This is perhaps best illustrated by David Heath who stated that 'We watched television and read the newspapers … and looked at the long list of people who had lost their lives and the circumstances in which they had started their day. They were ordinary mundane stories of people who had caught planes or gone to work in New York or the Pentagon and were no longer there. These included people from all walks of life and professions and of all ages', *ibid*, c.650.

[157] See Charles Kennedy, HC Debs (2005-06) 436, c.571, in response to which Tony Blair promises action, *ibid*, c.565.

[158] A similar trend in legislative rhetoric is observed by Daniel Filler in relation to the debate over public lists of individuals with child sex attack convictions and by David Hyman concerning the role of congressional rhetoric in 'patient-dumping' stories. See D. Filler, 'Making the Case for Megan's Law: A Study in Legislative Rhetoric' (2001) 76 *Indiana Law Journal* 315 and D.A. Hyman, 'Lies, Damned Lies and Narrative' (1988)73 *Ind. L.J.* 979.

[159] The need for Governmental and Parliamentary popular accountability is described as 'desperately important', Tony Lloyd, HC Debs (2001-02) 372, c.726. See also A.J. McClurg, 'The Rhetoric of Gun Control' 42 *American University Law Review* 53 (1992-93).

[160] A comment by Bruce George suggests almost a desire to be caught up in the emotion surrounding the events by describing how '[w]e are all willing voyeurs of a catastrophe, rushing to our television sets and pinning our eyes on something quite surreal', HC Debs (2001-02) 372, c.635.

[161] E.g., Tony Blair reiterates the importance of this three times in quick succession stating that 'it is necessary now to use the outrage to devise the right agenda to tackle terrorism', as well as that '[i]t is most important not to forget the sheer horror of the events. Let it inspire use to take the action that is now necessary', and finally 'we must not let the passage of time dull our determination, in any shape or form, to carry out the agenda that we have set out today', *ibid*, cc.609-10 and 613. Jack Straw similarly refers to the need to 'channel the rage and revulsion that we feel today', *ibid*, c.620.

usurped such considerations, and resulted in calls for an 'instinctive and robust' parliamentary response.[162]

Following 9/11 US politicians were also keen to ensure that their actions were reflective of the environmental irritants arising from popular opinion.[163] Congressional accounts, for example, dwelt on instances of individual heroism arising out of the attacks,[164] including that of the rescue services who responded to the events.[165] The range of talents and positive personal characteristics of the victims,[166] were used in stark juxtaposition with the imagery surrounding their deaths.[167] These condensed biographies demonstrate how the law-making subsystem was aligning its own behaviour with the environmental irritants leading to the rapid legislative response to 9/11.[168] Whether they had suffered personal losses themselves, therefore, members of Congress were clear that '[n]ow more than ever, many people are searching for strength and solace', and that this was expected to come from their political representatives.[169]

One example demonstrating the importance of popular accountability as an irritant in the subsystem's operation is Arlen Specter's concern that 'some further act of terrorism may occur which could be attributed to our failure to act promptly'.[170] This fear was turned

[162] Brian Mawhinney, *ibid*, c.613.
[163] See R. Jackson, 'Wartime Security and Liberty under Law' (1951) 1 *Buffalo Law Review* 107 in which Justice Jackson makes the connection between public fear and anxiety and the political desire to enact legislation, which may not be justified, to give public their desired assurance.
[164] The pilot of flight 93, which was brought down short of its target in Pennsylvania, Jason Dahl, was cited for special praise. E.g., Scott McInnis described how although Mr. Dahl had wanted to change flights to spend more time with his family he nevertheless fulfilled his responsibility, and describes him as a 'national hero', *ibid* E1649-50. See also Michael M. Honda who describes Dahl as 'an emblem of the American dream', HRCR 12 October 2001, E1868 and John Shimkus, HRCR 13 September 2001, E1644. Elsewhere the 'band of passengers who fought the hijackers' on the plane are described as being 'freedom fighters', Rush Holt, HRCR 21 September 2001, E1702.
[165] See, e.g., Benjamin A. Gilman, HRCR 11 September 2001, who speaks of the death of a cousin of a colleague who had been a fire-fighter responding to the World Trade Center attacks, E1649.
[166] See comments of Felix J. Grucci who gives examples of four casualties from a single High School, Rocky Point High School, and describes the hobbies and talents that each had while at school, HRCR 5 October 2001, E1824.
[167] James P. McGovern cites two particularly emotive examples of the human loss caused by the 9/11 attacks: Linda M. George who he describes as 'planning to get married on October 20' and Christopher Zarba, for whom 'Saturday would have been his 48th birthday', HRCR 14th September 2001, E1662.
[168] In order to emphasise the human loss and the importance of not losing sight of this amid the sheer numerical scale of deaths caused by the attacks Shelia Jackson-Lee urges that 'we should not consider that 6,000-plus people died as much as we should consider 6,000 time one. One person died, 6,000 times', Administration's Draft Anti-Terrorism Act of 2001. Hearing before the Committee on the Judiciary, House of Representatives (107th Congress, 1st Session, 24 September 2001) 62.
[169] Corrine Brown, HRCR 16 October 2001, H6790.
[170] Arlen Specter, HRCR 11 October 2001, S10568. Specter also states that he sent two letters to Leahy repeating this concern, and urging that the 'Judiciary Committee proceed promptly with the Attorney

into a threat, directed at the law-making subsystem, by the Attorney General John Ashcroft who suggested that delays in passing the statute risked national security,[171] and would render representatives culpable for any subsequent attacks.[172] These sentiments were strengthened by the idea, expressed by Orin Hatch, that if the powers under consideration had already been in place the attacks could have been prevented.[173] Specter further demonstrated his responsiveness to popular accountability by criticising the bill's opponents 'for putting on record a disregard for constitutionality and elevating procedure over substance',[174] implying that anyone speaking against the bill would be liable to face electoral reproach. The link between public opinion and congressional behaviour is also suggested by the desire for individuals who had missed congressional votes relating to the statutory powers to put on record their reason for not attending, whilst affirming their uncaveated support for the proposed anti-terrorism legislation.[175]

Alongside the feelings of 'shock', anger and 'outrage' felt at the commission of the attacks,[176] the overwhelming public support for President Bush immediately following 9/11 was also cited within Congress to garner political support for the Executive's legislative proposals.[177] Several members of Congress cited examples of public support both for the President and for legislative action,[178] particularly from children,[179] and, less

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General's terrorism package', S10568-69.

[171] R. Dworkin, 'The Threat to Patriotism' *New York Review of Books* (25 February 2002).

[172] D. Weisburd and A.A. Braga, 'Introduction: Understanding Police Innovation' in D. Weisburd and A.A. Braga (eds.), *Police Innovation: Contrasting Perspectives* (CUP, 2006) 4-11.

[173] Orrin Hatch, SCR 25 October 2001, S11015.

[174] Arlen Specter, SCR 11 October 2001, S10579.

[175] See, e.g., HRCR 13 September 2001, Norman Dicks, E1644, Solomon Ortiz, E1647, and Carolyn Kilpatrick, E1638 who all gave their utmost apologies for missing the congressional vote condemning the terrorist attacks (vote no.338).

[176] Steve Chabot, Administration's Draft Anti-Terrorism Act of 2001. Hearing before the Committee on the Judiciary, House of Representatives (107th Congress, 1st Session, 24 September 2001), p.52.

[177] Joe Pitts states that 'right now this country is united like never before. The President has 90 per cent approval rating. His handling of the war has a 94 per cent approval rating. Bipartisanship is the rule of the day in Congress, and the flag is flying everywhere', HRCR 16 October 2001, H6791. This level of popular support of the President is largely in line with that found by a poll carried out almost contemporaneously which put presidential support at 86 per cent. This is a marked increase on the 44 per cent Presidential approval recorded immediately prior to the 9/11 attacks. See *The Washington Post* (21 December 2001) and *NY Times* (3 January 2002).

[178] E.g. Randy Forbes read out a statement by Rabbi Israel Zoberman who described the aftermath of the attacks as having a 'Holocaust resonance to it', HRCR 3 October 2001, E1785; and Michale Biliraki reads a poem by a friend of his entitled 'Lady Liberty Still Stands Tall', HRCR 24 September 2001, E1705.

[179] E.g., Jim DeMint read out a poem by a 16 year old girl describing the horrors of the attacks and the need to take action against the perpetrators, HRCR 16 October 2001, E1909; and Timothy Johnson reads out a letter by his son which described the escape of a family friend from an apartment near the World Trade Center and implored 'the citizens of our country … [to] remembers that our elected officials are working dutifully to do all that they can to help keep our country safe and protected. Our President and our Congressmen, now more than ever before, need our full confidence and support', HRCR 14 September

prosaically, some of the practical reasons for demanding immediate action.[180] Members of the executive and Congress, therefore, demanded complete responsiveness to the expectations of their electors whilst rejecting the importance of balancing these with other considerations.[181] The American people were described as deserving 'fast work and final action' in the enactment of additional police powers,[182] despite the known trend for the American public to support the President in times of tension, even where the administration commits gross violations of civil liberties.[183] A further subsystem behaviour that was used to quieten critics of counter-terror legislation[184] was repetition of media descriptions of the attacks.[185] These also helped to strengthened the popular 'availability heuristic' so that the statistical likelihood of a repeat event did not determine popular or subsystem reaction to it.[186] Instead it was portrayed as a single example of a broader, endemic phenomenon.[187] At the same time that the threat of terrorism was transformed from abstract notions to a real occurrence with a tangible impact,[188] therefore,

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2001, E1660.

[180] E.g., Representative Keller states that the legislation is 'critical to the people of Orlando and across the country that we pass this anti-terrorism bill to give our citizens a sense of confidence and security that our skies and country are going to be safer' in order to safeguard the tourist-based Orlando economy, HRCR 12 October 2001, H6762.

[181] Smith, *ibid*, H6760.

[182] Patrick Leahy, SCR 25 October 2001, S10990. Leahy makes particular reference to the fact that the legislation following the 9/11 attacks would be completed 'months ahead of the final actions following the destruction of the Federal Building in Oklahoma City in 1995' and that this was a necessarily contrasting position as compared to the new legislation, *ibid.* Patrick Leahy also commented that differences between Senate and House versions of the anti-terrorism bill following the 1995 bombing 'took nearly a year to reconcile [and] I believe the American people and my fellow Senators, both Republican and Democrat, deserve faster action', *ibid*, S10548.

[183] P. Simon, 'We Can Learn from History' in D. Goldberg, V. Goldberg, and R. Greenwald (eds.), *It's a Free Country Personal Freedom in American after September 11* (RDV Books, 2002) 32.

[184] See, e.g., Tom Udall, 25 September 2001, E1735 and Maria Cantwell, 25 October 2001, S11029. See also J. Lancaster and W. Pincus, 'Proposed Anti-terrorism Laws Draw Tough Questions' *Washington Post* (25th November 2001) at A5.

[185] Various members of Parliament refer to the news coverage of the events and how this heightened the sense of tragedy. See, e.g., HC Debs (2001-02) 372Michael Ancram (c.621) who referred to 'a terrible and almost unbelievable series of images and pictures' and Tony Blair referred to 'the memory of it is fresh in our minds and its consequences are seen daily in our newspapers and on our television screens', c.13. In addition, in the House of Lords Lord Dubs stated that '[w]e are more affected [by the terrorist attacks] because of television. We have seen the events in our living rooms. We saw the horror of what happened as it took place', HL Debs (2001-02) 627, c.30. For discussion of this effect see R.E Kasperson *et al*, 'The Social Amplification of Risk: A Conceptual Framework' in P. Slovic (ed.), *The Perception of Risk* (Earthscan Publications Ltd, 2000) 232-45 and N. Pigeon, R.E. Kasperson and P. Slovic, *The Social Amplification of Risk* (CUP, 2003).

[186] A. Treversky and D. Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) *Journal of Cognitive Psychology* 207. See also, C. Sunstein, 'Terrorism and Probability Neglect' (2003) *The Journal of Risk and Uncertainty* 121.

[187] See J. Best, *Random Violence: How We Talk about New Crimes and New Victims*, (University of California Press, 1999) 28-9. See also F. Furedi, *Invitation to Terror. The Expanding Empire of the Unknown* (Continuum, 2007) which considers the way modern society has styled itself as vulnerable, powerless and at risk from, as opposed to being in control of, external events, 66.

[188] Note, 'Responding to Terrorism: Crime, Punishment and War' (2002) 115 *Harvard L. Rev* 1217, 1230.

law-making subsystem debate focused on the worst possible outcome of such events and the need to avoid this at all costs.[189]

Whilst popular accountability is a key strength of the US and UK law-making sub-systems its known weakness in emergency situations, arising from popular 'probability neglect',[190] and the legislators need to be seen to be doing something rather than nothing, affected the subsystem's debate surrounding the counter-terrorism powers.[191] Some commentators have described the effect of these pressures as resulting in 'governance through fear'.[192] The environmental irritants produced by the images of 9/11 overwhelmed subsystem operational closure and was highly influential in directing the legislative programme implemented.[193] This contributed to subsystem behaviour which departed from the normal programme of effective and impartial law-making in favour of unilateral legislating which led to the enactment and use of statutory provisions without the necessary safeguards against misuse.[194] The outcome arose despite subsystem recognition of the detrimental impact that emergency situations can have on legislating and the importance of avoiding such effects.[195]

In a comparable trend in both countries, therefore, debate focused on individual stories of tragedy and heroism arising from the attacks, incorporating particularly emotive details

[189] C.R. Sunstein, 'Probability Neglect: Emotion, Worst Cases, and Law' (2002) 112 *Yale LJ* 61, 66.
[190] See C.R. Sunstein, 'Terrorism and Probability Neglect' (2003) 26(2) *The Journal of Risk and Uncertainty* 121-36 who suggests that the probability of an event happening is neglected when individual's emotions are activated, and that this response is especially prevalent in situations of terrorist attack.
[191] Editorial, *The Independent* (10 August 2005), 26 described this sentiment as leading to government by press release and 'post it' note and accused it of lacking coherence.
[192] See, e.g., R. Ericson and A. Doyle, 'Catastrophic Risk, Insurance and Terrorism' (2004) 33 *Econ. And Society* 135; J. Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* (Random House, 2004); and S. Ahmed, 'The Politics of Fear in the Making of Worlds' (2003) *16 Qualitative Studies in Education* 377.
[193] N.F. Pigeon, R.E. Kasperson and P. Slovic, *The Social Amplification of Risk* (CUP, 2003); and R.E. Kasperson et al, 'The Social Amplification of Risk: A Conceptual Framework' in P. Slovic (ed.), *The Perception of Risk* (Earthscan, 2000) 232-45.
[194] Compare this with the argument in E. Posner and A. Vermule, *Terror in the Balance: Security, Liberty and the Courts* (OUP, 2007), which argues that emergency delegation of power to the executive is not obviously broader than would have been enacted by a strictly rational legislation, updating its assessment of the terrorist threat: 4-5. However, this overlooks the fact that even this 'rational legislature' is responding to expectations of popular accountability, and its behaviour in substance and process reflects this.
[195] Jack Straw, HC Debs (1999-00) 341, c.155. In addition, whilst the damage caused by 9/11 was unquestionably horrific, and the potential for attacks using biological weapons was new, seen through another lens of understanding these threats repeat the terrorist predisposition to utilise the most technologically advanced weapons available at the time, M.O. Chibundu, 'For God, For Country, For Universalism: Sovereignty as Solidarity in our Age of Terror' (2004) 56 *Fla. L. Rev* 883,911.

about the victims.[196] The need to respond to public expectations of law-making subsystem actions became the preeminent driving force behind subsystem operations aimed at countering the threat from international terrorism, both before and after 9/11. This shifted the subsystems' behavioural programme from balancing majoritarian responsiveness and minority protection, which in turn affected the legislation produced. Although the rhetoric of balance was retained this essentially referred to balance between minority rights and majority security as opposed to normal operational balance. Indeed, as Gavin Phillipson has noted, this is a recurrent trend in counter-terror law-making, because of the lack of any significant electoral penalty for invasions of civil liberties. Instead, even where liberties do have an impact on law-making subsystem behaviour it tends to be against parties seen as being pro-civil liberties at the expense of fighting terrorism or crime.[197] The loss, or at least relegation, of minority interests within the subsystem programme, meant that subsystem function was predominantly responsive to majoritarian concerns relating to national security. Given the role of the media and politicians seeking to win elections and retain political support, perhaps, to expect the legislature to behave otherwise perhaps 'smacks of extreme naivety'.[198]

3.4 Conclusion

This chapter has demonstrated how the parliamentary and congressional enactment of the suspicion-less stop, search and surveillance powers took place through a law-making process with an acknowledged pre-disposition to depart from the self-referential behaviours essential to creating even and effective legislation. Such behaviour supports the systems theory claim, as well as more general critiques, that law does one things whilst maintaining that it is doing another, by way of the hidden assumptions and values shaping the law and legal discourse.[199] The manifestation of such deviations in the law-making process were differently recognised in the US and UK as either the outcome of a

[196] See, e.g., Howard Coble, who speaks of the death of Sandy Bradshaw, who was just 38 years old … [and] leaves behind her husband Phil and her daughter, Alexandria, 2, and her son, Shenan, not yet one'. Howard Coble describes Ms Bradshaw as 'friendly, outgoing, bubbly and devoted to her family', HRCR 11 September 2001, E1635.

[197] G. Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act Era' (2004) *Current Legal Problems* 40-75, 45.

[198] A. Ashworth, 'What have Human Rights Done for Criminal Justice in the UK?' (2004) 23 *U. Tai L. Rev* 151, 157.

[199] See D. Kennedy, 'The Political Significance of the Structure of the Law School Curriculum' (1983) 15 *Seton Hall Law Review* and also G. Minda, 'The Jurisprudential Movements of the 1980s' (1989) 50 *Ohio St. L.J.* 599, 622.

compromise in procedural standards in the enactment of laws; or the failure to incorporate a balanced consideration of the substantive qualities expected to be found in enacted legislation. Despite this difference the outcome of both forms of non-normative legislative behaviour was the implementation of legislation which lacked sufficient consideration of, or safeguards against, the misuse of the powers contained within it, such that it was deployed in a racially uneven manner.[200]

Both the congressional, parliamentary and committee-based debates acknowledged the risk of enacting permanent counter-terror powers without safeguards.[201] An almost self-congratulatory tone was therefore adopted during the debates for having identified past legislative behavioural deficiencies and being committed to remedying them in the new statute.[202] However, despite the explicit acknowledgement of the need for legislative safeguards, and a number of signs of human rights thinking within the Act,[203] the US and UK law-making subsystems determinedly refused to demand the incorporation of protections against the unrestricted use of the stop, search and surveillance powers into the legislation.[204] The warnings relating to the possible negative impact of enacting powers wholly-responsive to popular panic, therefore, did not translate into the inclusion of effective protections in the legislation, thus laying the foundations for the possibility of the racially disproportionate implementations of the powers once activated against a racially-characterised threat.[205] Despite the apparent desire to break away from cycles of ineffective and detrimental emergency law-making, either the process or the contents of

[200] In this context 'misuse' is used to mean the use of s.44 stop and search in a way that disproportionately focuses on racial and religious minority individuals, without this being an effective or justifiable means of policing the threat of terrorist attacks, as explored in chapter one of this thesis.
[201] See, e.g., Alan Simpson, HC Debs (1999-00) 346, c.358.
[202] See, e.g., Jack Straw who states unequivocally that '[w]e are determined to strike the right balance between giving the police and other agencies the powers that they need to fight terrorism and guarding the civil liberties of people affected by the exercise of those powers', HC Debs (1998-99) 327, c.1004. See also Simon Hughes who states that 'I am conscious of the fact that the provisions are partly a continuation of Prevention of Terrorism legislation, which has been tested from time to time. However, we need to link it with the proper level of authorisation', Standing Committee, 1 February 2000.
[203] C. Gearty, '11 September and the Human Rights Act' (2005) 32(1) *JLS* 18, 21-22.
[204] See, e.g., Ken Maginnis, who states that '[i]t is important that the Bill, as it evolves through its various stages over the forthcoming months, is flexible enough to adapt to the changing nature of terrorism', HC Debs (1999-00) 341, c.199. See also Charles Clarke, Standing Committee (1 February 2000) who stated that '[a]n important and well-established principle of our policing system is that chief officers of the police have operational independence. They are best placed to make operational policing decisions which…include deciding whether making a stop-and-search authorisation is expedient in preventing acts of terrorism'.
[205] Such characterisation is clear from media reporting of the 9/11 terrorist attacks and subsequent focus on Islamic terrorism and terrorism groups, whilst effectively distancing these incidents from terrorist attacks outside this narrow construction of the threat. See H. Vu, 'Note. Us against Them: The Path to National Security is Paved with Racism' (2002) 50 *Drake L. Rev.* 661, 663.

the legislative debate did not achieve this. The alternative form of behaviour evident in the counter-terrorism law-making failed to incorporate the necessary safeguards and considerations to maintain subsystem effectiveness and legitimacy.[206]

This chapter has shown that there is a version of the law-making subsystem's operational programme that makes its communications 'legitimate', but that this version is not the actual programme on the basis of which it operates. In times of crisis and the threat of violence it becomes clear that the actual programme on the basis of which the system operates places very little weight on minority protection and almost all of its weight on pleasing the electorate. Although this raises serious questions about the legitimacy of the subsystem's communications, for the purpose of this thesis the key relevance is that racial effect, if present, might flow necessarily and predictably from this 'real' programme, and that, indeed the existence of a veneer of minority protection, itself generated to feed appearance-driven electoral accountability, helps to obscure the real operational programme, and create an impression of legitimacy, while in fact the law-making system simply pursues the interests of the ruling group. Having set out the expected characteristics of fair and effective law-making, together with the legislature's understanding of the problems encountered if these are departed from and their impact on the statutory provisions, chapter four shows how subsystem behaviour brought about these deficiencies and, therefore, played its role in the eventual racial effect of the legislative provisions.

[206] E.g., Steve McCabe tabled an amendment to the Standing Committee that the stop and search powers should be subject to police codes of practice. However, this amendment was withdrawn following Mr. Ingram's response that the police should be free to institute more onerous codes of practice in relation to these powers if they wish. The effect of it, however, was to include no safeguards concerning standards of police use of the powers into the statute, Standing Committee (3 February 2000).

Chapter Four: The Contribution of Legislative Subsystem Behaviour to the Racial Effect of Counter-terror Stop, Search and Surveillance

Fig. three: UK passage of s.44

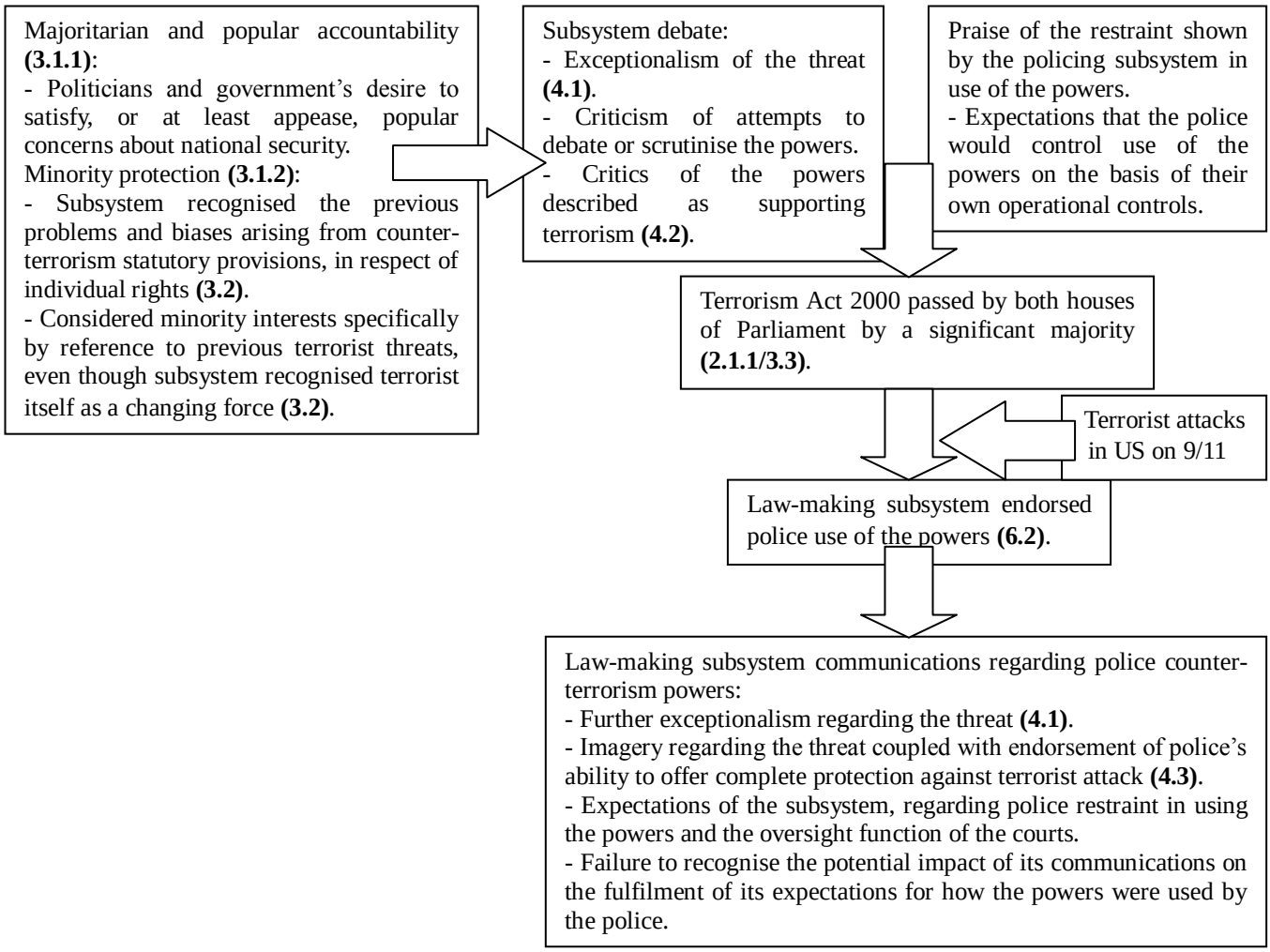
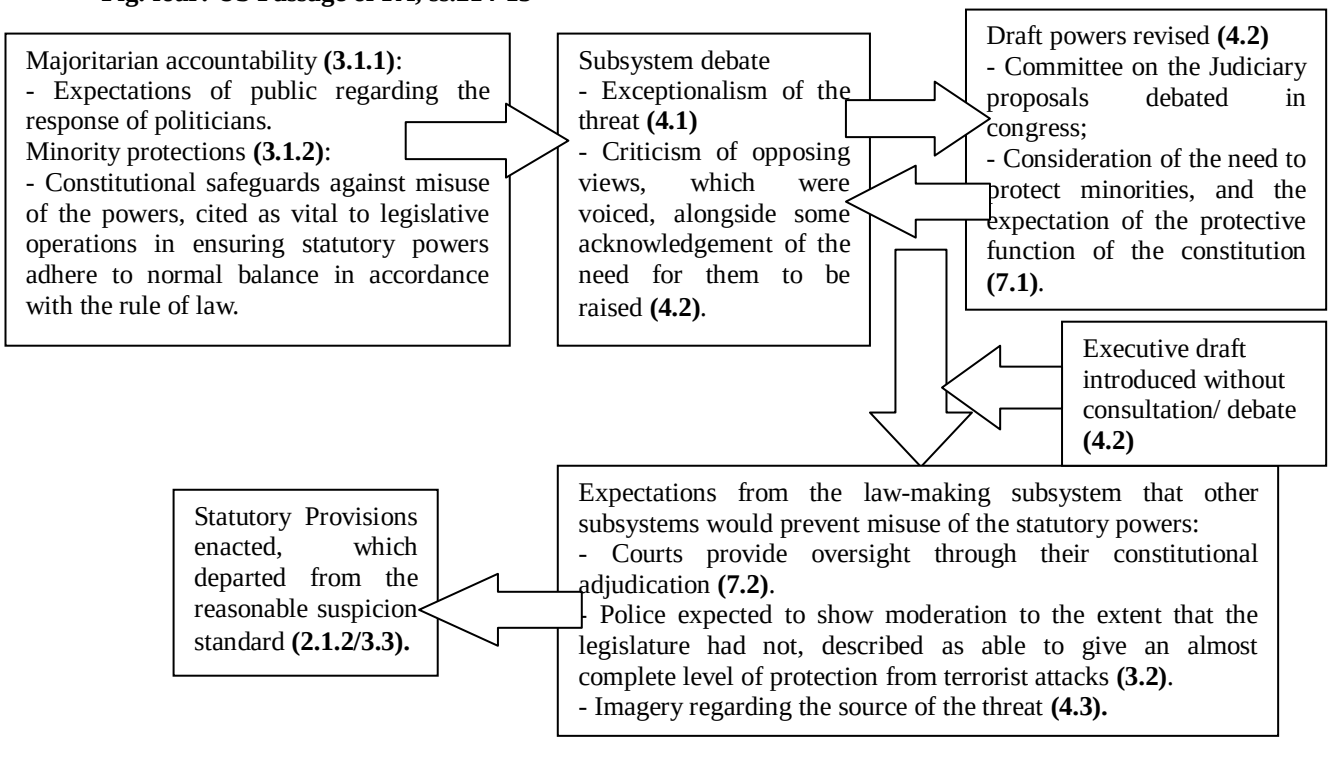


Fig. four: US Passage of PA, ss.214-15



Chapter three set out the law-making subsystem's programme of operation for enacting legislation, together with evidence that the subsystem appreciated the negative impact on its legislating when it failed to adhere to this subsystem programme, and its apparent repetition of these criticised modes of operation in response to the terrorist threat. In order to explain this mode of subsystem behaviour this chapter uncovers the real operational programme through which the law-making subsystems created its impression of legitimacy while responding to the interests of the ruling group in the context of the threat of terrorist attack in the US and UK.[1] This argument follows that of race-crits who perceive law-making as a highly politicised activity, dominated by majority social groups and their needs.[2] One impact of this is that potential effects of statutory provisions which would bear most heavily on minorities are subordinated or even entirely absent from law-making discourse.[3] In particular, the desire to reflect and respond to popular accountability, above all other considerations, had a strong politicising influence on the subsystem function and output and indicates that what is promoted as the subsystem programme of operation in terms of balancing minority and majority interests is little more than a specific manifestation of the legislature responding to the majority expectations and which is readily dispensed with when majority priorities change.

For the purposes of this analysis the behaviour of the UK legislature is considered across several different periods, encompassing the enactment and extension of the suspicion-less stop and search powers in 1994 and 1996,[4] their re-enactment through the Terrorism Act 2000,[5] and their use following 9/11.[6] Scrutiny of the Terrorism Bill, undertaken by the Parliamentary Standing Committee, will also be used as evidence of the subsystem

[1] See figs. three and four. See also R. Jackson, *Writing the War on Terrorism. Language, Politics and Counter-terrorism* (Manchester University Press, 2005) 23; I. Parker, *Discourse Dynamics: Critical for Social and Individual Psychology* (New Left Books, 1992) 5.
[2] D. Kairys (ed.), *The Politics of Law: A Progressive Critique*(rev'd ed., 1990).
[3] R.T. Ford, 'The Boundaries of Race: Political Geography in Legal Analysis' 81 *Harvard Law Review* 1841.
[4] The specific powers that s.44 replaced were contained within the Criminal Justice and Public Order Act 1994 and the Prevention of Terrorism (Additional Powers) Act 1996, which inserted ss.13A and 13B into the Prevention of Terrorism (Temporary Provisions) Act 1989.
[5] Jack Straw, HC Debs (2000-01) 363, c.238W, confirming commencement of the 2000 Act and that it would replace the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996. The main focus of this analysis, however, concerns the period prior to the Bill gaining Royal Assent, see HC Debs (1999-00) 354, c.608.
[6] Although s.44 had been in force since February 2001 it was little used before 9/11, see Human Rights Watch, *Without Suspicion. Stop and Search under the Terrorism Act 2000* (2010) 11, HC Debs (2001-02) 372, c.604ff; and HL Debs (2001-02) 627, c.1ff.

programme which gave rise to the statute.[7] The behaviour of the US law-making subsystem is analysed through congressional debate and committee-based comments during the period between the 9/11 attacks[8] and the passage of the USA Patriot Act of 2001.[9] Although congressional behaviour clearly shifted to incorporate popular expectations of the subsystem, this chapter considers how, despite the new reality of the security threat, constitutional protections continued to influence the subsystem programme in delineating the legislative powers.[10] This chapter suggests that the US and UK law-making subsystem debates reveal a subsystem amnesia as regards the aspirations for effective and proportionate counter-terrorism measures expressed within the subsystem. Instead, the debates indicate an all-consuming concern amongst the politicians to be seen to be safeguarding the population and freeing the police from any constraints, which could curb their use of their law enforcement powers. This is present in relation to the TA debates, despite MPs explicitly commending themselves for acting outside a context of immediately national security threat, and with the PA debates occurring in the immediate aftermath of 9/11. This indicates that the law-making subsystem departure from normal operational behaviour was not contingent upon the specific events of 9/11, but reflects a more general trend in how subsystem communications are affected by subsystem operational closure and cognitive openness.

The first section in this chapters looks at how exceptionalism became the dominant theme in subsystem communications. The next section suggests that the subsystem response to the exceptional context was to seek to eliminate or circumvent the normal operational behaviour of statutory debate. By repeating the previously criticised patterns of autopoietic behaviour subsystem agents contributed to the implementation of statutory powers which operated on the basis of unchecked subjectivity, particularly owing to their suspicion-less nature. This meant that the powers had the potential to be used in a way that targeted individuals on the basis of their membership of a minority racial group, a potential that was realised in the febrile atmosphere in which the powers were used,

[7] This comprised of nine sittings between 18 January 2000 and 8 February 2000. Minutes of the sittings are available at www.publications.parliament.uk/pa/cm199900/cmstand/d/cmter.htm, accessed 26.11.2010.
[8] See HRCR (11 September 2001) H5503-91ff and SCR (12 September 2001) S9284-88, 9289-333ff. See www.thomas.loc.gov/cgi-bin/query, accessed 04.01.2011
[9] See HRCR (25 October 2001) S10969-70; and SCR (25 October 2001) S10990-11060. See also Minutes of House Judiciary Committee (24 September 2001) and (3 October 2001).
[10] See, e.g., Adam B. Schiff, who stated: 'We will not relinquish our freedoms of speech, assembly and religion, nor sacrifice our precious right of privacy or way of life. The price of freedom is high, and Americans have always paid it', HRCR Additional Comments (article 4 of 4), E1647.

following 9/11. The final section analyses the communications arising from within the law-making subsystem pertaining to the race and religious-based nature of the threat.

4.1 The Appeal to Exceptionalism

Both US and UK law-making subsystems described the legislative context giving rise to the counter-terrorism stop, search and surveillance powers in highly exceptional terms, repeating a subsystem tendency to portray all national security threats as uniquely severe.[11] Of course, this is unsurprising given the scale and severity of the 9/11 attacks.[12] However, the UK Terrorism Act was enacted before this date, with the powers on which s.44 was based having existed even before this. Nevertheless, on each occasion the context was portrayed as so exceptional that only the most elevated powers could match the threat.[13] Terrorism became the 'trump card' to support government action, irrespective of its potential impact on civil liberties.[14] Within this context moderating legal powers to protect individual rights was readily portrayed as a 'gamble with people's safety'.[15] Whilst the scale of the 9/11 attacks was undoubtedly shocking, descriptions of them in terms of absolute exceptionalism was contrary to the recognised need to engage in measured and calm law-making, in accordance with the subsystem's self-developed functional programme.[16] Both US and UK law-making subsystem behaviour suggest that the special counter-terrorism measures arose from a pattern of operations driven by the desire to be seen to take decisive and uncompromising action, as opposed to its task of

[11] As previously considered in Chapter 3 of this thesis (section 3.2). B. Vaughan and S. Kilcommins, *Terrorism, Rights and the Rule of Law. Negotiating Justice in Ireland* (Willan Publishing, 2008) 4.

[12] J. Huysmans, 'Minding the Exceptions: Politics of Insecurity and Liberal Democracy' (2004) 3 *Contemporary Political Theory* 321; House of Commons Defense Select Committee, *The Threat from Terrorism* HC 348 (Session 2001-2002); Home Office, *Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society. A Discussion Paper* (2004) Cm 6147 at 5 and 7. This is not, however, a wholly post 9/11 phenomenon, see B. Hoffman, *Inside Terrorism* (1998); W. Laquer, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (1999); X. Raufer, 'New World Disorder, New Terrorism, New Threats for Europe and the Western World' (1999) 121 *Terrorism and Political Violence* 30; and C. Schmitt (auth.), E. Kennedy (trans.), *Crisis of Parliamentary Democracy* (MIT Press, 1985).

[13] Criticising this see: M. Ignatiev, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh, 2005); and I. Leigh and R. Masterman, *Making Rights Real* 296.

[14] A.C. Coveny, 'When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism' (2007-08) 31 *Am. J. Trial Advoc* 329, 367. See also M.D. Evans, 'International Law and Human Rights in a Pre-emptive Era' who describes how 'Such is the totemic power of the all-pervasive and yet unseen threat that it is difficult to gauge the point at which general tolerance of such [civil rights] erosions might lie', in M. Buckely and R. Singh, *The Bush Doctrine and the War on Terrorism. Global Responses, Global Consequences* (Routledge, 2006) 193.

[15] I. Loader, 'The Cultural Lives of Security and Rights' in Goold and Lazarus, *Security and Human Rights* (Hart Publishing, 2007) 39.

[16] H. Kennedy, *Just Law. The Changing Face of Justice – and Why it Matters to Us All* (Vintage, 2005) 198.

enacting effective and balanced statutory provisions.[17]

Despite recognising the benefit of enacting security related measures, through its 'normal' subsystem programme, the UK law-making subsystem interpreted and responded to environmental irritants as necessitating legislation that was anything but normal.[18] One example of the impact of the exceptional circumstances on subsystem operations and resulting statutory provisions was that the subsystem changed its normal aversion to pre-emptive police stop and search and enacted permanent police powers as an anticipatory step against the significant and serious contemporary terrorist threat.[19] The original suspicion-less stop and search powers were introduced through amendments to the Prevention of Terrorism (Temporary Provisions) Act 1989 which afforded the police the power to stop vehicles, and later pedestrians, where doing so was expedient for the purposes of protecting against terrorism, and search for articles which could be used in the commission of acts of terrorism.[20] The Government called for unilateral parliamentary support for the proposed powers which were accepted as being operationally essential,[21] on the basis of police expertise and support for the powers.[22] The Government used the urgency of the police calls for such powers to explain its introduction of the statutory provisions regarding pedestrian stops and searches by way of a timetable motion, and with only 24 hours' notice,[23] despite the Prevention of Terrorism (Temporary Provisions) Act 1989 having been renewed less than three weeks previously.[24]

The debates concerning the Terrorism Act sustained the sense of exceptionalism, with the 'crisis'[25] occasioned by the risk of terrorist attack described as being greater than anything

[17] For criticism of such narratives see: R. Jackson, 'Playing the Politics of Fear: Writing the Terrorist Threat in the War on Terrorism' in G. Kassimeris (ed.), *Playing Politics with Terrorism* (Columbia University Press, 2007); and J. Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats and Why We Believe Them* (Free Press, 2006).
[18] See, e.g., Alan Simpson, HC Debs (1999-00) 341, c.203.
[19] Clive Walker has noted the growing emphasis on the anticipatory risk in counter-terrorism legislating. See C. Walker, 'Keeping Control of Terrorists, without Losing Control of Constitutionalism' (2007) 59 *Stanford L. Rev* 1395.
[20] Prevention of Terrorism (Temporary Provisions) Act 1989, ss.13A and 13B. Suspicion-less powers were also later enacted through s.60 of the CJPOA 1994.
[21] Michael Howard, HC Debs (1999-00) 341, c.198.
[22] Ivan Lawrence, HC Debs (1995-96) 275, c.238.
[23] Michael Howard, HC Debs (1999-00) 341, cc.35, 37.
[24] For criticisms of this see *ibid*, David Wilshire, c.173, Max Madden, c.175.
[25] For consideration of the difficulty encountered in defining 'crisis', 'emergency' and the ready tendency to resort to emergency-based rhetoric in instances of legislative pressure see K.E Whittington, 'Yet another

previously seen.[26] The level of the threat was apparently confirmed by reference to the ability of terrorists to attack using chemical and biological weapons.[27] In using such references Parliament focused on the most destructive forms of possible attack without offering any evidence or basis on which to suggest that the use of such weapons was a real probability.[28] Nevertheless, the prevailing discourse portrayed the threat as one of 'common sense'.[29] Exceptionalism, therefore, operated as a 'universal legislator',[30] encouraging the implementation of heightened, continuous and UK-wide counter-terrorism powers.[31]

After 9/11 the claims of exceptionalism were again escalated. David Blunkett, for example, emphasised the unprecedented nature of the level of threat, which was greater than previously envisaged.[32] One illustration of parliamentary exceptionalism after 9/11 is shown in the way in which several MPs distinguished the contemporary terrorist threat from that of Irish terrorism. Irish terrorists were described as having been 'most obliging'; such that once caught 'they went to the courts, lined up like turkeys volunteering for Christmas'.[33] By contrast the contemporary threat represented 'everything that would

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Constitutional Crisis?' (2002) 43 *William and Mary L. Rev* 2093, 2096-98 and O. Gross, 'Once More into the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 438-9.

[26] See, e.g., David Liddington, HC Debs (1999-00) 346, c.359.

[27] E.g., Tom King states that in contrast to the previous threat '[t]errorism is now a global activity which poses many fresh and serious challenges, citing the example of the sarin attack on the Tokyo underground system in which 13 people dies and around 50 were injured, HC Debs (1999-00) 341, cc.177-78. This example is also used to justify the powers by Jack Straw, HC Debs (1999-00) 341, c.159. The threat of chemical, biological and nuclear weapons was also raised in Lord Lloyd of Berwick's *Inquiry into Legislation against Terrorism*, (1996) para 5.13.

[28] House of Commons Home Affairs Committee, *Terrorism and Community Relations*, HC165-II, Written Evidence (The Stationery Office, London, 2005), memorandum submitted by International Centre for Security Analysis, Ev.53.

[29] D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Clarendon Press, 2001) 135.

[30] This idea originates from Plato who wrote that 'no man ever legislates at all. Accidents and calamities occur in a thousand different ways, and it is they that are the universal legislators of the world', Plato (tr. T.J. Saunders), *The Laws* (Penguin Books, 2005) 119.

[31] Government Consultation Paper, *Legislation against Terrorism* Cm 4178 (December 1998). See also Jack Straw's statement that the powers were necessary for 'simply protecting democracy', *The Guardian* (14 November 1999).

[32] HC Debs (2001-02) 372, c.923 and also Baroness Symons of Vernham Dean who stated that 'few of us can recall a time when reality was so much more terrible than the worst we could imagine', HL Debs (2001-02) 627, c.10.

[33] Ken Maginnis, HC Debs (2001-02) 372, c.195 and generally cc.195-62. This is, however, is stark contrast to the portrayal of the context in which the 1974 legislation was passed which, it was argued, justified the sweeping powers enacted. See National Archives Catalogue ref CAB/128/55/24: 2-3. See also David Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' *Public Law* (Summer 2006) 374, who states, in relation to the legislative process surrounding the Prevention of Terrorism Act 2005, that '[t]he Prime Minister clearly has a rather cosy picture of villains in the 1960s as

substitute anarchy for democracy'[34] and as 'likely to continue to exist for the foreseeable future'.[35] The nature of the possible attacks and attackers was also contrasted from past terrorist activities,[36] particularly distinguishing the threat of suicide bombings perpetrated by terrorists who 'do not care about the consequences of their actions and do devastating things such as blowing up themselves as well as others' from Irish terrorists.[37] These descriptions imbued the parliamentary debate with a fear of the apparently exceptional threat faced, evoking the very kind of emergency response that was believed to be being avoided by having enacted the counter-terrorism powers 'in advance of events'.[38]

Debate, that so-cherished a feature of subsystem behaviour, designed to protect against ill-advised and minority-targeting law-making, was therefore marginalised in the name of public security in both pre- and post-legislative consideration of the counter-terrorism police powers.[39] Post-9/11 insistence on cross-parliamentary cooperation[40] was sustained after the 7/7 attacks, which gave rise to uncaveated assurances that the Government would receive 'unqualified'[41] and 'wholehearted support' for its policies from other political parties.[42] The appeal to unity was portrayed as the only possible response to the 'massive tragedy … of huge and almost unparalleled historical significance' and transcended all considerations of maintaining the normal subsystem programme, including parliamentary scrutiny of governmental proposals, through debate.[43]

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people who were not too violent or clever, easily caught, and then immediately said, 'It's a fair cop gov, you've got me bang to rights'', 367.

[34] Ken Maginnis, HC Debs (1999-00) 341, c.195.

[35] Jack Straw, HC Debs (1998-99) 327, c.999.

[36] David Feldman, however, considers that in practice the qualitative difference between Al Qaeda's terrorism and that of the IRA is limited, D. Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' (Summer 2006) *Public Law* 364, 369.

[37] Fiona McTaggard, HC Debs (1999-00) 341, c.182. Despite such descriptions the appeal to exceptionalism to justify extending existing powers was also evident following the Birmingham bombings in 1974, which were described by Roy Jenkins as 'a different order of casualties from anything we had previously known', R. Jenkins, *A Life at the Centre* (Politicos Publishing Limited, 1991) 393 and generally 392-97.

[38] Richard Shepherd, HC Debs (1999-00) 346, c.343.

[39] This trend has become a normal response to security threats to avoid accusations of being soft on terrorism, see N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: the Human Rights Era* (Butterworths Lexis Nexis, 2003) 151.

[40] Iain Duncan Smith assured Tony Blair that 'the Opposition will co-operate with the Government in any way possible', HC Debs (2001-02) 372, c.677.

[41] Menzies Campbell (then Leader of the liberal Democrat Party) and Elfyn Lloyd, HC Debs (2005-06) 436, cc.467 and 469.

[42] David Davis, HC Debates (2005-06) 436, c.466. See also Iain Duncan Smith (then Leader of the Conservative Party), *ibid*, cc.574-75.

[43] Jack Straw, HC Debs (2001-02) 372, c.618.

Whilst the UK law-making subsystem's cognitive openness caused it to respond to a non-particularised terrorist threat, the US legislative subsystem was responding directly and specifically to the attacks of 9/11.[44] The bombings were described as the first attack within United States borders by an outside power,[45] since the war of 1812.[46] Against the background of the attacks and declaration of emergency,[47] exhortations of the need for legislative innovation cut across debate in both congressional chambers and committees on the judiciary.[48] 9/11 was labelled 'a day our very way of life was attacked'[49], 'a date which will live in infamy'[50] and 'the day the landscape of America was changed forever'.[51] Through 9/11 the US was described as having entered into a new era in world history'.[52] Operating within such a context, congressional debate was replete with superlatives revealing the law-making context as being one of 'utter shock, horror, sorrow, [and] dismay'.[53] The strength of this sentiment is shown in the description of the attacks as a 'clarion call to arms in a new war against terrorism'.[54] This atmosphere affected how Congress conceptualised the terrorist threat and the way that members drew on notions of risk, fear, catastrophe and precaution to support the proposed statutory powers.[55]

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[44] See the National Commission on Terrorist Attacks upon the United States, *9/11 Congressional Report* (22 July 2004).

[45] Although the US did face over 3,000 domestic terrorist incidents between 1954 and 2000, none were anywhere near the scale or destructiveness of 9/11. See C. Hewitt, *Understanding Terrorism in America: From the Klan to al Qaeda* (Routledge, 2003) 14, 16.

[46] Orrin Hatch, SCR 25 October 2001, S11059.

[47] Pursuant to the National Emergency Act (50 USC 1621), s.201. Declaration of National Emergency by Reason of Certain Terrorist Attacks and Ordering Ready of Armed Forces to Active Duty, Message from the President of the United States, H.Doc. No. 107-118, (14 September 2001).

[48] The exceptional nature of 9/11 is however questioned by David Bonner examines knee jerk legislative responses to atrocities and suggests that the 'rules of the game' had not changed as a result of 9/11, as much as it being a case of 'old wine new bottles', D. Bonner, *Executive Measures, Terrorism and National Security. Have the Rules of the Game Changed?* (Ashgate Publishing, 2007) 40.

[49] James Sensenbrenner, Jr., HRCR (11 September 2001) E1628.

[50] Cliff Stearns, *ibid*, E1627.

[51] Todd Tiahrt, *ibid*. See also James Sensenbrenner stating that 'On September 11th. Not only our Nation but our entire way of life was attacked', House Committee on the Judiciary (3 October 2001). Such comments have also been reflected in academic debate which has considered the extent to which 9/11 fundamentally changed the world, see J. Strawson (ed.), *The Law after Ground Zero* (Glasshouse Press, 2002); M. Cox, 'American Power Before and After September 11: dizzy with success?' (2002) 78(2) *International Relations* 261; M. Cox, 'The imperial republic revisited: the United States in the era of Bush', in A. Colas and R. Saull (eds) *The War on Terrorism and the American 'empire' after the Cold War* (Routledge, 2006) 114-30; and J. Stromseth, P. Allott, and D. Scheffer, 'International Law after September 11' (2002) *American Society of International Law Proceedings* 410.

[52] Pete Sessions HRCR (14 September 2001) E1650

[53] Christopher Smith, HRCR (13 September 2001) E1643.

[54] Bob Goodlatte, HRCR (12 October 2001) H6761.

[55] A. Goldsmith, 'The Logic of Terror: Precautionary Logic and Counterterrorism Law Reform after September 11' (2008) 30(2) *Law and Policy* 141.

Descriptions of the terrorists as not simply having attacked the US but also democratic values, civilised and free society and the whole of humanity turned 9/11 into a powerful semiotic: a symbol of anarchy and the dying of democracy against which only the most uncompromising counter-terrorism powers would suffice.[56] The impact of these exceptional circumstances was confirmed by the need to 'go to any length to bring these criminals, and those who aid and abet them, to justice'.[57] A further characteristic of the US legislature's use of exceptionalism was that whilst the context was described as 'a dark time for America, which has generated grave memories that will last forever',[58] it was also used as a base line, from which Congress suggested even more horrific attacks which could be perpetrated. This even greater threat was then used as a rallying point for equally exceptional demonstrations of American unity, including support for heightened police powers, to enable the FBI and other security services to take a wide range of actions to safeguard against the terrorist threat. Tom Udall, for example, declared that '[n]ever before in our history have Americans borne witness to such an egregious, savage, violent and cowardly attack on American soil. The situation defies belief and embodies much of what had once been our greatest fear'.[59] The exceptional nature of the threat meant that what were deemed to be appropriately serious powers were proposed and enacted in response.[60] Despite an acknowledgement that in the process of enacting the Patriot Act '[t]here was some unfortunate rhetoric along the way',[61] subsystem communications reflected popular exceptionalism, thus helping to legitimise the public fear, whilst at the same time placating it through the strength of the legislative powers enacted.[62]

Both US and UK law-making subsystems were highly responsive to the irritants of popular opinion that arose in relation to the terrorist threat, leading to a self-perpetuating and self-legitimising sense of exceptionalism behind its legislating. Descriptions of the

[56] See Dennis Moore, HRCH (13 September), E1641; and Shelia Jackson-Lee, *ibid*, E1663. I. Ward, *Law, Text, Terror* (CUP, 2009) 6.
[57] William Jenkins, HRCR (13 September 2001) E1645. See also Olympia Snowe who insists that 'We must move heaven and earth to remove impediments that keep us from maximising our defense against terrorism', SCR (11 October 2001) S10596.
[58] Robert Cramer, Jr., HRCR (14 September 2001) E1659.
[59] HRCR (24 September 2001) E1735.
[60] Tony Hall, HRCR (14 September 2001) E1655. George Bush, Message from the President, Report on Recovery and Response to Terrorist Attacks on the World Trade Center and Pentagon, (20 September 2001) S9554.
[61] Patrick Leahy, SCR (25 October 2001) S11014.
[62] R. Whitaker, 'After 9/11: A Surveillance State?' in C. Brown (ed.), *Lost Liberties. Ashcroft and the Assault on Personal Freedom* (The New Press, 2003) 52, 53.

context as one of abject exceptionalism contributed to a state of 'ontological hysteria' amongst representatives who were left waiting for the next, seemingly inevitable and devastating attack.[63] Such 'discourses of insecurity'[64] did not depend on the occurrence of a specific terrorist attack because, both before 9/11 and in its aftermath, communications describing the threat faced were escalated to an ever greater level of acuteness. Consequently, it is inappropriate to view nature of the counter terrorism powers as wholly attributable to the exceptional exigencies of the situation immediately following 9/11. Instead, its genesis may be found in the desire of the law-making subsystem to respond to external irritants, such that through the enactment of stop, search and surveillance powers the subsystem sought to 'feign control over the uncontrollable'.[65] The subsystem's descriptions of the threat from terrorism in terms of its exceptional nature, and the subsystem's aim of satisfying majoritarian considerations, had a resultant impact on the subsystem modes of operation, such that it led to the curtailing of the parameters of the legislative debate, as is shown in the following section.

4.2 The Scope of Legislative Debate

A further effect of the irritants arising from the exceptional terrorist threat was that legislative debate concerning these issues was at best limited, at worse, effectively impossible. Both US and UK legislatures engaged in limited subsystem debate over the stop, search and surveillance provisions, and in so doing particularly marginalised concerns relating to minority protection within subsystem communications and operational considerations. This section considers the extent to which the subsystem's reliance on a particular type of discourse which marginalised debate facilitated dominance of that discourse by majority expectations of total safety, irrespective of considerations of minority protection.[66]

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[63] J. Zulaika and W. Douglas, *Terror and Taboo: The Follies, Fables and Faces of Terrorism* (Routledge, 1996). See also H. Hilary and N. Kubaek who argue that the American public and legislators, were blinded by the fear of more attacks and were therefore unable to see the consequences of the Patriot Act's excesses, 'The Remaining Perils of the Patriot Act: A Primer' (2007) 8 *Journal of Law and Society* 1, 73.

[64] See T. Abbas, *Muslim Britain: Communities under Pressure* (Zed, 2005); E. Poole, *Reporting Islam: Media Representations of British Muslims* (IB Tauris, 2002); and E. Poole, 'The Effect of September 11 and the War in Iraq on British Newspaper Coverage' in E. Poole and J. Richardson (eds.), *Muslims and the News Media* (IB Tauris, 2006).

[65] U. Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19 *Theory, Culture and Society* 39, 41.

[66] See J. Black, 'Proceduralizing Regulation' (2001) 20(1) *OJLS* 33, 45. See also M. Foucault, 'Politics and the Study of Discourse' in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in*

One change in subsystem operational programme that arose from its interpretation of the exceptional level of the threat was the demand for cross-parliamentary support for legislative proposals. This helped to frustrate one of the key autopoietic characteristics relied upon to ensure effective and appropriate legislating, that of confrontational debate and partisan scrutiny of draft statutory provisions.[67] In the UK, the subsystem's cognitive openness to what it understood as the exceptional threat from terrorism, therefore, meant that opposition politicians readily acceded that 'there should be a united front across all parties in the House in the fight against terrorism'.[68] Without such cross-party cooperation there was a sense that 'we [the Members of Parliament] would be betraying our duty to the people who elected all of us'.[69] In fact, enactment of the Terrorism Act was used as an opportunity to directly criticise the lack of support given to the previous Conservative Government by Labour when it had been seeking the renewal of counter-terror powers.[70] Labour's opposition was condemned as 'a shoddy and shameful action … [and] not a pattern that the present Opposition intend ever to follow'.[71] This commitment to cooperation between Government and Opposition meant that the Government's willingness to accept suggestions for improvements to the Bill[72] was expressed to a largely unchallenging audience.[73] In relation to s.44, for example, the only change to the drafting of the provision was the insertion of the words 'or on' in the scope of the authorisation for use of the power, so that it permitted search of 'anything in, or on,

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Governmentality (Harvester Wheatsheaf, 1991).

[67] The meetings of the Standing Committee demonstrate contradictory views on the role of partisan debate concerning the legislation. E.g., Charles Clarke sought 'to emphasise the importance of parliamentary debate on the issues', 3 February 200 and David Lidington refer to the Act as 'a subject that is so important that it merits a measure of bipartisanship' (8 February 2000). However, John Taylor, stated with apparent relief that '[t]his Committee has been mercifully free from partisanship' and David Lidington also commends that counter-terrorism measures 'be put on a permanent basis with cross-party support', 8 February 2000. These apparent contradictions suggest that the importance of debate was recognised but that in reality dissenting voices were few and minimised.

[68] Anne Widdicombe, HC Debs (1999-00) 341, c.166.

[69] Charles Clarke, HC Debs (1999-00) 341, c.223.

[70] The Government sought to explain, and thereby excuse, their opposition of the renewal of the counter-terrorism powers between 1983 and 1995, which was raised by James Gray, by stating that it related to proportionality in the use of the powers, as opposed to the need for the powers themselves, Jack Straw, HC Debs (1998-99) 327, cc.1002-03.

[71] Anne Widdicombe, HC Debs (1999-00) 341, c.167. See also David Lidington, John Taylor and Charles Clarke, Standing Committee, (8 February 2000).

[72] Jack Straw, HC Debs (1999-00) 341, c.161.

[73] In fact Opposition support in general for the implementation of a comprehensive prevention of terrorism act already appeared to be likely, see Anne Widdicombe, who questioned the reason for the Government's unwillingness to support such an Act, HC Debs (1998-99) 333, c.1173.

the vehicle or carried by the driver or a passenger' in the final Act.[74]

Amidst the consensus-dominated approach to parliamentary debate reservations pertaining to the strength of the powers were denigrated as pursuing 'a tedious path'[75] and displaying an 'almost wilful misunderstanding of the Bill'.[76] Further, any attempt to moderate the exceptionalism of the subsystem codings, by citing the potentially detrimental impact of the measures, was met with derision. Fiona Mactaggart, for example, cautioned against forgetting 'that the use of such [counter-terrorism] powers is itself terrorising in a sense', but was only met by the retort of 'Nonsense!' after which the debate resumed the succession of more supportive comments.[77] Similarly, Jeremy Corbyn's effort to temper the appeal to exceptionalism by stating that we are not 'in crisis at the moment, so surely it is time to do something far more rational and sane than what is proposed this evening'[78] was responded to by the evasive comment of Ken Maginnis that the measures themselves should not be seen as extraordinary, so much as the situation faced.[79] Further efforts by George Galloway[80] and Alex Salmond[81] to debate the implications of the powers were dismissed as seeking to justify the attacks.[82] Instead of examining why the pre-existing powers granted to government and executive agencies were either inappropriate or insufficient to meet the new threat, therefore, passage of the new legislation was promoted as the only responsible course of subsystem action.[83] Accordingly, the exceptional threat was seen as necessitating equally exceptional powers to enable the police to deal effectively with it.[84] The cumulative result of these influences is that the brevity of the legislative debate and shallowness of the scrutiny can be directly

[74] Terrorism Act 2000, s.44(1)(d). Compared to s.42(1)(d) Terrorism Bill, as presented to the House of Commons on 2 December 1999, c.443.
[75] Ken Maginnis, HC Debs (1999-00) 341, c.174, referring to the reservations expressed by Kevin McNamara, *ibid*, cc.173-4 and 196.
[76] Jack Straw, *ibid*, c.156.
[77] *ibid*, c.182.
[78] Jeremy Corbyn, *ibid*, c.194. See also the concerns of Steve McCabe who stated that 'we may be tilting the balance too far and creating circumstances in which authorities are tempted to be lazy in their investigations or in the construction of their evidence, or overzealous in identifying suspects so that they identify suspects without proper cause', Standing Committee (1 February 2000).
[79] Ken Maginnis, HC Debs (1999-00) 341, c.195.
[80] George Galloway, HC Debs (2001-02) 372, c.640.
[81] Alex Salmond, *ibid*, c.614.
[82] D. Nicol, 'The Human Rights Act and the Politician' (2004) 24 *Legal Studies* 451.
[83] Oren Gross described the portrayal of the determinacy of legislative responses as a recurrent trend in emergency legislating, see O. Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional' (2002-3) 112 *Yale Law Journal* 1011, 1032.
[84] David Lidington, HC Debs (1999-00) 341, c.222.

contrasted with the extent of the powers the statute set out.[85]

Although the need to balance civil liberties with national security was mentioned within the debates[86] the examples offered ignored the specific burden that the measures could place on the interests of minority individuals.[87] Instead 'balance' was accepted as a necessary compromise when minority rights were being balanced with majority freedoms;[88] but as inappropriate where the powers could have any significant effect amongst majority, white individuals.[89] Where concern was expressed about the minority targeting effect of the flexible statutory powers[90] attempts to challenge this approach were dismissed as 'invent[ed] hypothetical circumstances'.[91] At the time of their enactment, however, whilst parliamentarians were willing to concede that minority communities needed to be protected from the actions of other individuals,[92] they were unwilling to acknowledge that minorities may have needed protection from the counter-terrorism powers themselves.[93] A consequence of this was that new laws to prevent race and religion-based violence and harassment were proposed and supported,[94] but that there was

[85] P.A Thomas, 'Emergency and Anti-terrorism Power: 9/11: US and UK' (2003) 26 *Fordham International Law Journal* 1203, 1216.

[86] See, e.g., David Blunkett, HC Debs (2001-02) 375, c.31 and Hazel Blears, HC Debs (2005-06) 438, c.411.

[87] H. Kennedy, *Just Law. The Changing Face of Justice – and Why it Matters to Us All* (Vintage, 2005) 50. However, the nature of the balancing exercise being undertaken is largely overlooked by Richard Posner and Adrian Vermeule, see R.A. Posner and A. Vermeule, *Terror in the Balance: Security Liberty and the Courts* (OUP, 2007).

[88] However, even the need to protect civil liberties in general did not go wholly unopposed. See, e.g., Kevin Hughes who referred to 'the yogurt and muesli-eating, Guardian fraternity [who] are only too happy to protect the human rights of people engaged in terrorist acts, but never once talk about the human rights of those who are affected by them', HC Debs (2001-02) 372, c.30. Further, Bridget Prentice urged that the demands of the 'civil liberties lobby' should be strongly resisted, HC Debs (2001-02) 372, c.933.

[89] JCHR, 'Review of Counter-terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention' Twenty-fourth Report of Session 2005-6, (HL Paper 240/HC 1576), para 158. See also T. Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 *International and Comparative Law Quarterly* 841.

[90] See Lord Goodhart, HL Debs (1999-00) 611, c.1082 and Simon Hughes in the Standing Committee on 20 and 27 January 2000 who both voiced concern about the level of discretion afforded to the Executive in exercising the counter-terrorism powers. See also HC Debs (1999-00) 341, Steve McCabe, c.207.Kevin MacNamara, cc.173-76; and Fiona Mactaggart, c.182 whose comments were criticised by Simon Hughes, c.183.

[91] Jack Straw, HC Debs (1999-00) 341, c.163. See also Anne Widdicombe who criticised the Bill for failing to incorporate a mechanism by which Parliament could submit the powers to on-going scrutiny, *ibid*, c.171.

[92] E.g., Khalid Mahmood describes people 'ringing up mosques and other institutions leaving abusive messages and putting excrement through doors' as well as the abuse suffered by Sikhs who had been mistaken as being Muslims, HC Debs (2001-02) 372, c.649. See N.S Gohill and D.S Sidhu, 'The Sikh Turban: Post 9/11 Challenges to this Article of Faith' (2007-8) 9 *Rutgers Journal of Law and Religion* 1.

[93] See, e.g., HC Debs (2001-02) 372 Tony Blair (c.671) who condemns racist attacks including an attack on an Edinburgh Mosque, Iain Duncan Smith (c.675), HL Debs (2001-02) 627, Baroness Uddin (c.205) and Baroness Walmsley (c.225).

[94] Ultimately, however, proposals for such a law were dropped from new counter-terror legislation after opposition from the House of Lords which voted 204 against 141 to remove the relevant clause (see HL

no consideration of the racial effect of the counter-terrorism legislation itself.[95] The imperative of reassuring the general population of their safety against terrorism dominated the parliamentary programme and resulted in its departure from the ordinary check and balances which safeguard against the passage of ill-conceived and discriminatory statutory powers.[96] In the face of such overwhelming public sentiment minority-protection remained largely unobserved in the counter-terror law-making programme, even though the risk that the powers could be deployed in a discriminatory manner was recognised outside the subsystem.[97]

Following 9/11 the parliamentary subsystem rendered any debate concerning the statutory powers, including their appropriateness to address the current threat, impossible. Instead, the two main political parties cultivated an environment in which cross-party consensus was the obligatory subsystem sentiment. This atmosphere left any concerns about the weakness of the purported safeguards to be voiced by lone independents,[98] or party rebels at the risk of losing the party whip.[99] The only consideration given to the powers was that they might be insufficient and, therefore, need to be enhanced, in order to ease popular anxiety and assure security.[100] Consequently, the parliamentary behaviour in enacting the Terrorism Act and post-9/11 demonstrate the subsystem's ability to repeat history whilst not recognising that it was so doing. This cycle reveals the extent to which Parliament responded to irritants both in a self-referential way, but also in a way that failed to avoid repeating the mistakes observed as occurring on previous occasions.[101]

Debs (2001-02) 629, cc.348-59). They were instead included in the Racial and Religious Hatred Act 2006 (c.1) which came into force on 1 October 2007.

[95] See, e.g., Mike O'Brien who 'strongly welcome[s] the announcement of new laws against religious violence and harassment', HC Debs (2001-02) 372, c.716. Support for the proposed bill was also shown, see Diane Abbott (c. 932), Kenneth Clarke (c.931), Edward Garnier (c.932) and Paul Marsden (c.935).

[96] Making a comparable point in relation to laws concerning paedophiles, see D. Filler, 'Silence and the Racial Dimension of Megan's Law' (2003-4) 89 *Iowa L. Rev* 1535, 1569-72.

[97] See Amnesty International, *UK: Briefing on the Terrorism Bill* (April 2000); and later Amnesty International, *United Kingdom: Human Rights a Broken Promise* (February 2008); Amnesty International, *United Kingdom: Submission for the Review of Counter-terror and Security Powers* (2010) 11.

[98] See, e.g. George Galloway, HC Debs (2005-06) 436, cc.639-42.

[99] See, e.g., Jeremy Corbyn, HC Debs (1999-00) 341, cc.191-94; HC Debs (2001-02) 375, c.25; and HC Debs (2001-02) 372, cc.734-39.

[100] Bruce Ackerman identifies a 'pathological political cycle' by which successive waves of ever-increasingly repressive laws follow threats to national security to ease anxiety regarding security, whilst not actually provide the purported protection. See B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006) 1-3. See also K.D Ewing, 'The Futility of the Human Rights Act' [2004] *PL* 829.

[101] See G. Teubner, 'Law as an Autopoietic System' and G. Teubner, 'Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital' in R. Veld *et al*, *Autopoiesis and Configuration Theory: New Approaches to Social Steering* (Kluwer Academic Publishing, 1991).

In the US, the margin by which the Patriot Act was passed in both congressional houses suggests almost unanimous congressional support for the legislation.[102] However, subsystem opinion concerning the draft bills, and even the final Act, was more polarised than the vote suggests. The breadth of views ranged from those who considered the Act to afford the executive too strong powers, which compromised individual rights and freedoms too far,[103] to those who felt that the powers did not go far enough to protect national security.[104] The operational utility of the powers was also questioned. For example, congressmen Bob Barr noted that it was important to 'remember that electronic surveillance can actually make intelligence and law enforcement agencies less effective',[105] and Ron Paul felt that '[t]he utility of these [surveillance] items in catching terrorists is questionable to say the least'.[106] Whilst ultimately, and despite continuing reservations,[107] the severity of the threat faced meant that an overwhelming proportion of Representatives and an even higher proportion of Senators supported the Act,[108] opposition opinions encouraged the exploration of the rights-related issues surrounding the powers prior to their enactment.

Despite the more noticeably partisan scrutiny of the draft counter-terrorism legislation in the US than in the UK there remained a persistent demand for unified support of the proposals. Senators and Representatives both called for 'a united Congress',[109] undivided

[102] The Senate passed the bill by 98 votes to 1, Senator Feingold opposing the bill, SCR 11 October 2001, S11059. The House of Representatives passed the bill the following day by 337 votes to 79, with one Representative answering 'present', HRCR 12 October 2001, H6775.
[103] See, e.g., the many concerns over compatibility of the surveillance powers with the Fourth Constitutional Amendment reflected the partisanship in the debate, which include Maxine Waters (Democrat) and Bob Barr (Republican).
[104] The polarised nature of opinion concerning the Act is well illustrated by the exchange between Senators Feingold and Hatch. In this exchange Feingold's concern for the potential loss of commitment in the Congress and country to traditional civil liberties, exemplified by the powers of the Act, is countered by the assertion that 'these terrorists still have a gun pointed at the heads of all the American people' and that the current legal provisions treated 'terrorism with kid gloves' SCR S11019-23.
[105] HRCR (24 September 2001).
[106] HRCR (12 October 2001) H6769.
[107] E.g. Martin Meehan noted in the additional congressional remarks that 'The short-circuiting of the regular order clouds what should have been a day of unanimity. Nonetheless, I rise in support of the antiterrorism legislation', HR Additional Remarks CR (16 October 2001) E1893. In addition Jerrold Nalder urged that 'the terrorism bill proceed for terrorism now, albeit in haste, albeit hastily drafted, albeit not properly vetted', HRCR (12 October 2001) H6774.
[108] Recalling the level of support for the Act Congresswomen Maxine Waters stated that 'I did not vote for it [the proposed Act], but some who were not happy with it did, knowing that our country was desperate for some efforts at reducing terrorism', HRCR (10 April 2002).
[109] William Jenkins, HRCR (13 September 2001) E1645.

support for President Bush,[110] and for all members to be 'pulling together in support of our nation',[111] as a means of harnessing the popular and political anger aroused by 9/11.[112] The non-partisan approach to law-making was most clearly expressed by Representative Dennis Moore who said that '[t]oday there are no Republicans, no Democrats. Today we are all Americans'.[113] As the legislation progressed through its various stages of enactment calls of unanimity were bolstered by praise for the consensus of support shown across the political spectrum, and the beneficial effect that this was having on the law-making process.[114] Despite the calls for unity, however, in the US this was achieved through 'the essence of compromise', which characterised the debates as opposed to a one-sided acceptance of government proposals.[115] The role of compromise was acknowledged by a series of Representatives and Senators, who praised the considered and careful nature in which politically opposed individuals sought to develop a mutually satisfactory legislative solution.[116] A further demonstration of the consensual approach to the debate was that a number of proposed amendments were raised simply to indicate an area of concern, before being withdrawn as a result of support for, or at least acceptance of, the original proposals.[117] Congress, therefore, continued to be vociferous in its criticism of the Executive's draft legislation,[118] the law-making process,[119] and the

[110] Henry Bonilla, HRCR (11 September 2001) E1627. See also James Sensenbrenner whose immediate response to the attacks called for Representatives to 'support Bush and …expeditiously make available all necessary means so that justice can be carried out', HRCR (11 September 2001) E1628.
[111] Dan Burton, HRCR (13 September 2001) E1642.
[112] E.g., Nick Smith stated that it was 'Congress' duty to direct its anger give it purpose, use it to defend democracy and freedom. Before forgetfulness seeps in', HRCR (14 September 2001) E1662.
[113] Dennis Moore, HRCR (11 September 2001) E1641.
[114] E.g., Tony Hall remarks that 'I am uplifted by the mood among members of Congress who have abandoned all partisan differences to pass critical legislation, HRCR (14 September 2001) E1655 and Senator Stabenow speaks 'to congratulate all involved in this effort. …it is not perfect but we have come together with a very positive, important step forward that we can celebrate this evening on a bipartisan basis', SCR (11 October 2001) S1069.
[115] James Sensenbrenner, House Committee on the Judiciary, 3 October 2001. See also John Conyers who described the law-making process in relation to the Patriot Act as 'a discussion between friends of how we get all this together and move forward', Hearing before the Committee on the Judiciary House of Representatives, (24 September 2001), Barney Scott, who expressed his 'frustration about the time limitations' imposed on the passage of the bill, 22.
[116] See, e.g., HRCR (12 October 2001), Bob Goodlatte, who commended the Committee on the Judiciary and its chairman 'for their dedication to crafting a bipartisan bill that will give law enforcement the tools it needs to fight a war on terrorism while still protecting the civil liberties of Americans', H6760; and Edward Bryant who complemented the bill as 'a balanced approach to our fight against terrorism. I believe it is an appropriate response to a very real problem', H6762.
[117] See, e.g., Bill Delahunt, who cited concerns over the adoption of the 'significant', as opposed to 'primary purpose' requirement for the grant of search orders under FISA, only to state at the outset that he should not press the matter beyond raising it, House Committee on the Judiciary (3 October 2001) 109.
[118] E.g., Donna Chistensen said that 'today we will react to one day of infamy with another if we pass HR3108', HRCR (12 October 2001) H6769. See also comments of Barney Frank in 'The USA Patriot Act and the American Response to Terror: Can we Protect Civil Liberties after September 11? A panel

impact of the proposed statutory provisions on constitutional values.[120]

Although different opinions were raised both for and against the provisions of the Patriot Act the detail in which these could be debated was limited by the lack of time for scrutiny of the bill.[121] The priority afforded to getting the legislation enacted[122] was indicated by Senate Majority Leader Tom Daschle, who said that although 'all hundred of us could go through this Bill with a fine-tooth comb, the clock is ticking and the work needs to get done'.[123] While normative subsystem behaviours of debate and negotiation continued, therefore, environmental irritants in the shape of the on-going threat and the need for rapid law-making,[124] meant that executive proposals were predominantly ascendant in the enacted legislation. [125] More prominent than the recursive behaviour of Congress, therefore, was its submission to the intervention of the Executive in directing the

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Discussion, 6 March 2002' (2002) 39 *Am. Crim L. Rev.* 150, 1505-06.

[119] Jane Harman criticised the law-making process on the basis that 'the process by which we are considering this measure plays fast and loose with our Constitution', HRCR (12 October 2001) H6774. See also the comments of Carolyne B. Maloney who raised in Additional Comments her 'great concern about the many in which the body conducted business on Friday' and said that 'Preparing for one bill only to have legislation brought to the floor for debate before anyone can carefully read and analyze its provisions, is irresponsible and dangerous. I hope that in future this body will return to conducting its business in a responsible and respectful manner', HRCR (17 October 2001) E1916.

[120] See, HRCR (12 October 2001) in which successive speakers noted their concern at the very limited opportunity that the Representatives had, had to review the contents of the bill being debates. See, in particular, Barney Frank who described the condensed legislative process as 'the least democratic process for debating questions fundamental to democracy I have ever seen', H6761; and John Dingell, who described the bill as having been changed 'in a sneaky, dishonest fashion', H6765.

[121] See Hearing before the Committee on the Judiciary House of Representatives (24 September 2001), Barney Scott, who expressed his 'frustration about the time limitations' imposed on the passage of the bill, 48. In the House a full mark-up of the bill was held in the judiciary committee, which after eight hours and around 30 amendments unanimously passed the amended bill. However, the House Republican leadership introduced virtually the original bill, forcing it through the House as the final bill. This attracted significant malcontent, but was ultimately passed by both Houses. See, e.g., HRCR (12 October 2001) Peter King who declared his support for the aim of the bill, whilst still noting his wish that the 'process has been followed through all the way to the end instead of being hijacked', H6772-3 and Bennie Thompson who clarifies his own position by stating that 'Let me be clear: I voted for the revised antiterrorism legislation today to ensure that the horrendous events of September 11th are never repeated. I am offended by the process but am compelled by the circumstances in which we live today', H6771. For support of the argument that the Patriot Act was adopted too rapidly see, e.g., S. Brill, *After: How America Confronted the September 12 Era* (Simon & Schuster, 2003).

[122] See, e.g., Howard Coble who calls for 'a quick a decisive response against the perpetrators of this attack on our nation' and states that he hope that 'severe action will be taken within days, rather than weeks or months', HRCR (11 September 2001) E1635.

[123] Tom Daschle, SCR (12 October 2001).

[124] D. Abramowitz, 'President, the Congress and the Use of Force: Legal and Political Considerations in Authorizing the Use of Force against International Terrorism' (2002) 43(1) *Harv Int L. J.* 71.

[125] This contrasts with the arguments of Mark Tushnet and Adrian Vermeule who maintain that the executive, in fact, received substantially less new authority than they requested and had to make significant compromises to obtain new powers and also that the need for rapid passage of the powers caused both the executive and Congress to compromise, see M. Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation' (2008) 3 *International J.L. in Context* 275 and A. Vermeule, 'Emergency Lawmaking after 9/11 and 7/7' (2008) 75 *Un. Chi L. Rev*. 1155, 1165.

operation of the law-making subsystem.[126] As a result the Senate passed a version of the Patriot Act which closely resembled that requested by the Attorney General and the Bill carefully constructed and debated within the House of Representatives was thrown out and replaced with legislation which mirrored the Senate's version.[127] In the end, therefore, Congress 'tossed away the bipartisan compromise painstakingly passed unanimously by the House Judiciary Committee'.[128] Instead, the final Act was drafted in secret over a weekend by representatives of the Department of Justice and the House Leadership,[129] the contents of which were little known by Members other than those directly involved in drafting it.[130] Attorney General, John Ashcroft, faced particular criticism for having exerted pressure on Congress to enact the Administration's proposals.[131] Consequently, whilst the US congressional record demonstrates a continuation of the partisan character of the US law-making subsystem this had a limited impact on the final version of the legislation enacted.[132]

The Executive's dominance of the law-making process evoked congressional criticism, and was described as the 'first partisan shot since September 11'.[133] The Executive's behaviour meant that instead of the legislation progressing through the ordinary law-

[126] For a description of the intense pressure exerted by the executive regarding the content of the PA and the need to rapidly enact the legislation see B.A. Howell, 'Seven Weeks: The Making of the USA PA' 2004) 72 Geo. Wash. L.R. 1145. See also H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Yale University Press, 1990) 117-123; M. Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *HLR* 2677.

[127] The House Judiciary Committee version was introduced into the House by a broad cross-party group consisting of Representatives Sensenbrenner, Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Thomas, Goss, Rangel, Berman, and Lofgren, HRCR (2 October 2001) H6135. A substantively identical version was reported in House on 11 October 2001, HR2975.RH, see HRCR (11 October 2001) H6696. However, a very different version, HR2975.EH, modelled closely on the Senate passed version was passed by the House the following day, HRCR (12 October 2001) H6726-76. USA Act of 2001, S1510.ES, passed Senate 11 October 2001, see SCR 11October 2001, S10547-10630. See also R. Toner and N.A. Lewis, 'House Passes Terrorism Bill Much Like Senate's but with a 5-Year Limit' *NY Times*, (13 October 2001) B6.

[128] Patsy Mink, HRCR (16 October 2001) E1896.

[129] Representative John Conyers, US House Constitution Subcommittee, 'Anti-terrorism Investigations and the Fourth Amendment after September 11: Where and When Can the Government Go to Prevent Terrorist Attacks?' (108th Congress, 2d. Sess, 20 May 2003) 3.

[130] Gerald D. Kleckza, HRCR (16 October 2001) E1904. See also Frank Rich who reported that Congress passed the Patriot Act 'before anyone could read it', 'Wait Until Dark' *NY Times* (24 November 2001) at A27.

[131] D. Cole and J.X. Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* (The New Press, 2002) 150-52.

[132] Diana DeGette summarises the anomalous process as being that 'in an end run around bipartisanship and the committee process, the House majority leadership brought a different and controversial bill to the floor without allowing time for committee consideration and without even giving Members time to figure out what the bill does', HRCR (16 October 2001) E1897.

[133] Maxine Waters, HRCR (12 October 2001) H6762. See also Bob Barr who also criticised the administration for having 'chosen to fire the first shots of partisanship after September 11', *ibid,* H6766.

making processes, in accordance with which differences between the Senate and House bills would have been debated and reconciled in a conference committee, the Attorney General introduced an alternative version of the Bill under amended rules of process.[134] Such manoeuvring demonstrates the strength of the influence of the political subsystem on the US law-making subsystem, and its ability to shape the subsystem programme of operation.[135]

Whilst Executive control over the law-making process was strong it was not, however, the singularly powerful one. Instead, members of Congress were confident that the Act finally brought into force was all the better for the changes they made to the executive's original bill,[136] and the limited period of debate that Congress had been able to engage in.[137] In particular, congressional negotiations secured two specific safeguards to protect against the misuse of the surveillance provisions within the Patriot Act.[138] These were the application of a sunset clause to many of the surveillance powers, and penalties for misuse of the powers.[139] Both of these safeguards came out of the work of the House Judiciary Committee, albeit that the sunset clauses, as originally proposed, set a two-year expiration period.[140] Eventually, in order to 'calm fears of permanent authorisation',[141] a four-year period, expiring on 31 December 2005, was incorporated into the Act.[142] Aside from these specific concessions the legislature mainly yielded to the Executive's proposals for the statutory provisions,[143] and ordinary legislative processes were not

[134] John Dingell, *ibid*, H6765.
[135] J. Yoo, *The Powers of War and Peace. The Constitution and Foreign Affairs after 9/11* (University of Chicago Press, 2005) chs.2-4.
[136] See, e.g., Patrick Leahy, who commended the Senate's role in refining and supplementing the Administration's original proposal in a number of ways, SCR (25 October 2001) S10990.
[137] See, e.g., Jon Kyle who wanted 'to make clear that we did not rush to pass ill-considered legislation', SCR (25 October 2001) S11049.
[138] Congressional imposition of safeguards was very much in accordance with that advocated in James Madison in the Federalist No. 51, which states that: 'In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions' in 'The Structure of Government must Furnish the Proper Checks and Balances across Different Departments' *Independent Journal* (6 February 1788).
[139] Patriot Act, ss.223-24.
[140] See USA Act of 2001, S1510.ES as compared to HR 2975 USA Act of 2001, HR 2975.PCS.
[141] Orrin Hatch, SCR (25 October 2001) S11054.
[142] Patriot Act, s.224.
[143] See D. Shelton, 'Shifting the Focus of US Law from Liberty to Security' in P. Eden and T. O'Donnell, September 11, 2001: A Turning Point in International and Domestic Law? (Transnational Publishers, 2005) 497-532 and M.T. McCarthy, 'USA PATRIOT Act' (2002) 39 *Harv J on Legis* 425, 439.

allowed to frustrate the need for protective legislation.[144]

Where the Congressional debate considered minority protection from any misuse of the counter-terrorism powers it was predominantly in terms of the need to protect racial minorities from hate attacks,[145] with such behaviour being condemned as 'characteristics of terrorists, not individuals who treasure freedom'.[146] Despite the limited consideration of the need to protect minorities from misuse of the counter-terrorism powers it was, however, not entirely absent from subsystem considerations. The single Senator to vote against the final bill, Russ Feingold, for example, voiced his concern that the new surveillance, and other, powers 'may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster'.[147] Feingold suggested that this impact may not be discernible by the majority population because '[w]e who do not have Arabic names or do not wear turbans or headscarves may not feel the weight of these times as much as Americans from the Middle East and South Asia do'.[148] Such concerns were, however, a very marginal consideration within the congressional debate.[149] In fact, Senator Feingold's suggestion that there only 'may' be an impact on minority groups resulted was immediately diminished as a purely theoretical concern, unable to withstand scrutiny when compared with the 'concrete loss of liberty of almost 6,000 people because of the terrorist acts on September 11'.[150]

In enacting legislative powers to counter terrorism, the US law-making subsystem departed from standard programmes of self-referential behaviour, with both legislatures being strongly influenced by executive communications and operations.[151] Consequently,

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[144] See D. Cole and J. Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (The Free Press, 2007) 207-59.

[145] See, e.g., Danny Davis who urged that 'Regardless of religion all law-abiding citizens…deserve full protection of the law against all acts of intolerance. The principle of justice for all shall remain unchanged', HRCR, (21 September 2001) E1702. See also, Dan Burton, who condemned the fact that 'some Americans have been made targets of violence simply because of the way they look and the way they dress', HRCR, (11 September 2001) E1642.

[146] Constance Morella, HRCR (24 September 2001) E1707.

[147] Russell Feingold, SCR (25 October 2001) S11023.

[148] *ibid* S11020. This comment supports arguments that the white majority experience continues to form the basis around which norms are created, see A, Bonnet, *White Identities: Historical and International Perspectives* (Prentice Hall, 2000).

[149] Congressional concern surrounding the Administration's apparent intention to use racial profiling to determine who might be a potential terrorism suspect was, however, shown in the months following the enactment of the Patriot Act, e.g. by Maxine Water, HRCR 10 April 2002 and Cynthia A. McKinney, 'Two Sikh Men Detained after flight – Racial Profiling Must be Stopped' HRCR (11 October 2002) E1859.

[150] Orrin Hatch, SCR (25 October 2001) S11023.

[151] S. Issacharoff and R.H. Pildes, 'Emergency Contexts without Emergency Powers: The United States'

the US enacted executive-dominated statutes, providing the law enforcement subsystems with high levels of subjectivity and individual discretion deploying the powers.[152] This discretion came to be exercised in a racially uneven manner. The next section shows how the atypical nature of subsystem operations not only contributed to the passage of sweeping and highly discretionary police powers, but also included communicative redundancies, which helped to legitimise the use of police discretion to target a created and racially-defined, 'suspect community'.[153]

4.3 Imagery Used to Create a Suspect Community

Whilst the law-making subsystem imagery used following the 9/11 attacks did not directly influence the statutory parameters of the counter-terrorism powers it reveals the strength of the lexical connection made within that subsystem between the terrorist attackers and the Muslim community, which contributed to a process of net-widening and thereby treating the whole [minority] population as a risk'.[154] This imagery formed an environmental irritant to the policing subsystem, perhaps contributing to the apparent legitimacy of the racially uneven use of the stop, search and surveillance powers,[155] which in turn encouraged the police's targeting of those 'beyond the reach of empathy',[156] in particular suspect racial minority groups.

It should be noted that nothing in parliamentary or congressional discussions after 9/11 supported the idea that all Muslims were held responsible for the attacks. Indeed, successive declarations were made to counter any such conclusion,[157] including citing

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Constitutional Approach to Rights during Wartime' (2004) *Int. J. Const. L* 296, 327.

[152] Regarding the gains in executive powers arising from the counter-terrorism legislation see, A. Schmid, 'Terrorism and Democracy' in A. Schmid and C. Crelinsten (eds.), *Western Reponses to Terrorism* (Frank Cass, 1993); and L. Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in B. Gould and L. Lazarus (eds.), *Security and Human Rights* (Hart, 2007) 257-75.

[153] See P. Hillyard, *Suspect Community. People's Experiences of the Prevention of terrorism Acts in Britain* (Pluto Press, 1993).

[154] C. Walker, 'Keeping Control of Terrorists without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395, 1400.

[155] See D. Moekli, 'Discriminatory Profiles: Law Enforcement after 9/11 and 7/7' (2005) *European Human Rights Law Review* 517 and O. Gross and F. Ni Aolain, *Law in Time of Crisis: Emergency Powers in Theory and Practice* (CUP, 2006) 54-62.

[156] B. Hudson, *Justice in the Risk Society* (Sage Publications, 2003) 204.

[157] See, e.g., Tony Blair, HC Debs (2001-02) 372, cc.605-06 and cc.672-73. See also *ibid*, Jack Straw and Bruce George, cc.620 and 636. In addition Charles Kennedy states that 'There is no argument to be had there [with the Muslim community in Britain] and woe betide anyone in a position to influence public opinion who tries to suggest that there is', HC Debs (2001-02) 372, c.610.

some examples of positive social contributions made by Muslims.[158] The terrorists were dismissed as a 'small number of totally unrepresentative groups and individuals'[159] and as not exemplifying 'those who truly follow Islam'.[160] Nevertheless, having made such affirmations both US and UK politicians frequently reasserted damaging rhetorical connections between the terrorists, their religion and particular ethnic communities.[161] Descriptions rendered the 'stranger' and 'foreigner' objects of heightened suspicion[162] – making minorities tantamount to an 'enemy within'.[163] Culpability for terrorism was portrayed as existing generally within Muslim communities.[164] Consequently, the language and imagery used in legislative discussions had the effect of fusing Muslims with fears of 'neighbour terrorism'[165] emanating from minority communities.[166] In the UK this image was reinforced and given apparent legitimacy by the fact that the individuals involved in the 7/7 attacks were second-generation British citizens with one long-term British resident.[167]

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[158] Karen Engle suggests that the very identification of these 'Good Muslims' helped to secure a tolerance, even endorsement, of negative forms of racial profiling, K. Engel, 'Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)' (2004) 75 *Colo. L. Rev*. 59, 87-94.

[159] Iain Duncan Smith, HC Debs (2001-02) 372, c.677. See also K. Delacoura, 'Violence, September 11, and the Interpretations of Islam' (2002) 16(2) *International Relations* 269 who also makes this observation more generally.

[160] Tony Blair, HC Debs (2001-02) 372, c.612. See also Michael Ancram who distinguished the terrorists from the 'true voice of Islam', *ibid*, c.623.

[161] M.A. Bari, 'No Section of British Society should be treated with Suspicion', www.opendemocracy.net, accessed 22.07.2011; and C. Pantazis and S. Pemberton, 'From the "old" to the "new" suspect community. Examining the impact of recent UK counter-terror legislation' (2009) *British Journal of Criminology* 646, 651.

[162] B. Vaughan, 'Cultured Punishment: The Promise of Grid-Group Theory' (2002) 6(4) *Theoretical Criminology* 411.

[163] Hazel Blears, Evidence to the Home Affairs Select Committee, *Terrorism and Community Relations* (2005). See also N. Murray, 'Profiles: Arabs, Muslims and the Post-9/11 Hunt for the "Enemy Within" in E.C. Haigopian, *Civil Rights in Peril. The Targeting of Arabs and Muslims* (Pluto Press, 2004) 27-68.

[164] Because the threat from terrorism cannot be delineated in terms of protection one country against another it has to be framed in terms of protection one country against a group of individuals with certain characteristics or ideologies. There only requires a very small shift from this, to a position by which all individuals with these characteristics or ideologies to be perceived as the enemy. F. Adamson and A.D. Grossman, *Framing 'Security' in a Post 9/11 Context* (Social Science Research Council, 2004) 4. See also S.N. MacFarlane and Y.F. Khong, *Human Security and the UN: A Critical History* (University of Indiana Press, 2006); and S. Tadjbakhsh and A.M. Chenoy, *Human Security: Concepts and Implications* (Routledge, 2007).

[165] C. Walker, 'Neighbour Terrorism and the All-Risks Policing of Terrorism' (2009) 3 *Journal of National Security Law and Policy* 121.

[166] The image was exacerbated by the fact that the individuals involved in the 7/7/ attacks were second-generation British citizens with one long-term British resident. See Intelligence and Security Commission, *Report into the London Terrorist Attack on 7th July 2005* (2006) Cm 6785 at 2; and *Report of the Official Account of the Bombings in London on 7th July 2005* (2006) HC 1087, at 13 and 17.

[167] *ibid*.

In the UK, one example of the 'suspectification' of ethnic minority communities[168] is Peter Mandelson's statement that '[t]o fight the menace of fundamental Islamic terrorism recruitment has to be directed at Muslim and Arab-speaking communities' because these are where the terrorist organisations draw their own membership.[169] Although Mandelson is referring to the recruitment of individuals to protect against the terrorist threat, his comments made a link between mainstream Muslim communities and extremist terrorists, thus entrenching a perception that minority-identity constituted an appropriate operational rationale for deployment of the counter-terrorism powers.[170] The sense of widespread complicity in the terrorist attacks is also demonstrated by the idea that British Muslim communities were operating as a safe haven for terrorists.[171] The first mention of this was during the debate concerning the Terrorism Act,[172] but various MPs and peers unquestioningly adopted the idea, following 9/11.[173] The collusion between Muslims and terrorists that was implied within the debates is exactly the type of heuristic shortcut against which MP Khalid Mahmood sought assurance when he stated that 'it would be quite wrong for British Muslims to be tarred with the same brush [as Islamic terrorists] following that dreadful act of terrorism'.[174] Despite receiving the necessary platitudes,[175] imagery within the debates continued to conflate 'Muslim' firstly with specific racial minority groups, and ultimately with 'terrorist'.[176]

The 'intensive othering'[177] of Asian and Arabic Muslims was initially achieved by the portrayal of the terrorists as 'foreign',[178] and was made more explicit by emphasising the 'foreignness' of Muslims, for example by suggesting that Muslims considered events

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[168] M.J. Hickman, L. Thomas, S. Silverstri and H. Nickels, '*Suspect Communities'? Counter-terrorism Policy, the Press and the Impact on Irish and Muslim Communities in Britain* (July 2011).
[169] Peter Mandelson, HC Debs (2001-02) 372, c.627.
[170] D. Munby, *Communication and Power in Organization: Discourse, Ideology and Dominant* (Ablex, 1988).
[171] Viscount Slim warns that 'terrorists, I think, would say that Britain is rather inviting place to come to set about their business', HL Debs (2001-02) 627, c.83.
[172] Tom King, *ibid*, c.165 and cc.177-78.
[173] See, e.g., Michael Ancram who referred to the terrorist's need for safe havens, *ibid*, c.623. See also HL Debs (2001-02) 627, Lord Strathclyde (c.7) and Lord Howell of Guilford (c.16).
[174] Khalid Mahmood, HC Debs (2001-02) 372, c.612.
[175] Tony Blair, *ibid*, cc.612-13.
[176] This represents the wider trend within descriptions of the terrorist threat by which government agencies grossly simplified images of the enemy, see U. Beck, 'The Terrorist Threat: World Risk Society Revisited' (2002) 19 *Theory, Culture and Society* 39, 45.
[177] S. Poynting and V. Mason, 'Tolerance, Freedom, Justice and Peace? Britain, Australia and Anti-Muslim Racism since 11th September 2001' (2006) 27(4) *Journal of Intercultural Studies* 365, 368.
[178] I.M. Porras, 'On Terrorism: Reflections on Violence and the Outlaw' (1994) *Utah L. Rev* 199.

'differently' from the rest of the population.[179] In addition, through linguistic laxness terrorist characterisations were applied generally to Muslims and individuals within racial minority communities.[180] This trend, which had the effect of increasing the circle of suspicion as to those implicated in the attacks, is exemplified by Baroness Cox who, having described a film portrayal of a terrorist training camp near Slough, cited five examples linking internationally committed terrorist attacks with Britain through a range of racial minority and refugee groups, living in the UK.[181] A further theme in the debate was the distinction between the terrorists and 'Britishness' which helped to reaffirm the national/ non-national distinction between the law-abiding population and terrorist suspects.[182]

Whilst ordinary Muslims were repeatedly distanced from the 'very small number of extremists'[183] by discussing terrorists alongside Muslims and particular racial minorities Parliamentary discourse encouraged the popular conflation of these groups which was reflected in police actions and media portrayals of the terrorist threat.[184] Consequently, the predominantly minority characteristic of an institution or group became sufficient to place it under suspicion.[185] Separating 'them' from 'us'[186] provided a functional basis for the departure from standard communicative redundancies maintaining human rights expectations or any concessions to the pursuit of security beneath concerns regarding national security.[187] Such a division also provides an implicit confirmation that whilst the

[179] Paul Goodman, HC Debs (2001-02) 372, cc.779-80.
[180] E.g. in a speech Keith Vaz variously mentioned the terrorist threat in connection with 'the British Muslim community', 'people of Asian origin', 'Asians' and 'the Arab world', *ibid*, cc.711-13.
[181] Baroness Cox, HL Debs (2001-02) 627, cc.37-39. The examples given included the connection between the jihad for Chechnya against Russia, which had been declared in a Friends' Meeting House in Euston Road, London, the arrest of Islamic terrorists in Yeman, who had come from London, two members of the Islamic Armed Group who were arrested in Birmingham and who had come into the country on false passports to recruit and train supporters of Osama bin Laden, concerns that Iraqi refugees were being forced to bring lethal pathogens into Britain, and the belief amongst Middle-Eastern Muslims that Britain was 'viewed as the Islamist terrorist capital of the world', c.39.
[182] A. Fortier, 'Pride Politics and Multiculturalist Citizenship' (2003) 28(3) *Ethnic and Racial Studies* 559. See also Parekh Report, *The Commission of Multicultural Britain* (January 1998).
[183] Tony Blair, HC Debs (2005-06) 436, c.573.
[184] See chapters 6 and 8 of this thesis.
[185] E.g., Lord Pearson of Rannock expressed concern at the 'indoctrination or incitement to violence which may be taking place in our schools', HL Debs (2001-02) 627, c.58.
[186] See David Blunkett, (2001-02) 375, c.25.
[187] See, e.g., Michael Ancram, HC Debs (2001-02) 372, c.623. The separation of 'us' and 'them' is described as a means by which excessive emergency powers may be more readily accepted, then they focus on 'them', and is all the more potent when the 'other' is a well-defined and visible groups, as is the case with Asian and Arab individuals in the UK. See W.A. Elliott, *Us and Them: A Study of Group Conscious* (Aberdeen University Press, 1986) 9; O. Gross, 'On Terrorists and Other Criminals: States of Emergency and the Criminal Legal System', in E. Lederman (ed.), *Directions in Criminal Law: Inquiries in the Theory*

benefits of the counter-terrorism laws extend to everyone, their costs – defined as the groups the powers target – would only be experienced by 'them'.[188] Parliamentary communications, therefore, constituted a strong environmental irritant, which, appeared to endorse the racially disproportionate implementation of stop and search, and other counter-terrorism policing tactics.[189]

After 9/11 parliamentary interconnection of 'Muslim' with 'terrorist' resulted in calls for Muslims to speak out against terrorism in a way not required of the population in general. Before 9/11, for example, former Prime Minister Margaret Thatcher stated that she 'had not heard enough condemnation from Muslim priests', when commenting on concerns of growing Muslim extremism within the country and the threat of attack from international terrorist organisations.[190] Whilst Thatcher's comment was described as being inappropriate, and potentially damaging to cohesion between Muslims and non-Muslims,[191] some MPs had already expressed the same idea.[192] Support of such calls increased over the course of the ensuing debate, eventually justifying the expectation that Muslims should explicitly 'say that suicide bombing is a perversion of the Koran and that there is no way in which those who use themselves to destroy the lives of innocent people can hope to obtain an accelerated passage to paradise'.[193] Following 7/7 the need for Muslim religious and community leaders to take the initiative in distancing themselves from the attacks was strongly linked to preventing any popular backlash against them.[194] The onus was thus placed on the Muslim communities to demonstrate that they were not part of the terrorist threat, despite there being no general criminal law requirement for such action. The implication was that if national loyalty was not evident, disloyalty was a natural presumption.[195] Even where they were not being constructed as suspect, therefore,

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of Criminal Law (2001) 409.

[188] See O. Gross, 'Chaos and Rules' 1037.

[189] As argued by D. Filler, 'Terrorism, Panic and Pedophilia' (2003) 10(3) *Virginia Journal of Social Policy and the Law* 345. See also P. Gerwitz, 'Narrative and Rhetoric in the Law' in P. Brooks and P. Gerwitz (eds.) *Law's Stories. Narrative and Rhetoric in the Law* (Yale University Press, 1993).

[190] BBC News, 'Thatcher Comments 'Encourage' Racism', 4 October 2001, www.news.bbc.co.uk/l/hi/uk-politics/1578377.stm, accessed 16.10.2010.

[191] See, e.g., Keith Vaz, HC Debs (2001-02) 372, cc.711-13.

[192] Andrew Robatha, suggested that 'all Muslims speak out and call these acts evil so that it is associated in the minds of others who may try to attack Islam that these acts can have nothing to do with one of the world's great religions', HC Debs (2001-02) 372, c.656.

[193] Donald Anderson, HC Debs (2001-02) 372, c.788.

[194] Keith Vaz stated that since 7/7 there had been more than 100 reported race hate attacks on members of the British Asian Community, HC Debs (2005-06) 436, c.826.

[195] T.W Yoo, 'Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race before and After September 11' (2002-3) 34 *Column Human Rts. Law Review* 1.

Muslim communities were subject to dualistic treatment as compared to the majority population.[196]

As in the UK, an important characteristic of the US congressional debate was the use of particular language and imagery to create a separate target community for the counter-terrorism powers. Expressions of solidarity with Muslim Americans, [197] were superseded firstly by a general statement linking the attackers and their religious convictions which then expanded to statements linking the wider Muslim community to the threat. Robert Erlich, described the attackers as being fuelled by 'religious extremism, cultural bias, or political philosophy', strongly implicating racial and religious minorities within America as being potential terrorist suspects.[198] This theme also helps to show how differences between outsiders and the rest of the community were emphasised, as compared to an exaggerated internal conformity of the majority population. [199] For example, congressional comments stressed the need to ensure that terrorists were given 'no place to hide, no place to train and organize, no place to keep their assets' and 'no safe harbour'.[200] President Bush also made statements distancing the attackers from mainstream Muslims groups and ideology.[201] However, such statements positioned the terrorist threat as arising from within America, but from amongst Americans who existed outside the dominant social groupings.[202]

The connection between minority communities and the threat from terrorism was further entrenched by actions of politicians, such as in returning donations received following 9/11 to Muslim and Arabic donors. For example Hilary Clinton returned $50,000 to Muslim organisations and the, then New York Mayor, Rudy Giuliani, returned money

[196] B. Spalek, 'Muslim Communities Post 9/11 – Citizenship, Security and Social Justice' (2008) 36 *International Journal of Law, Crime and Justice* 211; and J. Rehman, 'Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom. Dilemmas of Multiculturalism in the Aftermath of the London Bombings' (2007) 29 *Human Rights Quarterly* 831, 856.
[197] George W. Bush's first proclamations regarding the attacks, e.g., showed his unwillingness to demonize Islam or Stigmatize Arab-Americans. However, subsequent rhetoric went counter to this early trend. See C West, 'Lift Every Voice' in D. Goldberg, V. Goldberg and R. Greenwald, *It's a Free Country. Personal Freedom in America after September 11* (RDV Books, 2002).
[198] HRCR (13 September 2001) E1638.
[199] This point is made by Elliott in relation to the treatment of outside groups during the Second World War, see Elliott, *Them and Us*, 9.
[200] Charles F. Bass, HRCR (13 September 2001) E1643.
[201] See chapter 3 of this thesis.
[202] E. Said, *Orientalism* (New York, 1978). See also H. Vu, 'Note. Us and Them: the Path to National Security is Paved with Racism' (2022) 50 *Drake L. Rev* 661, 663.

donated for the victims of 9/11 by a Saudi Prince.[203] Further, despite Bush stating that the attackers were part of a 'fringe movements that perverts the peaceful teachings of Islam', in the same public announcement he repeatedly made the connection between the mainstream religion and the terrorists' 'radical beliefs'. [204] In addition, Attorney General John Ashcroft's calls for Americans not to engage in hate attacks against Americans of Arabic, Middle Eastern and Muslim descent were coupled with the request that Americans be alert to the activities of 'suspicious individuals'. [205] This connection perpetuated the idea that 'suspicious individuals' were likely to belong to a visible, minority community, a sentiment more explicitly expressed by his statement that terrorists overstaying their visas will be arrested – presuming that terrorists would be non-Americans.

Within Congress itself, debates made use of various religious and race-based stereotypes,[206] while remaining impervious to the involvement in terrorism of individuals not fitting these stereotypical images. For example the terrorist threat was described without reference to incidents unrelated to Islam, such as the Oklahoma bombing in America in 1995, perpetrated by Timothy McVeigh. [207] The limited utility of such stereotypical descriptions of potential terrorists is further demonstrated by the actions of terrorists who do not fit the racial or ethnic profile being perpetuated, such as John Walker Lindh, [208] Richard Reid[209] and Umar Farouk Abdulmutallab.[210] In the US legislative

[203] F. Wu, *Yellow: Race in America beyond Black and White* (Basic Books, 2003) 104-116; and S. Akram and K.R. Johnson, 'Race, Civil Rights and Immigration Law after September 11, 2001: The Targeting of Arabs And Muslims' (2001-3) 58 *N.Y.U. Annual Survey of American Law* 295, 311.
[204] President George W. Bush, Message from the President, 'Report on Recovery and Response to Terrorist Attacks on World Trade Center and Pentagon', SCR (20 September 2001) S59554.
[205] Attorney General John Ashcroft, Prepared Remarks for the US Mayors Conference, 25 October 2001, www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm, accessed 24.01.2011.
[206] B. Lincoln, *Holy Terror: Thinking about Religion after September 11* (Chicago, 2002) 20.
[207] *United States v McVeigh*, 153 F.3d 1166 (10th Cir. 1998). It is particularly interesting that the preliminary stages of the investigation of McVeigh's crime focused on Muslims and Arabs, see J. Hester and D. Eisenstadt, 'Terror Blast Kills Scores: Suspects Spotted in Texas' *NY Daily News* (20 April 1995) at 2.
[208] One example of this is the white American John Walker Lindh who was convicted for joining the Taliban in Afghanistan. See *US v Lindh*, 212 F. Supp. 2d 541, 574-77 (E.D.Va. 2002). See S.K. Babb, 'Note, Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh', 54 *Hastings L.J.* 1721 (2003) and K. Engle, 'Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)' 75 *Colo. L. Rev* 59 (2004); L. Michel and D. Herbeck, *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing* (Regan Books, 2001); and S.K. Babb, 'Note, Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh' (2003) 54 *Hastings L.J.* 1721. Leti Volpp, e.g., describes the trend by which Middle Eastern and Asian terrorists are seen as exemplifying their entire 'group', whilst white terrorists are characterised as damaged or deviant individuals, L. Volpp, 'The Citizen and the Terrorist' (2002) 49 *UCLA L. Rev*. 1575,1585.
[209] Reid attempted to detonate explosives hidden in his shoes on 22 December 2001 on a flight from Paris to

debate a single reference is made to the 9/11 attackers being no more 'typical of their religion than Timothy McVeigh is typical of Christianity'.[211] However, aside from this remark the terrorist threat was exclusively described as arising from racial minority adherents to Islam, leading to an inaccurately narrow portrayal of the source of the terrorist threat.[212] By selectively concentrating on particular events as being wholly representative of this new manifestation of highly threatening terrorism its religious, and also racial, nature were emphasised, whilst the terrorists themselves were reduced to racially identifiable, religious fanatics.[213]

4.4 Conclusion

In the shadow of the threat from terrorism the subsystem behaviour of US and UK legislatures repeated recognised deficiencies of systems behaviour in their response to national security law-making needs. The environmental irritant of public opinion and political considerations were particularly able to shape the subsystems' programme of operation, which in turn appeared to justify the level of the public fear and nature of the statutory powers. Environmental irritants arising from the national security threat face unbalanced each legislature's prioritisation of the habitualised principles of majoritarian responsiveness and minority protection, which legitimise the law-making supremacy of Parliament and Congress.[214] Portrayal of a wholly unprecedented threat meant that effective debate was dominated by calls for cross-party consensus, which failed to effectively give voice to minority interests.

Miami. Reid is a British citizen of mixed white and African-Jamaican descent. See P. Ferdinand, 'Would-be Shoe Bomber Gets Life Term', *Washington Post*, 31 January 2003, at A1.

[210] Abdulmutallab attempted to detonate plastic explosives on 25 December 2009 on a flight from Amsterdam to Detroit, Michigan. Abdulmutallab is Nigerian, and attended university in the UK. See 'Christmas Day 'bomber' Umar Farouk Abdulmutallab charged' *The Times* (7 January 2010) accessed 27.01.2011.

[211] Edolphus Towns, HRCR (24 September 2001) E1711.

[212] See William Lacy Clay, E1658 and Adam Schiff, E1658-59 HRCR 13 September 2001. Even though the anthrax scare immediately following 9/11 demonstrated that it was inappropriate to solely focus on Islamic terrorism, see B. Woodward and D. Eggen, 'FBI and CIA Suspect Domestic Extremists; Official Doubt any Links to Bin Laden' *Washington Post* (27 October 2001) at A1.

[213] This dehumanising process is seen as 'the first step in scapegoating' a group of individuals. See R. Ripston 'Casualties of War: Anti-terror Hysteria' 133-42, in D. Goldberg, V. Goldberg and R. Greenwald, *It's a Free Country. Personal Freedom in America after September 11* (RDV Books, 2002) 135; and N. Fairclough, *Critical Discourse Analysis. The Critical Study of Language* (2nd ed., Harlow, 2010) 488.

[214] Ronald Dworkin cites the importance of the 'metaphor of balancing the public interest against personal claims' as 'established in our political and judicial rhetoric', R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 198.

In the US, although debate and legislative scrutiny persisted, law-making behaviour was controlled by the demands of the executive, which imposed its own legislative priorities on the law. The evidence of this is borne out by the failure to incorporate significant safeguards against misuse of the powers into the statutory powers and the rejection of the draft proposals arising from the committee-based scrutiny, in preference for its own unilaterally determined bill.[215] In the UK, in the aftermath of 9/11, any consideration of minority protection was seen as an almost unspeakable concession to terrorists.[216] Somewhat counter-intuitively, therefore, the US sub-system's operation was more able to uphold normal autopoietic behaviour than the UK, against the politically-driven environmental irritants it faced. Adherence to positive patterns of subsystem behaviour was, however, weakened by the ability of the US executive to circumvent ordinary legislative process by passing over the House and Senate negotiated bills in favour of its own draft statute.[217]

Racially loaded imagery also demonstrated the subsystem's own understanding of the threat, which was then reflected in its subsystem communications.[218] This imagery fashioned a homogenous and separate suspect community identifiable by its racial, ethnic and religious origins, thus making minority and Muslim communities appear to be the common-sense focus for terror-related policing. The link between particular racial and religious minority groups and the terrorist threat was given the appearance of rationality through legislative language, imagery and specific legislative provisions such as the definition of terrorism. Such subsystem behaviour resulted in the enactment of broad and highly discretionary law enforcement power, which contained the potential for racially disproportionate use.[219] Mere recognition of the need to uphold ordinary law-making standards even in the face of an acute national security threat was thus insufficient to achieve this effect.[220] However, in the US the cause of this departure appears to owe

[215] See J.W. Whitehead and S.H. Aden, 'Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Initiatives' (2002) 51 *American U.L. Rev* 1081, 1086-94 analysing the shifting power balance in the post 9/11 legal provisions.
[216] See, e.g., Peter Mandelson, who commented that 'the test of the response that will be made [to the operation of the counter-terrorism powers] is not so much whether it is proportionate, as whether it is effective', HC Debs (2001-02) 372, c.626.
[217] See D. Cole and J.X. Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* (The New Press, 2002) 152.
[218] J. Goldsmith and A. Vermule, 'Empirical Methodology and legal Scholarship' (2002) 69 *U. Chi L. Rev* 153, 157.
[219] W.J. Stuntz, 'Local Policing after the Terror' (2001-02) 111 *Yale L.J.* 2137, 2138.
[220] See T.T. Gonzalez, 'Individual Rights versus Collective Security: Assessing the Constitutionality of the

more to the atypical progress of the bill through Congress, and the successive interventions of the Bush Administration in imposing its own draft legislation on the process,[221] than to Congressional failure to consider the importance of balancing individual rights with national security.

In the UK, despite both a clear description of the problems arising out of the 1974 Act and the principles by which Parliament would be able to avoid these procedural and substantive mistakes, the law-making process giving rise to the Terrorism Act repeated many of the failings attributed to past legislators.[222] Therefore, while past experiences caused Congress and Parliament to hesitate before instituting the statutory powers proposed, each ultimately bowed to mounting public and Executive pressure for a quick and decisive subsystem response to the terrorist threat.[223] What this suggests is that while the programme of operation of both the US and UK law-making subsystems is understood as being based in considerations of majority responsiveness, curbed by minority protection, this is not actually how the subsystems behave, particularly when faced with certain environmental irritants, such as threats to national security. In such circumstances, as seen in relation to the Terrorism Act and the Patriot Act, effective minority protection does not form a meaningful part of subsystem behaviour. Instead, minority protection is described as the responsibility of some other subsystem or subsystems. However, law-making subsystem expectations regarding the responsibility of the policing subsystem derive from its own system-specific understanding of the policing subsystem's role. This does not match the police's own interpretation of tits role and its subsystem operations consequently do not meet the expectations of he law-making subsystem. Chapters five and six will now show how this barrier between the understanding of the two subsystems further contributed to the realisation of the racial effect of the stop, search and surveillance powers.

USA Patriot Act' (2003) 11 *Univ. Miami Int'l Comp. L. Rev.* 75, 95.

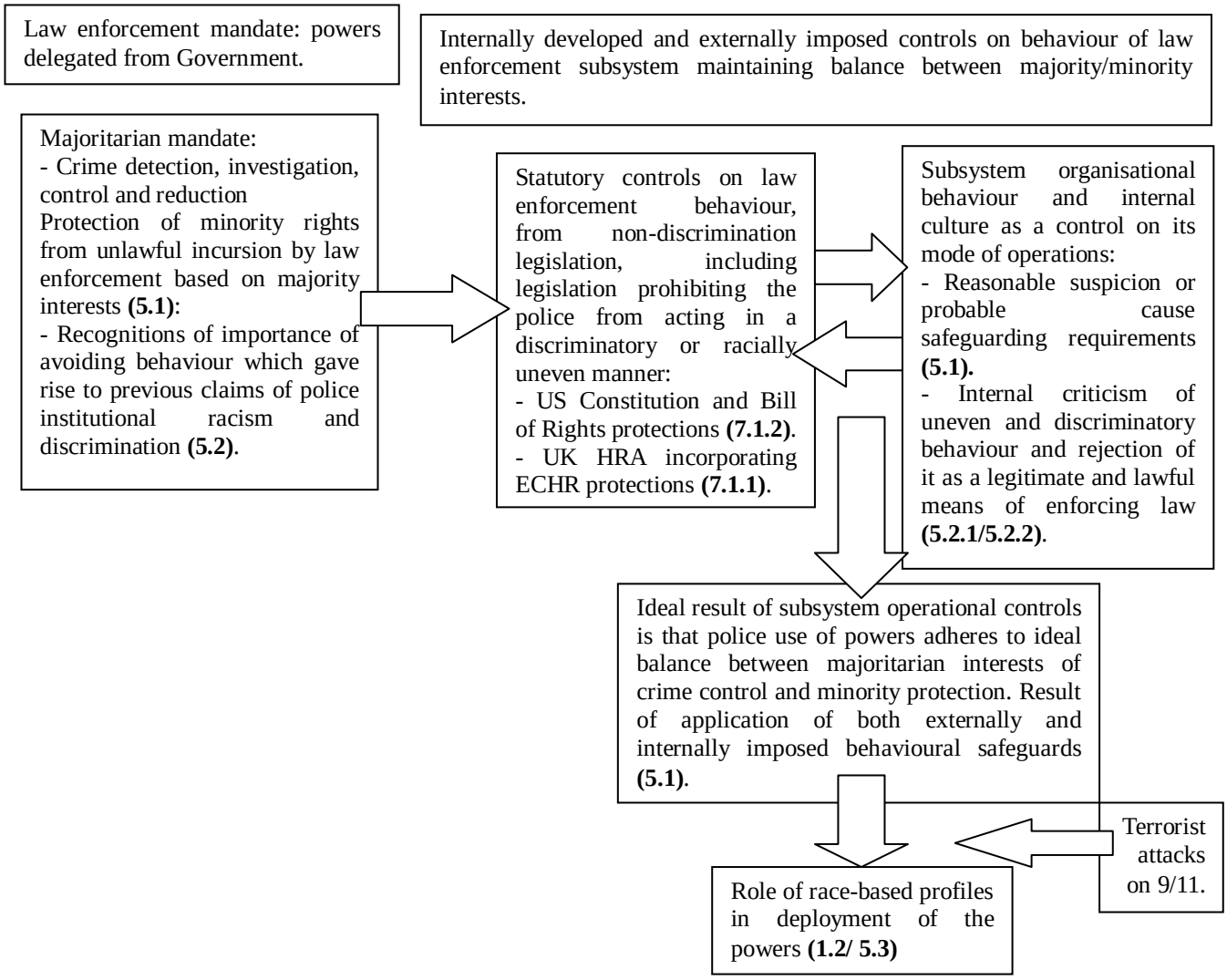
[221] See D. Cole and J.X. Dempsey, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security* (The New Press, 2002) 103.

[222] See, e.g., Lord Lloyd of Berwick who criticised the Terrorism Act 2000 for simply incorporating many of the provisions of previous counter-terrorism legislation, even though they 'have proved almost completely useless', HL Debs (2001-02) 627, c.151.

[223] C.P. Banks, 'Protecting (or Destroying) Freedom through Law: The USA PATRIOT Act and Constitutional Implications' in D.B. Cohen and J.W. Wells (eds.), *American National Security and Civil Liberties in an Era of Terrorism* (Palgrave Macmillan, 2004) 30.

Chapter Five: The Policing Standards for Sub-system Behaviour: Normative versus Empirical

Fig five: policing subsystem – use of powers



Once enacted, interpretation and implementation of the statutory stop, search and surveillance powers was effectively passed to the US and UK policing subsystems, in order that they could apply the provisions to concrete situations.[1] In the US use of the ss.214-215 powers was strongly linked to the exceptional circumstances in which they were enacted. For the law-making subsystem the 'state of exception' resulting from the 9/11 attacks justified, even demanded enacting suspicion-less powers and the 'new' criminal process of which they were a part.[2] By contrast, the permanent enactment of the

[1] R. Reiner, *The Politics of the Police* (OUP, 2010) 206-07.
[2] For consideration of the 'state of exception' thesis see, e.g., G. Agamben, *The State of Exception* (University of Chicago Press, 2009); and J. T. Parry, 'Terrorism and the new criminal process' (2007) 15

UK powers, in advance of 9/11, permitted a degree of normalisation of the suspicion-less powers within the broader spectrum of police stop and search.[3] One consequence of this 'normalisation' was that the powers were already available for the police to use when the 9/11 attacks were carried out. Despite the different contexts in which the s.44 and ss.214-215 powers were enacted, following 9/11 the police in both the US and UK had at their disposal powers which lacked the normal operational restrictions arising from the requirement of reasonable suspicion. In both countries the police were also confronted with strong exhortations to protect national security amid the unparalleled threat faced.

Chapters five and six will question whether the police's understanding of law-making expectations for how it would exercise the discretion within the statutory powers played a role in giving rise to the racial effect and, if so, in what ways.[4] Indeed, US and UK law-making subsystems have sought to dismiss any failings on their own part as contributing to the disproportionate targeting of the powers on particular racial minorities and instead linked this effect to police use of the powers.[5] These arguments support claims that counter-terrorism statutory provisions have only an ancillary role in directing and shaping police operations in tackling terrorism.[6] Whilst the legislature's protestations have been criticised,[7] instead of absolving either the law-making or the policing subsystems, chapters five and six of this thesis analyse the communicative barriers between the two subsystems, and suggest that these barriers meant that neither subsystem truly understood the operational programme of the other so that the expectations each held for the behaviour of the other were not in-line with the other's expectations of those expectations. One area of such a mismatch was in relation to minority protection, and in particular the minority-protecting role that each subsystem expected the other subsystem to perform.

William and Mary Bill of Rights Journal 765.

[3] For consideration of the 'normalisation thesis' see, e.g., P. Hillyard, 'The "War on Terror": Lessons from Ireland' (2005) *European Civil Liberties Network* 1.

[4] See fig. five.

[5] See, e.g., the evidence of Mr. Philip to the Home Affairs Committee, who stated that 'We have some uneasiness about the actual Act but we think this is not the important issue at this point, we think the most important thing is the matter of implementation', Minutes of Evidence, Oral Evidence Taken before the Home Affairs Committee (8 July 2004).

[6] Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol. 1, Cm 3420 (October 1996), para 2.1.

[7] E.g. Director of Liberty, Shami Chakrabarti, maintained the role of the legislative subsystem by urging that 'Parliament needs to take responsibility for the divisive, blunt instrument it created', see BBC News, 'Police reduce the number of anti-terror stops and searches' (26.11.2009), http://news.bbc.co.uk/1/hi/england/london/8380709.stm, accessed 30.05.2011.

In order to identify and analyse the inter-subsystem communicative barriers between the law-making and policing subsystems, this chapter firstly sets out the programme of system-specific operations by which policing subsystems in the US and UK seek to reconcile and fulfil various externally held expectations that the police operate in an effective, efficient and fair manner. By acting pursuant to their interpretation of these expectations to law enforcement subsystems retain their operational legitimacy, in society at large. This chapter then suggests that the damaging effect to the legitimacy and utility of police activities experienced when these standards are not maintained was fully appreciated within each country's law enforcement subsystem, prior to the enactment of the suspicion-less stop, search and surveillance powers on which this thesis focuses. Finally this chapter will produce evidence to suggest that despite the existence of established system behaviours, and subsystem awareness of the implications of not adhering to these, the police subsystems in both the US and UK deviated from these in applying the suspicion-less counter-terrorism stop, search and surveillance powers on the basis of broadly drafted, race-based profiles.

Before analysing policing operations in the US and UK it is necessary to note that there are significant differences in the nature of each country's law enforcement organisations.[8] In the US, the 'police' is comprised of a variety of federal, state and local forces with different, but overlapping, geographical remits, varying law enforcement powers and distinct organisational structures.[9] UK policing is organised into regional police authorities, operating in accordance with centrally devised standards, but without a single overarching nationwide police force.[10] To facilitate this comparison this chapter focuses on specific parts of each country's law enforcement organisation which have comparable elements in both countries. The US analysis focuses on the role of the Federal Bureau of Investigation ('FBI'), as it is this organisation which, through its operational field offices, is responsible for law enforcement at a federal level and has the primary policing mandate to tackle terrorism.[11] There are 56 FBI field offices located in major metropolitan areas across the US, which are responsible for all FBI operations within a defined geographical area. Each office is headed by a special agent in charge or an assistant director and has

[8] Although for their early commonalities see L.A. Steverson, *Policing in America* (ABC-CLIO, 2008) 4-10.
[9] See J.S. Dempsey and L.S. Forst, *An Introduction to Policing* (5th ed., Delmare, 2010) 42-108.
[10] See L. Jason-Lloyd, *The Legal Framework of Police Powers* (Frank Cass & Co., 1997) 1.
[11] Pursuant to 28 C.F.R. 0.85(1). See also A.G. Theoharis, 'FBI Oversight and Liaison Relationships' in A.G. Theoharis (ed.), *FBI: A Comprehensive Reference Guide* (The Oryx Press, 1999) 159-67.

control over a number of resident agencies, of which there are around 400 across the country and are located in smaller cities and towns.[12] FBI operations are undertaken on the basis of Attorney General Guidelines and are subject to congressional and executive oversight.[13] In the UK, local police authorities operate on the basis of UK-wide powers, loosely built upon the ancient premise of keeping the king's peace.[14] There are 43 police authorities of varying size within England and Wales, and eight in Scotland, each headed by a chief constable.[15] Under the chief constable's authority there is a strong UK policing convention of constabulary independence, intended to enable the police to act autonomously from political control and base their decisions on their law enforcement expertise.

A further important point to note, in relation to the analysis of the UK police is that the counter-terrorism powers were used far more heavily by some police authorities than others, due to the relative importance of national security concerns and the different operational priorities of local forces.[16] In particular, the s.44 powers were predominantly deployed by police officers, at street-level, within the Metropolitan Police Service ('MPS') and the British Transport Police ('BTP').[17] These two forces focus on urban areas of high population density and which include high levels of sites, which are recognised as potential terrorist targets.[18] It is, therefore, the operational behaviour of these two forces, as analysed through police authority guidelines and similar publications, which represents the major focus of the UK policing subsystem analysis. Geographical differences in US police use of the powers are less clear than in the UK because the FBI, despite being broken down into regional field officers, operates under nationwide umbrella organisations and because there is less statistical data to reveal the patterns of use of the powers. Despite the structural differences in US and UK policing subsystems, the

[12] See http://www.fbi.gov/contact-us/field, accessed 06.06.2011.
[13] www.fbi.gov/about-us/faqs, accessed 02.09.2011.
[14] A. Brown, *Police Governance in England and Wales* (Cavendish Publishing, 1998) 3-4.
[15] See http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Thejudicialsystem/DG_4003281, accessed 06.06.2011.
[16] In his annual review Lord Carlile attributed this uneven use to an inconsistency in approach to using the powers among chief officers, see Carlile, *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006* (June 2008), para 32 and Carlile, *Report on the Operation in 2009 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006* (June 2010), para 52.
[17] In fact the MPA and BTP consistently accounted for over 90 per cent of the use of s.44. See Lord Carlile, *Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (July 2010), annex E, table 2.2.
[18] J. Coaffee, *Terrorism, Risk and the City: The Making of a Contemporary Urban Landscape* (Ashgate, 2003).

barriers to inter-subsystem understanding, which contributed to the racial effect of the policing powers, were experienced in both US and UK police subsystems. One reason which may explain this it that, despite the organisational differences between the US and UK policing subsystems, there are some comparable subsystem priorities which marked both country's policing subsystem programme of operation, as are considered in the next section.

5.1 Standard Policing Subsystem Programme

In the US and UK the functional aims through which the police seek to fulfil the expectations for their behaviour held by other subsystems, focus on enforcing and upholding criminal law.[19] Each policing subsystem, therefore, shapes its operational and law enforcement programme in accordance with its interpretation of the requirements for crime prevention, detection and reduction.[20] The effect of these operational priorities is that police behaviour is largely results-driven.[21] Pursuant to the achievement of the desired 'results' stops, searches and surveillance are frequently deployed investigative techniques, predominantly used to secure indictments, arrests and ultimately convictions.[22] In utilising these powers the police respond to legislative powers by drafting and implementing operational guidelines. Like the statutory powers, these guidelines are designed to balance majority concerns of law enforcement with avoiding unreasonable and disproportionate police incursions into individual liberties.[23] In particular, such subsystem norms seek to address the 'perennial problems' of discrimination and disparity in the police treatment of different groups.[24] In this way the police's identification with the rule of law provides a means of reconciling their

[19] Memorandum for the Heads of Department Components, 'The Attorney General's Guidelines for Domestic FBI Operations' Press Release (29 September 2008) 2, http://www.justice.gov/ag/readingroom/guidelines-memo.pdf, 07.06.2011.
[20] L. Lustgarten, 'The Future of Stop and Search' (2002) *CLR* 603.
[21] See ACPO, APA and Home Office, *Equality, Diversity and Human Rights Strategy for the Police Service,* which described the police as having 'developed a strong culture of focusing on results' 5.
[22] J.T. Nason, 'Conducting Surveillance Operations. How to Get the Most out of them' (May 2004) 73(5) *FBI Law Enforcement Bulletin* 1 and USDOJ, *Report to the National Commission on Terrorist Attacks upon the US: The FBI's Counterterrorism Program Since September 11 2001* (14 April 2004) 67.; G.P. Alpert, D. Flynn and A. Piquero, 'Effective Community Policing Performance Measures' (2001) 3(2) *Justice Research and Policy* 79.
[23] See, e.g., *Spano v New York* which held that 'the police must obey the law while enforcing the law, that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves, *Spano v New York* 79 S. Ct. at 1206 (1959).
[24] R. Reiner, *The Politics of the Police* (OUP, 2010) 25.

fundamentally authoritarian character with the expectations of democratic society.[25] To help to maintain this balance evidential standards govern police implementation of their statutory powers.[26] In relation to stop, search and surveillance the key requirements are the need for reasonable suspicion in the UK, and either reasonable suspicion or probable cause in the US. The nature of these evidential pre-requisites, and the way that the police have interpreted and shaped their own subsystem behaviour around them, is considered further in the following paragraphs.

5.1.1 UK: Stop and Search based on Reasonable Suspicion

The power of the police to stop and search individuals is a common and long-established form of street-level policing in the UK, albeit that it remains highly contentious.[27] The first such powers were implemented through the Metropolitan Police Act 1839 which gave police officers in London the power to stop and search people if they 'reasonably suspected' them of carrying anything 'stolen or unlawfully obtained'.[28] The criterion for conducting these searches was an officer's subjective suspicion, a controversial and unpopular standard, which led to the provisions being pejoratively referred to as the 'sus' laws.[29] The first standard stop and search power in England and Wales was introduced by s.1 of PACE, and under which the determinant for carrying out a stop and search has developed into the requirement for *reasonable* suspicion.[30] Use of a stop and search power, where there is reasonable suspicion of criminal behaviour or intent, is intended to allay or confirm the officer's suspicions that he will find stolen or prohibited articles on the individual stopped,[31] without the need for the police officer to exercise a power of arrest.[32]

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[25] D.A. Sklansky, 'Police and Democracy' (2004-05) 103 *Mich L. Rev* 1699 as earlier recognised in J.H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society* (1966).
[26] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., OUP, 2002) 330.
[27] B. Bowling and C. Philips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *MLR* 936-61.
[28] Metropolitan Police Act of 1839 (2&3 Vict. c.47), s.66.
[29] C. Demuth, *'Sus': A Report on the Vagrancy Act 1824* (Runnymede Trust, 1978).
[30] PACE, s.1. See also Council of Europe, *European Code of Police Ethics*, adopted 19 September 2001 pursuant to Recommendation Rec (2001) 10 (March 2002) para 47 and European Commission against Racism and Intolerance, *General Policy Recommendation number 11 on Combating Racism and Racial Discrimination, in Policing* (adopted 29 June 2007) sec I, para 3 which advocate maintenance of a reasonable suspicion standard in police investigations.
[31] PACE, s.1(3).
[32] Home Office, PACE Code A, para 1.4. The Home Office definition of a stop is: 'when an officer requests a person in a public place to account for themselves, ie. Their actions, behaviour, presence in an area or possession of anything', *ibid*, para 4.12.

Reasonable suspicion shapes police conduct of stops and searches on two levels. Firstly, it imposes a requirement for objective intelligence and secondly, it expressly demands that this intelligence must not rely on group-based generalisations which could lead to discriminatory connections between, for example, race and criminal behaviour. These conditions shape the policing subsystem's programme of operation by which it pursues its operational aim of crime reduction, whilst also responding to wider legislative and societal expectations relating to efficient and fair police behaviour. Reasonable suspicion, therefore, serves as a safeguard to protect individuals from arbitrary or prejudicially-motivated police action,[33] and is a key communicative redundancy by which the police respond to the irritants arising from popular opinion, which expect the police to fulfil their mandate to control crime, while balancing this with individual rights.

The parameters of the reasonable suspicion requirement within police stop and search are further delineated by the explicit exclusion of certain grounds for using the powers. These grounds emphasise the importance of objectively assessed suspicion and the strong nexus between particularised intelligence and use of the power. Code A guidance,[34] issued by the Secretary of State in conjunction with the Police and Criminal Evidence Act 1984, for example, explicitly states that a police officer's reasonable suspicion can never be based on personal factors alone, without some supporting intelligence or specific behaviour by the individual concerned.[35] In particular race, age, appearance or the fact that the person is known to have a previous criminal conviction cannot be used, either separately or cumulatively, as the basis for a reasonable suspicion stop and search.[36] Reasonable suspicion, therefore, must not be based on generalisations or stereotypical images of certain groups of people as more likely to be involved in criminal activity than others.[37] Policing subsystem operations maintain the reasonable suspicion requirement, irrespective of views of the reality of 'on street' criminal behaviour, in order that it may

[33] As first expressed in *Dumbell v Roberts* [1944] All ER 326 at 329: 'The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the function of arrest – in a modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstances which point either way, either to innocence or guilt'. See also G. Smith, 'Reasonable Suspicion: time for a re-evaluation?' (2002) 30 *International Journal of the Sociology of the Law* 1.
[34] Issued in accordance with Police and Criminal Evidence Act 1984, s.66.
[35] PACE Code A, para 2.2.
[36] *ibid*.
[37] *ibid*.

legitimately fulfil its law enforcement mandate.[38]

The 'reasonableness' of the police officer's suspicion is assessed on an objective standard,[39] and is coupled with the requirement that stop and search must be used 'fairly, responsibly, with respect for people being searched and without unlawful discrimination'.[40] These operational benchmarks illustrate the importance of reasonable suspicion as a mechanism by which a police officer's decision-making is regulated and individual discretion is limited to a closely defined 'sphere of autonomy'.[41] In particular, the objective nature of reasonable suspicion requires that it is grounded in fact, information and/or intelligence.[42] The intelligence must 'meet the needs of frontline officers', which includes the expectation that the information should be temporally relevant and geographically specific.[43] Police discretion to exercise their powers, therefore, requires the existence of reasonable suspicion. Discretion in the absence of reasonable suspicion can lead to a risk that the police lapse into actions based on stereotypes.[44]

5.1.2 US: Surveillance and Search based on Probable Cause or Reasonable Suspicion

Surveillance and search powers are an important means of enabling the police to investigate individuals suspected of engaging in criminal behaviour. Such investigative operations are primarily governed by the Fourth Amendment of the US Constitution which safeguards individual liberties against unreasonable searches and seizures.[45] The Constitutional protections, therefore, do not prohibit all governmental and police searches, only those which are unreasonable.[46] The Fourth Amendment also does not apply to wiretaps,[47] or pen registers,[48] but does apply to other forms of electronic surveillance.[49]

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[38] A. Saunders and R. Young, *Criminal Justice* (Butterworths, 2000) 87.
[39] PACE Code A, para 2.2.
[40] *ibid*, para 1.1. See also Race Relations (Amendment) Act 2000 which makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationalist or national origin when using their powers.
[41] D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (2nd ed, Clarendon Press, 1990) 8.
[42] PACE Code A, para 2.2.
[43] Home Office, *Stop and Search Action Team. Interim Guidance* (Home Office, 2005) para 3.6.
[44] See section 5.2 of this thesis.
[45] US Constitution, Fourth Amendment.
[46] *Elkins v United States* 364 US 206 (1960) at 222.
[47] *Olmstead v United States*, 277 US 438 (1928); and *United States v Miller*, 425 US 435, 442-43 (1976).
[48] *Smith v Maryland*, 442 US 735 (1979).

Nevertheless, even where the constitutional protections do not directly apply, the legitimacy of police operations is based on adherence to the same substantive measures regarding what constitutes lawful police behaviour. The starting position for establishing that a search or surveillance operation is reasonable is the warrant preference rule, which holds that police operations are presumptively unreasonable if they are not undertaken pursuant to a warrant.[50] All warrant applications require that the applying officer outlines the exact scope and specific circumstances that justify the request for use of the relevant powers.[51] The requirement for a warrant it is designed to ensure that police behaviour is constitutional, on the basis of the reasonableness of the proposed operations.[52] This reasonableness is assessed by the court, as opposed to individual police officers.[53] There are, however, recognised exceptions to the rule, including for operations conducted in relation to national security threats.[54] Instead of requiring a warrant, such searches and surveillance must fulfil one of two legal standards to constitute lawful operational behaviour: probable cause; or reasonable suspicion.

The primary standard for police individualised suspicion is 'probable cause'.[55] Probable cause requires that the circumstances and facts known to the officer are sufficient to suggest to a person of reasonable prudence, 'beyond reasonable doubt', that evidence of criminal behaviour will be found.[56] Evidentially, probable cause is 'more than bare suspicion' and 'less than evidence which would justify … conviction'.[57] Probable cause has a number of components, which determine whether the standard has been reached. These comprise of a quantitative component, relating to how certain the police are; a qualitative element, determined by how strong the supporting data sources are; a temporal component, regarding when the courts and police must make their judgement; and a moral dimension of whether the police officer has individualised suspicion.[58] The

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[49] *Berger v New York*, 288 US 41 (1967); and *Katz v New York*, 389 US 347 (1967) at 354-56.
[50] See T.K. Clancy, 'The Fourth Amendment's Concept of Reasonableness' (2004) *Utah Law Review* 977, 993.
[51] *Johnson v United States* 333 US 10, 13-14 (1948).
[52] *United States v Katz*, 389 US 347, 360 (1967) at 20.
[53] D.A. Sklansky, 'Police and Democracy' (2004-05) 103 *Mich L. Rev* 1699, 1738.
[54] *United States v Katz* 389 US 347, 360 (1967), per Justice White. See also *New Jersey v TLO*, 469 US 325, 340-41 (1985).
[55] *Beck v Ohio* 379 US 89, 91 (1964). See also *Almeida-Sanchez v United States*, 413 US 266, 269-73 (1978).
[56] *US v Ornelas* 116 S. Ct 1657 (1996). See also *U.S. v Covarrubias* 65 F.3d 1362 (7th Cir. 1995).
[57] *Brinegar v US* 338 US 160 (1949).
[58] A.E. Taslitz, 'What is Probable Cause, and Why Should We Care?: The Costs, Benefits and Meaning of Individualized Suspicion' [2010] 73 *Law and Contemporary Problems* 145.

Supreme Court has prioritised the existence of individualised suspicion as the most important amongst the different considerations.[59] Like the warrant preference rule, however, there are also exceptions to the requirement for probable cause where the lower, 'reasonable suspicion', standard applies.[60]

Despite the difficulty the courts have found in precisely defining the reasonable suspicion standard[61] it requires a particularised and objective suspicion that the target of the power is, or has been, involved in a criminal activity.[62] This standard necessitates more than 'inchoate and unparticularized suspicion or [a] 'hunch'' and must be based on 'specific and articulable facts'.[63] The necessary facts can, however, be little more than suspicious behaviour in an area known for criminality.[64] The difference in the intelligence requirements in the two standards was considered in *United States v Perrin,* in which the court held that reasonable suspicion is a less demanding standard and can be established with quantitatively less information and information that is qualitatively less reliable than that required to establish probable cause.[65] Crucially, however, for both operational standards the information must constitute objective intelligence regarding suspected criminal activity, which is reasonably linked to the individual subject to the search or surveillance.[66] This connection must not be derived from discriminatory considerations such as, relating to the individual's religious or political views.[67] The operational importance of the reasonable suspicion and probable cause requirements, as safeguards against the unbalancing of the crime prevention and civil liberties considerations, is heightened by the fact that if the requisite legal standard for the stop or surveillance is present the officer's personal motive for his actions is irrelevant.[68] Consequently any reduction in the stringency of the legal tests, or their application, could accommodate

[59] *Maryland v Pringle*, 540 US 366, 372-73 (2003), quoting *McCarthy v De Armit*, 99 P. 63, 69 (1881); and citing *Ybarra v Illinois*, 445 US 85 (1979).
[60] *Terry v Ohio* 392 US 1 (1968) 4.
[61] W.R. LaFavre, *Search and Seizure*, vol 1 (4th ed. 2004).
[62] See *Carroll v United States* 267 US 132, 153-54 (1925); and *Camara v Municipal Court* 387 US 523, 538-39.
[63] *Terry v Ohio*, 392 US 1 (1968) 21. See also *Ferguson v City of Charleston* 532 US 67, 86 (2001); *City of Indianapolis v Edmond* 531 US 32, 37 (2000).
[64] See *Illinois v Wadlow* where the court upheld the reasonableness of the suspicion aroused by an individual's flight from the police, in an area known for drugs trafficking, 528 US 119 (2000).
[65] *U.S. v Perrin* 45 F.3d 869 (4th Cir 1995).
[66] *Ornelas v United States* 517 US 690, 696 and *Carrol v US* 267 US 132, 162, 288.
[67] *United States v US District Court* 407 US 287 (1972).
[68] *Whren v U.S.* 166 S.Ct 1769 (1996).

police action consciously or unconsciously motivated by racial animus.[69]

In both the US and UK the key communicative redundancy designed to sustain the subsystem's balance between crime reduction and individual civil liberties, is based on the pre-requisite for objectively reasonable suspicion. These standards not only help to ensure that limited police resources are effectively deployed and enforce the presumption of innocence, but also that police action is not based on race-related generalisations about criminality or, indeed, officer prejudice. Both the US and UK police subsystems understood the negative impact on its subsystem operations of deviating from these normal modes of operation, as is shown in the next section.

5.2 Recognised Risk of Departing from Standard Operational Behaviours

In both the US and UK, policing subsystems have recognised their susceptibility to racially uneven policing when there is a specific, acute environmental irritant such as with 'epidemics' of drugs-related crime or threats to national security.[70] Police behaviour in such circumstances is strongly affected by political interests which, in turn, are heavily influenced by public sentiment.[71] Such publicly endorsed and high profile policing objectives have been linked to the reduction or removal of statutory safeguards as well as the uneven and aggressive use of police powers.[72] Such behaviours are most readily accommodated where the police are afforded extremely broad, discretionary powers, with minimal statutory safeguards to maintain standards of due process.[73] Such powers can undermine human rights whilst also having a counterproductive impact on crime detection and prevention.[74] In this way, policing failure to adhere to normal operational and evidential standards has contributed to stop, search and surveillance practices being a

[69] J.H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 96-97.
[70] For past examples of this see D. Walsh, 'The Impact of Anti-subversive Laws on Police Powers and Practice in Ireland: The Silent Erosion of Individual Freedom' (1989) 62(4) *Temple Law Review* 1099.
[71] See, e.g., *Chandler v Miller* 520 US 305 (1997); and *Ferguson v City of Charleston* 121 S. Ct. 1281 (2001).
[72] See, e.g., D. Cole, *No Equal Justice* (1999); M. Mauer, *Race to Incarcerate* (1999); S.L. Johnson, 'The Self-Fulfilling Nature of Police Profiles', in M.W. Markowitz and D.D. Jones-Brown (eds.), *The System in Black and White* (2000).
[73] See, e.g., T. Maclin, 'Race and the 4th Amendment' (1998) 51 *Vand. L. Rev*. 333, 344-54; and A.C. Thompson, 'Stopping the Usual Suspects: Race and the 4th Amendment' (1999) 74 *NYU L Rev.* 956, 983-91.
[74] H. Fenwick, *Civil Liberties and Human Rights* (4th ed. Routledge-Cavendish, 2007) 1329; and B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006) 109.

source of conflict between minority individuals and the police'.[75] Indeed, a continuing race-based division in attitudes towards the police has been borne out by several surveys in which white respondents consistently exhibit a more favourable attitude towards the police than minority individuals.[76] The discriminatory nature of institutional racism and racial profiling, together with their lack of utility in effectively tackling crime, have resulted in the widespread recognition and condemnation of such behaviours within the US and UK policing and law-making subsystems, as is shown in the following paragraphs.

5.2.1 Deleterious Impact of Institutional Racism

The concept of 'institutional racism'[77] developed in the US out of the radical political struggle and Black Power movement of the 1960s,[78] and the expansion of understandings of the causes of racial inequality from their focus on individual prejudice.[79] The concept was later applied to UK policing in the report arising from the Stephen Lawrence Inquiry, which referred to institutional racism as a 'corrosive disease' and concluded that it was present within police forces nationwide.[80] These reports contributed to a change in the official recognition and condemnation of institutional racism, and prompted the enactment of the Race Relations (Amendment) Act 2000 which brought the police within the scope of UK anti-discrimination legislation.[81] The evolution in official views of institutional racism in the UK, from denial to acceptance and then criticism has been experienced in an even more high profile way in the US, especially following the investigation and report regarding the police beating of Rodney King, by the Los Angeles Police Department, in 1991.[82] Whilst institutional racism can include overt and

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[75] L. Lustgarten, 'The Future of Stop and Search' (2002) *CLR* 603. See also J. Bennett, *Police and Racism: What has been Achieved 10 Years after the Stephen Lawrence Inquiry Report* (ECHR, 2009); European Commission against Racism and Intolerance, Third Report on the United Kingdom (15 June 2005) para 83. J. Foster, T. Newburn and A. Souhami, *Assessing the Impact of the Stephen Lawrence Inquiry* (Home Office, 2005) 30; and 'Where has all the Racism Gone/ Views of Racism within Constabularies after Macpherson' (2007) 30(3) *Ethnic and Racial Studies* 397.

[76] R. Weitzer and S.A. Tuck, *Race and Policing in America: Conflict and Reform* (CUP, 2006) 106, 70-73, and 119-23.

[77] Scott and Marshall, *Oxford Dictionary of Sociology* (OUP, 2005) 211-12.

[78] See S. Carmichael and C. Hamilton, *Black Power: The Politics of Liberation* (Vintage, 1967) and K. Murji, 'Sociological Engagements: Institutional Racism and Beyond' (2007) 41(5) *Sociology* 843.

[79] See, e.g., G. Myrdal (auth) and A.M. Rose (ed.), *The Negro in America* (Harper and Row, 1964) and R.E. Park, *Race and Culture* (Simon & Schuster, 1964).

[80] Sir William of Cluny, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William of Cluny* (HMSO, 1999). See M. Rowe (ed.), *Policing beyond MacPherson – Issues in Policing, Race and Society* (Willan Publishing, 2007).

[81] See Race Relations (Amendment) Act 2000 (c. 34).

[82] Report of the Independent Commission on the Los Angeles Police Department (1991), also informally

conscious discriminatory attitudes, more invidious forms exist in the unquestioned, unconsciously discriminatory bureaucratic procedures, which become entrenched within the subsystem operations through its self-referential behaviour. Although the requirements for probable cause and reasonable suspicion are not a panacea for curing all uneven and race-based policing, and are frequently absent even where they are officially required,[83] departing from these standards make the policing subsystem particularly susceptible to institutionally racist operations.[84]

Official recognition of the presence of institutional racism within the police has led to efforts in both countries to regulate the subsystem's choice from amongst its repertoire of possible behaviours to exclude those which lead to discriminatory practices.[85] The most overtly discriminatory subsystem behaviour, identified by Scarman, Macpherson, the Christopher Commission, and in other studies,[86] have been at least partly remedied through institutional reform.[87] However, the communicative redundancies behind this systemic racism have by no means been wholly excised from subsystem programmes.[88] Instead, the practices that gave rise to it may have simply become more subtle and

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referred to as 'the Christopher Commission', due to it being headed by then-attorney Warren Christopher.

[83] See, D. Brown, *PACE Ten Years On: A Review of the Research*, Home Office Research Study 155 (Home Office Research and Statistics Directorate, 1997); D. Dixon, *Law in Policing: Legal Regulation and Police Practice* (OUP, 1997); P. Quinton, N. Bland and J. Miller, *Police Stops, Decision-making, and Practice, Police Research Series* (Home Office, Policing and Reducing Crime Unit, 2000).

[84] Report of an Inquiry by Sir William MacPherson of Cluny Presented to Parliament by the Home Secretary (February 1999) and Report of the Independent Commission of the Los Angeles Police Department, *The Rodney King Beating* (1991). See also J. Hall, 'Police and Law in a Democratic Society' (1953) 28 *Und. L.J.* 133, 153, 156, 171 – an early article which warden that the wide scope of police discretion opened the door to discrimination against minorities and that it violated the rule of law.

[85] See C. Ogletree, M. Prosser, A. Smith and W. Talley, *Beyond the Rodney King Story. An Investigation of Police Conduct in Minority Communities* (Northeastern University Press, 1995) and B.K. Landsberg, *Enforcing Civil Rights. Race Discrimination and the DOJ* (University of Kansas, 1997).

[86] See S. Holdaway, *Recruiting a Multi-Racial Police Force* (HMSO, 1991); S. Holdaway and A.M. Barron, *Resigners? The Experience of Black and Asian Police Officers* (Macmillan, 1997); E. Cashmore, 'The Experiences of Ethnic Minority Police Officers in Britain: Under Recruitment and Racial Profiling in a Performance Culture' (2001) 24(4) *Ethnic and Racial Studies* 642; and E. Cashmore, 'Behind the Window Dressing: Ethnic Minority Police Perspective on Cultural Diversity' (2002) 28(2) *Journal of Ethnic Migration Studies* 327.

[87] See Home Office, *From the Neighbourhood to the National Policing our Communities Together* (July 2008) which states that there have been 'substantial and positive changes' in policing since the Macpherson report, at para 4.18. See also ACLU claims that '[a]lthough fewer *de jure* forms of discrimination remain in existence, *de facto* racial disparities continue to plague the United States and curtail the enjoyment of fundamental human rights', 'The Persistence of Racial and Ethnic Profiling in the United States. A Follow-Up Report to the UN Committee of the Elimination of Racial Discrimination' (June 2009).

[88] See J. Bennett, *Police and Racism: What has been achieved 10 Years after the Stephen Lawrence Inquiry Report* (ECHR, 2009); European Commission against Racism and Intolerance, Third Report on the United Kingdom, (15 June 2005), para 83; and R.BR. Banks and R. Thompson-Ford, '(How) Does Unconscious Bias Matter?: Law, Politics and Racial Inequality' (2008-09) 58 *Emory L.J.* 1053, 1089-90.

covert:[89] less visible but hardly less 'polluting' to police operations.[90] This would certainly correspond with CRT arguments of racism as part of the normal state of institutional operation. In particular, behaviour that has an unconsciously discriminatory effect, rather than a discriminatory intent, continues to be a recognised feature of routine policing.[91] The engrained nature of institutional racism in the UK was suggested by the Parekh report which concluded that even the notions of Britishness and Englishness have racial connotations so that there remains an unstated assumption 'that Britishness and whiteness go together, like roast beef and Yorkshire pudding' and that these ideas are spread throughout society, and perpetuated in popular culture and consciousness.[92]

The types of unconsciously discriminatory operations which fuel institutional racism arise from a particular mode of understanding human behaviour which perceive certain criminal activities as more associated with some racial minority groups than others. Consequently, in order to pursue the policing aim of reducing crime it appears to be appropriate, even necessary, to shape the subsystem programme so that police resources are concentrated on particular societal groups.[93] The mechanisms though which racial profiling threatens to maintain racial hierarchies are mutually reinforcing, so that, for example, law enforcement tactics which result in heavily disproportionate rates of arrest, conviction and incarceration of members of racial minorities may reinforce stereotypes of minorities as linked to criminality.[94]

A further manifestation of institutional racism is where the police give higher priority to the offences that are dominant amongst minority communities.[95] This form of behaviour has been linked to the disparate treatment of crack and powder cocaine possession in the

[89] J. Foster, T. Newburn and A. Souhami, *Assessing the Impact of the Stephen Lawrence Inquiry* (Home Office, 2005) 30 and 'Where has all the Racism Gone/ Views of Racism within Constabularies after Macpherson' (2007) 30(3) *Ethnic and Racial Studies* 397.
[90] D.T. Goldberg, 'Racial Europeanization' (2006) 29(3) *Ethnic and Racial Studies* 331, 339.
[91] Metropolitan Police Authority, *Report of the MPA Scrutiny on MPS Stop and Search Practice* paras 87-88
[92] The Runnymede Trust, *The Future of Multi-ethnic Britain, The Parekh Report* (Profile Books, 2000) 24-25.
[93] A.H. Garrison, 'Disproportionate Minority Arrests: A Note on What had been Said and How it Fits Together' (1997) 23 *New England J. on Criminal and Civil Confinement* 29, 53-54; and S.L. Johnson, 'Race and the Decision to Detain a Suspect' (1983) 93 *Yale L.J.* 214, 236-39.
[94] D.A. Sklansky, 'Police and Democracy' (2004-05) 103 *Mich L. Rev* 1699, 1817.
[95] ACLU, *How the USA PATRIOT Act Enables Law Enforcement to Use Intelligence Authorisations to Circumvent the Privacy Provisions Afforded in Criminal Cases* (23 October 2001).

US,[96] and police concentration on crimes associated with minority groups, as a means of meeting law enforcement targets,[97] rather than the much more economically costly white-collar crime associated with white individuals.[98] Such behaviour joins two 'outsider' concepts – race and crime – in an effort to enhance operational legitimacy and efficiency, and accords with expectations of other subsystems that these modes of police operation will reduce crime.[99] This prioritisation need not be attributed to a conscious desire to target minority offenders but is demonstrative of how the policing subsystem shapes its programme in response to external irritants which designate these forms of offending as being a particularly acute social problem, and so as warranting greater attention from the police.[100]

Whilst institutional racism exists at a structural level it can manifest itself in the behaviour of individual officers, especially where officers' use of their powers is not subject to the normative safeguards. One operational manifestation of structural, institutional racism is the use of racial profiling, as is considered in the following paragraphs.

5.2.2 Rejection of Racial Profiling

Unlawful racial profiling consists of any 'action that relies on race, ethnicity, or national origin rather than the behaviour of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity'.[101] Such profiles are based on generalisations about the predicted future

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[96] See K.B. Nunn, 'Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks" (2002) 6 *Journal of Gender, Race and Justice* 381, 415-16; R.R. Banks and R. Thompson-Ford, '(How) Does Unconscious Bias Matter? Law, Politics and Racial Inequality' (2008-09) 58 *Emory L.J.* 1953, 1095-96; and D.A. Sklansky, 'Cocaine, Race and Equal Protection' (1995) 47 *Stan. L. Rev.* 1283.

[97] See comments of Professor R. Morgan, former Chair of the Youth Justice Board, describing how police practices of 'picking low hanging fruit' to meet law enforcement targets had a disproportionate impact on minority youth', see *The Guardian* (19 February 2007).

[98] R. Delgado, 'Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat' (1994) 80 *Virginia Law Review* 503.

[99] K. Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 *Harvard Law Rev* 1331, 1357.

[100] The relationship between the police and minority communities was explored in the 1960s by the Kerner Commission, see *The National Advisory Commission on Civil Disorders* (February 1968). See also Committee to Review Research on Police Policy and Practices, *Fairness and Effectiveness in Policing: The Evidence* (The National Academic Press, 2004).

[101] D. Ramirex, J. McDevitt, A. Farrel, *A Resource Guide on Racial Profiling Data Collection Systems. Promising Practices and Lessons Learned* (November 2000) 3. The USDOJ uses a similar definition of profiling as 'the erroneous assumption that any particular individual of one race or ethnicity is more likely

behaviour of specific groups and individuals within those groups. Consequently, profile-based policing has the tendency to result in wide net-casting for information and potential assailants,[102] and can result in the police focusing on individuals whose apparent racial or ethnic background fulfils a stereotypical image of a criminal suspect.[103] The discriminatory nature of policing based on unlawful race-based profiles has been recognised in both the UK[104] and the US.[105] Accordingly, the routine use of such profiles violates the legal principle that only in exceptional circumstances may the race, ethnicity, religion or national origin of a person influence any decisions about their treatment.[106]

Race-based profiles should be distinguished from criminal and suspect profiles which are based on detailed information or suspect descriptions, specifically relating to a crime or series of crimes.[107] Such profiles can be legitimate policing tools, and are widely accepted as useful in law enforcement terms by judges and scholars.[108] The degradation of profiling from being based on specific information to becoming stereotype-led, is

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to engage in misconduct than any particular individual of any other race or ethnicity', Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003). See also D.Al. Ramirez, J. Hoopes, T.L. Quinlan, 'Defining Racial Profiling in a Post September 11 World' (2003) 40 *American Criminal Law Review* 1195, 1206. A similar definition is used in Amnesty International, *Threat and Humiliation. Racial Profiling, Domestic Security and Human Rights in the United States* (Amnesty International, 2004).

[102] See C. Walker, 'Intelligence and Anti-terrorism Legislation in the United Kingdom' (2006) 44 *Crime, Law and Social Change* 387 and Open Society Justice Initiative, *Ethnic Profiling in Europe: Counter-terrorism Activities and the Creation of Suspect Communities* (June 2007) 6.

[103] P. Siggins, 'Racial Profiling in an Age of Terrorism' (2003) 5 *J. L and Soc. Challenges* 59; and R. Singer, 'Race Ipsa? Racial Profiling, Terrorism and the Future' (2007-8) 1 *DePaul Journal of Social Justice* 293. See also N. Lund, 'The Conservative Case against Racial Profiling in the War on Terrorism' (2002-3) 66 *Alb L. Rev* 329.

[104] See Open Society Justice Initiative reports: *Ethnic Profiling by Police in Europe* (Open Society Institute, 2005); *Ethnic Profiling in the Moscow Metro* (Open Society Institute, 2006); and *I Can Stop and Search Whoever I Want. Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain* (Open Society Institute, 2007).

[105] See, e.g., A.W. Aschuler, 'Racial Profiling and the Constitution' (2002) *Uni. Chi. Legal F.* 163, 186-69; R. Brest, 'The Supreme Court, 1975: In Defense of the Antidiscrimination Principle' (1976) 90 *Harv. L. Rev.* 1, 9-10. See D.A. Harris, 'Symposium Article: When Success Breeds Attack: The Coming Backlash against Racial Profiling Studies' (2001) 6 *Michigan Journal of Race and Law* 237 and S.J. Ellman, 'Racial Profiling and Terrorism' (2003) 22 *New York Law School Journal of International and Comparative Law* 305.

[106] EU Network of Independent Experts on Fundamental Rights, Opinion No. 4, *Ethnic Profiling* (December 2006) at 10; and US Constitution, 14th Amendment.

[107] See European Network against Racism and Open Society Justice Initiative, *Ethnic Profiling* (October 2009) 2; O. De Shutter and J. Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' (2008) 71(3) *MLR* 358; and D.H. Harris, *Profiles in Injustice – Why Racial Profiling Cannot Work* (The New Press, 2002) 16-18.

[108] See, e.g., J. Jackson, P. van den Eshof, and E. De Kleuver, 'A Research Approach to Offender Profiling' in J. Jackson and D. Bekerian (eds.), *Offender Profiling: Theory, Research and Practice* (Wiley, 1997) 107-32; *United States v Waldron*, 206 F.3d 597, 604 (6th Cir. 2000); D. Cole, *No Equal Justice* (1999) 540; and R. Kennedy, *Race, Crime and the Law* (1997) 137-38n.

synonymous with profiles of drug couriers[109] used by the Drug Enforcement Agency during the mid-1980s as part of 'Operation Pipeline'.[110] Political pressure to reduce drug-related crime was a powerful environmental irritant encouraging police officers to target people of colour, who were represented as being predominantly responsible for drug use and trafficking, thus making an individual's ethnic or racial background an apparently justifiable reason for them being targeted.[111] This police focus has been connected to the overrepresentation of blacks throughout the criminal justice system, which perpetuated the apparent legitimacy of police use of race as a proxy for criminality.[112]

In the US the controversy surrounding racial profiling developed during the 1990s alongside growing evidence of the targeting of people of colour for police attention.[113] Such operational priorities led to the development of phrases such as 'driving while black', 'flying while Arab' and 'flying while black/brown' - variants on the criminal act of 'driving while intoxicated'[114] - which entered popular discourse.[115] Racial profiling of airline passengers was a particular source of concern, with the US Customs Service facing

[109] The 'drug courier' profile was created by President Nixon's Drug Enforcement Agency, established in 1973 to tackle the politically-fuelled popular concern regarding illegal drug use that had been growing since the middle of the 1960s.

[110] K.B. Nunn, 'Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"' (2002) 6 *Journal of Gender, Law and Justice* 381, 396-400.

[111] D. Rudovsky, 'Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause' (2001) 3 *U. PA. J. Const. L.* 296, 398; and W.J. Stuntz, 'The Pathological Politics of Criminal Law' (2001) 110 *Mich. L. Rev.* 505, 575.

[112] H. Winant, 'Race and Racism: Towards a Global Future' (2006) 29(5) *Ethnic and Racial Studies* 986; and T. Duster, 'Selective Arrests, and Ever-Expanding DNA Forensic Database, and the Spectres of Early Twenty-First Century Equivalent of Phrenology' in D. Lazer (ed.), *DNA and the Criminal Justice System: The Technology of Justice* (MIT Press, 2004). A comparable connection between the operational decisions of police officers and the profile of individual entering the criminal justice system has been found in relation to youth offending in the UK, see T. May, T. Gyateng and M. Hough, *Differential Treatment in the Youth Justice System*, Report 50 (ECHR, 2010).

[113] See, e.g., J.K. Levit, Pretextual Traffic Stops: United States v Whren and the death of Terry v Ohio' (1996) *Loy. U. Chi. L.J.* 145, 163-87; C.M. Glantz, 'Note "Could" This be the End of Fourth Amendment Protection for Motorists' (1997) 85 *Journal Crim. Law and Criminology* 864, 874-76; E.L. Johnson, 'A "Menace" to Society: The Use of Criminal Profiles and its Effect on Black Males' (1995) 38 *How. L.J.* 629; R.K. Mages, 'The Myth of the Good Cop and the Inadequacy of the Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt' (1994) 23 *Cap. U.L. Rev* 151; A.J. Davis, 'Race, Cops and Traffic Stops' (1997) 51 *U. Miami L. Rev.* 425, 425; D.A. Harris, 'Factors for Reasonable Suspicion: When black and Poor Means Stopped and Frisked' (1994) 69 *Ind. L.J.* 659, 677-88; D.A. Harris, 'Frisking Every Suspect: The Withering of Terry' (1994) 28 *U.C. Davis L. Rev* 1, 43-45.

[114] D.A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways. An American Civil Liberties Union Special Report* (June 1999), http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways, accessed 02.05.2011. See also J. Lamberth, 'Driving While Black: A Statistician Proves that Prejudice Still Rules the Road' *Washington Post* (16 August 1996) C01; and D.A. Harris, 'The Stories, the Statistics and the Law: Why Driving While Black Matters; (1999) 84 *Minn L. Rev.* 265.

[115] K.K. Russell, 'Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature' (2001) 3 *Rutgers Race and Law Review* 9, 9-10.

multiple allegations of discrimination from black travellers.[116] Profiles also featured in covert policing methods and were again subject to criticism for their discriminatory nature. For example, FBI efforts to uncover potential Communist sympathisers involved the surveillance of library records based on profiles which targeted patrons with 'Eastern European or Russian-sounding names', from at least the early 1960s until the late 1980s.[117] In the UK Lord Scarman criticised the police's use of stop and search against anyone who 'looked suspicious' or 'did not belong' in an area.[118] This mode of police operation was linked to the fact that over half of the 943 individuals stopped and 118 arrested during the three days of the Brixton Riots were black.[119] Scarman noted the tendency of some police officers to 'lapse into an unthinking assumption that all young black people are criminals', particularly in the absence of clearly and enforced safeguards against such modes of behaviour.[120] The Scarman report suggests the extent to which race-based policing was entrenched as a permissible form of law enforcement behaviour, and came to the fore, in response to particular environmental irritants relating to crime control and public order priorities.[121] Such claims prompted studies dismissing arguments claiming that profiling was an operationally effective police tool.[122] However, police stops, searches and surveillance based on racial profiling, have proved to be so endemic that even after their official rejection minority individuals have continued to be disproportionately targeted by the police.[123]

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[116] See R.L. Jackson, 'Customs Limiting Drug Searches of Airline Passengers. Travel: Screening Curbs Come on Heels of at Least 12 Law Suits, Including a Class-Action Case on behalf of 100 Black Women, Filed Against Federal Service' *LA Times* (12 August 1999) at A19.

[117] H.N. Fuerstel, *Surveillance in the Stacks: The FBI's Library Awareness Program* (Greenwood Press, 1991).

[118] The Scarman Report, *The Brixton Disorders 10-12 April 1981* (1982). See also D. Ramirez, J. McDevitt, A. Farell, *A Resource Guide on Racial Profiling Data Collection Systems. Promising Practice and Lessons Learned* (November 2000)

[119] See B. Bowling and C. Phillips, *Racism, Crime and Justice* (Pearson Education Limited, 2002) 139-40.

[120] Scarman, *The Brixton Disorders 10-12 April 1981* (1982) para 4.63. See also J. Bourne, 'The Life and Times of Institutional Racism' (2001) 43 *Race and Class* 7-22.

[121] A connection also found in many other studies of race-based criminal justice, see, e.g., J.H. Bagehot, 'Juvenile Delinquency' cited in M. Grunhit, *Juvenile Offenders before the Courts* (Clarendon Press, 1956); F.H. McClintok and N.H. Avison, *Crime in England and Wales* (Cambridge Studies in Criminology) vol XXII, (Heinemann, 1968), J.A. Ditchfield, *Police Cautioning in England and Wales*, Home Office Research Study, no. 37 (HMSO, London, 1976); G. Laycock and R. Tarling, 'Police Force Cautioning: Policy and Practice' (1985) 24(2) *The Howard Journal* 81; R. Evans and C. Williamson, 'Variations in Police Cautioning and Practice in England and Wales' (1990) 29(3) *The Howard Journal* 155; R. Evans and R. Ellis, *Police Cautioning in the 1990s, Home Office Research Study No. 52* (HMSO, London, 1997).

[122] See US Federal Accounting Office, US Customs Service, Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results (2000) 12-13.

[123] J. Lamberth, *Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/ Traveler on the New Jersey Turnpike between Interchanges 1 and 3 from the Years 1988 through 1991* (11 November 1994), http://www.lamberthconsulting.com/downloads/new_jersey_study_report.pdf, accessed 29.05.2011.

US opinion polls, prior to 9/11, demonstrate a near consensus in opposition to police use of race-based profiling,[124] with the majority of Americans considering it to be an illegitimate and ineffective method of policing.[125] This rejection was judicially supported, such as in a number of cases linked to Nixon's Operation Bolder, which singled out Arabs for FBI investigations, interrogations and wiretapping; and cases challenging the use of biased and hearsay evidence to secure the removal of Arabs through the immigration framework.[126] Similarly, in *United States v Avery*, the Court held that if law enforcement 'adopts a policy, employs a practice or in a given situation takes steps to initiative an investigation of a citizen based on that citizen's race without more, then a violation of the Equal Protection Clause has occurred'.[127] The Court concluded that selective law enforcement, based on race, was forbidden.[128]

Through the 1990s, political opinion also turned against profiling, which was labelled a 'morally indefensible, deeply corrosive practice', by then President Bill Clinton.[129] In the months before the 9/11 attacks, George Bush pledged to end racial profiling on the basis that it was both wrong and ineffective,[130] and Attorney General John Ashcroft stated that 'racial profiling is not doing the job well because … [i]t injures the trust that communities

[124] See, e.g., US General Accounting Office, US Customs Service: Better Targeting of Airline Passengers for Personal Searches could produce better Results (March 2000) GAO/GGD-00-38, 5-6; 10-15 \which found that the change from use of profiles in race/ gender to observational and intelligence based actions in the late 1990s produced an increase in proportion of stops and searches leading to the discovery of drugs at customs by over 300%. S. Gross and D. Livingston, 'Racial Profiling under Attack' (2002) 102 *Columbia Law Review* 1412: 'We have just reached consensus on racial profiling. By September 10, 2001, virtually everyone, from Jesse Jackson to George W. Bush to John Ashcroft agreed that racial profiling was bad', 1414.

[125] In 1999 a Gallup Poll recorded that 81% of people disapproved of the use of racial profiling by the police, F. Newport, 'Racial Profiling is seen as Widespread Particularly among Young Black Men', *Gallup News Service* (9 December 1999); and also J.X. Dempsey and D. Cole, *Terrorism and the Constitution* (2002) 168.

[126] See *Reno v Am-Arab Anti-Discrimination Comm*, 525 US 471 (1999); *Am-Arab Anti-Discrimination Comm v Reno*, 70F.3d 1045 (9th Cir, 1995); *Am-Arab Anti-Disc Comm v Meese*, 714 F.Supp 1060, 1063 (C.D. Cal, 1989 rev'd on other grounds; and *Am-Arab Anti-Discrimination Comm v Thornburgh*, 970 F.2d 501 (9th Cir, 1991). See also G. Neuman, 'Terrorism, Selective Deportation and the First Amendment after Reno v Am-Arab Anti-Discrimination Comm' (2000) 14 *Geo Immigr. L.J.* 313 (2000); and W.C. Banks, 'The LA Eight and the Investigation of Terrorist Threats in the US' (2000) *Colum Hum Rts L. Rev 479*.

[127] *United States v Avery*, 137 F.3d 343, 355 (6th Cir, 1997).

[128] *ibid*, at 354.

[129] Bill Clinton, 'Opening Remarks at a roundtable discussion on increasing trust between communities and law enforcement' Conference on 'Strengthening Police-Community Relations', *Washington D.C.* (9-10 June 1995), 35 Weekly Compilation of Presidential Documents 1066 (14 June 1999).

[130] George W. Bush, Address to a Joint Session of Congress (27 February 2001). See also US DOJ, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003).

need to have in order to participate in law enforcement'.[131] In accordance with its widespread criticism in 2000 the US Customs Service ended its use of race and gender-based profiles to decide who to stop and search for drugs,[132] and by 2001 more than 20 US states had enacted legislation prohibiting racial profiling.[133] In the US, therefore, there was a widespread appreciation, both inside and outside the policing subsystem, that powers based on racial profiling were ill-suited to effective law enforcement, because of their weakness as predictors of future criminal behaviour.[134] In the UK there was a similarly negative attitude to race-based profiling prior to the enactment of the Terrorism Act 2000.[135] Indeed, the UK was more alert to the problem of such profiling than many European countries,[136] and had enacted statutory provisions intended to prohibit the practice.[137]

The extent of the rejection of racial profiling in both the US and UK meant that even profiles which did not exclusively operate on a racial basis, but included it as one of a number of policing considerations, were criticised as unreliable 'given the outsized prominence of physical appearance in human perception'.[138] Accordingly, any operational decision incorporating race or ethnicity was recognised as creating a risk that this factor would be given a greater prominence than other factors.[139] Consequently, police use of profiles was endorsed only where they were based on 'concrete, trustworthy

[131] See Attorney General's News Conference on Racial Profiling, International Information Programs (2 March 2001).
[132] US General Accounting Office, *US Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results* (March 2000) GAO/GGD-00-38, at 10-15.
[133] See, e.g., Cal. Pen Code ss 13519.4 (2001); Conn Gen Stat ss.54-11 (2001)l N.J. Stat. Ann. ss 31.1 (West 2003); Okla. Stat. title 22 ss34.3 (2001); R.I. Gen. Laws ss 31-21.1-2 (2001).
[134] D.A. Harris, 'Confronting Ethnic Profiling in the United States' in Justice Initiatives, *Ethnic Profiling by Police in Europe* (2006) 66-74, 70.
[135] See, e.g., criticisms in G. Lewis and E. McLaughlin, *The Report on Racial Stereotyping* (Open University, 1998) 954-56; and Her Majesty's Inspectorate of Constabularies, *Winning the Race: Policing Plural Communities*: *HMIC, Thematic Report on Police Community and Race Relations* (Home Office, 1997).
[136] Open Society Justice Initiatives, *Ethnic Profiling by Police in Europe* (2005) 14-21.
[137] Race Relations (Amendment) Act 2000, s.19B(1).
[138] Open Society Justice Initiative, *Ethnic Profiling in Europe: Counter-terrorism Activities and the creation of Suspect Communities* (June 2007) 16. See also B. Harcourt, 'Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties and Constitutional Literature, and of Criminal Profiling More Generally' (2004) 17 *Chicago L. Rev* 1275, 1345.
[139] See R. Kennedy, 'Racial Profiling Usually Isn't Racist' *The New Republic* (13 September 1999); Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the "War on Terror"* (New York University School of Law, 2006); D.M. Tanovich, 'Moving beyond "Driving while Black": Race Suspect Description and Selection' (2004-5) 36 *Ottawa Law Review* 315; R.R. Banks, 'Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse' (2001) 48 *UCLA L. Rev.* 1075, 1080, 1196; and K.K.. Russell, 'Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature' (2001) 3 *Rutgers Race and Law Review* 61, 65-68.

and timely intelligence that is time – and/or place – specific'.[140] Growing recognition of the discriminatory nature of race-based profiles was coupled with an understanding that such subsystem behaviour was also ineffective in achieving law enforcement aims.[141] In particular, the over-inclusive nature of profiles was recognised as a significant limitation to their operational utility.[142] Such profiling was also acknowledged as being under-inclusive because not all criminals, and therefore not all criminal suspects, adhere to stereotypes.[143] Before 9/11 a further negative effect of profiling that had been identified was the disengagement of targeted minorities with law enforcement.[144] US Attorney General John Ashcroft, for example, recognised the policing problems arising from minority distrust, both in terms of its efficacy,[145] and legitimacy.[146]

Such wide-ranging condemnation of race-based profiling demonstrates how, at least at a strategic level, this form of police behaviour evolved from being an accepted communicative redundancy within the policing subsystems to being rejected as a deviant activity, in light of the police's response to changing environmental irritants from society, the government and the legislature. On the basis of these irritants the programme of operation for both the US and UK policing subsystems was built around the aim of controlling and reducing crime; but subject at all times to officers acting in a non-discriminatory manner in achieving this aim. This representation of the subsystem programme was borne out in its criticism of previous police behaviour, which was

[140] Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory* (Open Society Institute, 2009) 21.
[141] See J.I. Winn, 'Time for Clarity in Federal Guidance: Suspect Profiling as Legitimate Counter-terrorism Policy' (2005-07) 1 *Homeland Security Review* 53 which distinguishes between the long-criticised contentious and ineffective racial-profiling and narrowly framed and particularised profiles that may be usefully deployed in counter-terror policing. See also study by Lamberth Consulting, 'Racial Profiling Doesn't Work' (data collated 1998-2000), http://www.lamberthconsulting.com/about-racial-profiling/racial-profiling-doesnt-work.asp, accessed 29.05.2011.
[142] I. Glasser illustrates this failing in the counter-terrorism laws by noting that '[m]ost NBA basketball players are black, but most blacks are not NBA basketball players. Most American jazz musicians are black, but most blacks are not jazz musicians. And if you wanted to find a good jazz band you wouldn't begin by rounding up random blacks', I. Glasser, 'More Safe, Less Free: A Short History of Wartime Civil Liberties' in D. Goldberg, V. Goldberg and R. Greenwald (eds.), *It's a Free Country Personal Freedom in America after September 11* (RDV Books, 2002) 23.
[143] S. Hall, G. Lewis, and E. McLaughlin, *The Report on Racial Stereotyping* (Open University, 1998).
[144] See M. O'Rawe, 'Ethnic Profiling, Policing and Suspect Communities: Lessons from Northern Ireland' in Open Society Justice Initiative, *Ethnic Profiling in Europe* (2005) 88; D.A. Harris, *Profiles in Injustice. Why Racial Profiling Cannot Work* (The New Press, 2002) 1112 and D.A. Harris, 'The Stories, the Statistics and the Law: Why Driving While Black Matters' (1999) 84 *Minn L. Rev* 265.
[145] John Ashcroft's comments in response to a question about the state of relations between the police and minority communities. See AG. J. Ashcroft, Remarks at AGs' News Conference, (1st March 2001) http://www.aele.org/fedprof2.html, accessed 05.05.2011.
[146] Remarks at AGs' News Conference, (1st March 2001) http://www.aele.org/fedprof2.html, accessed 05.05.2011.

labelled as racist and unacceptable. Even within pre-9/11 condemnation and prohibition of racial profiling as a mode of subsystem behaviour, however, there remained a degree of disjunct between the express subsystem programme and actual practice.[147] Consequently, irrespective of opposition to profiling the behaviour was stubbornly resistant to elimination, such that race-crits have argued that it widely persists in policing.[148] Statutory safeguards, effective review and independent oversight of police behaviour were, therefore, advocated to minimise the risk of the police succumbing to the 'complex and multifaceted problem' of unlawful racial profiling.[149] However, in relation to the ss.214-15 and s.44 powers the recognised need for safeguards failed to prevent profiles based on race and religion from affecting how the powers were used, as is shown in the next section.

5.3 The Role of Race-based Profiles in Deployment of the Powers

In relation to the suspicion-less counter-terror stop, search and surveillance powers the US and UK policing subsystems departed from normal subsystem behaviours in a manner which resulted in the powers having a racial effect. This occurred through the apparent legitimation of use of the powers based on broadly-drafted, race-based profiles.[150]

In the UK, judicial and other criticisms of such use of the s.44 powers are given additional credence by policing guidance apparently advocating the implementation of s.44 on the basis of broadly-drafted, race-dependent profiles.[151] Acceptance of the role of such profiles is suggested by the PACE Code A guidelines, from 1999 and 2003, which state that it may be relevant to take into account an individual's ethnic background in deciding who to stop and search, where a specific terrorist threat is 'associated with

[147] R.R. Banks, 'Beyond Racial Profiling: Race, Policing and the Drugs War' (2003-04) 56 *Stan. L. Rev.* 571, 602.
[148] See, e.g., T.A.V. Manahan, *Fifth Semiannual Public Report of Aggregate Data Submitted Pursuant to the Consent Decree Entered into by the United States of America and the State of New Jersey Regarding the New Jersey Division of State Police* (2002); R.F. Worth, 'Blacks are Searched by Police at a Higher Rate, Data Show' *NY Times* (18 June 2003) at B4; Press Release, US Customs, *Customs Releases End-of-Year Personal Search Statistics* (10 April 2000); and 'Where has all the racism gone? Views of Racism with Constabularies after Macpherson' (2007) 30(3) *Ethnic and Racial Studies* 397.
[149] D. Ramirez, J. McDevitt, and A. Farrell, *A Resource Guide on Racial Profiling Data Collection Systems. Promising Practices and Lessons Learned* (November 2000) 3.
[150] See D.A. Harris, New Risks, New Tactics: An Assessment of the Reassessment of Racial Profiling in the Wake of September 11, 2001' (2001) *Utah L. Rev.* 913, 915-17, 924-25; and O. De Schutter and J. Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' (2008) 71(3) *Ethnic and Racial Studies* 358.
[151] PACE Code A (1999 and 2003), para 2.25.

particular ethnic groups, such as Muslims'.[152] Further, National Police Improvement Agency ('NPIA') guidance from 2004 stated that although ethnic, religious or personal criteria could not be the sole consideration in using s.44, they will sometimes be relevant.[153] The guidance potentially placed all Muslims, and those perceived as being Muslim, under heightened scrutiny.[154] Code A also failed to specify what factors beyond ethnic origin might be relevant to such targeted behaviour, what weight could legitimately be given to ethnic origin, and when and whether specific intelligence was required for ethnicity to be a legitimate factor.[155] Such omissions from the law enforcement guidance helped to accommodate the use of race-dominated profiles in stop and search programmes.

The police's approach to using the powers in a racially uneven way was further indicated by Ian Johnson's now infamous comment, that the police 'should not waste time searching old white ladies'.[156] Similarly, Hazel Blears, the then Minister responsible for counter-terrorism policing, expressly justified the use of racial and religious profiling when she told a Home Affairs Select Committee that 'the fact that at the moment the threat is most likely to come from those people associated with an extreme form of Islam, or falsely hiding behind Islam…inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community. That is the reality of the situation'.[157] Blears' comments, in 2005, give a clear and unashamed indication of the type of irritants in response to which the police were shaping their use of the powers. Race-based counter-terror policing has also been linked to the shooting dead of 'Asian-looking' Jean Charles de Menezes in 2005.[158] Even former Chief Superintendent Ali Dizaei, of the National Black Police Association, supported s.44's use on the basis of racial profiling, provided that the searches were carried out politely and

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[152] *ibid*.
[153] NPIA, para 2.3.1.
[154] Liberty, *A New Suspect Community* (October 2003), http://www.liberty-human-rights.org.uk/policy/reports/a-new-suspect-community-october-2003.pdf, accessed 26.03.2011, building on Paddy Hillyard's thesis in *Suspect Community: Peoples' Experiences of the Prevention of Terrorist Acts* (Pluto Press, 1993). See also J. Welch, 'Overview of S.44' in K.P. Sveinsson (ed.), *Ethnic Profiling. The Use of 'Race' in Law Enforcement* (Runnymede, 2010) 25.
[155] Human Rights Watch, *Without Suspicion. Stop and Search under the Terrorism Act 2000* (2010) 27.
[156] V. Dodd, 'Asian men targeted in stop and search' *The Guardian* (17 August 2005).
[157] Home Affairs Select Committee, Uncorrected Minutes of Evidence (1 March 2005), HC 156-v.
[158] See BBC News, 'I Saw Tube Man Shot – Eyewitness', 22 July 2005 which quotes a witness who described the victim of the shooting as 'an Asian guy', a characteristic which may have made him more suspicious to the police involved in the incident'. De Menezes was actually Brazilian. Available at http://news.bbc.co.uk/1/hi/uk/4706913.stm, accessed 22.03.2011. See also R. Cowan, D. Campbell and V. Dodd, 'New Claims Emerge over Menezes Death' *The Guardian* (17 August 2005).

with respect.[159] These communications suggest that the law-making subsystem's intention that s.44 would not be discriminatory was not upheld in the policing subsystem's own communications. Consequently, each subsystem was saying one thing and doing another. Race-based profiles were, therefore, understood by at least some elements within the policing subsystem as an appropriate basis for deployment of the suspicion-less stop and search powers,[160] despite this constituting misuse of the powers in terms of normal subsystem operational standards.

Whilst the ss.214-15 powers are covertly deployed evidence of the role of racial profiling in driving use of the powers is suggested, by analogy, from how the FBI has used overt counter-terrorism powers. The way in which the profiling has been used is, for example, suggested by airport screening through which individuals with Asian and Arabic-sounding names have been pre-selected for additional scrutiny.[161] In 2006 the Council on American-Islamic Relations received 80 complaints of racial discrimination having taken place in US airports.[162] Patterns of security staff behaviour demonstrate that individuals who appear to be Muslim, Sikh, Arab and Asian have been subjected to different and discriminatory treatment, irrespective of whether their behaviour warrants any special attention.[163] This has included targeting individuals that are American-born, but with minority ethnic origins.[164] The legal powers, which have accommodated this profiling, take the same form as ss.214-15, in that they are not premised on individualised suspicion.

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[159] T. Kirby, 'Muslim Groups Condemn Stop-and-Search Policy' *The Guardian* (2 August 2005).

[160] T. Choudhury and H. Fenwick, *The Impact of Counter-terrorism Measures*, quoting a police officer saying that implementation of stop and search had left the impression that the actions of some officers may be based on racial or religious profiling, 36.

[161] Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith and Finances of Americans Returning Home* (2009) 37. See also E. Baker, 'Flying While Arab: Racial Profiling and Air Travel Security' (2002) 67 *Journal of Air Law and Commerce* 1375; C.A. Chandrasekhar, 'Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians' (2003) 10 *Asian Law Journal* 215; M. Chon and D.E. Arzt, 'Walking while Muslim' (2004-5) 68 *Law and Contemporary Problems* 215; and D. Harris, 'Flying While Muslim: Racial Profiling Post 9/11' available at: http://web.mac.com/flyingwhile/iWeb/flyingwhilemuslim/Documentary.html, accessed 27.05.2011. See also ACLU, 'ACLU of Illinois Challenges Ethnic and Religious Bias in Strip Search of Muslim Woman at O'Hare International Airport', 16.01.2002.

[162] ACLU, *The Persistence of Racial and Ethnic Profiling in the United States. A Follow-up Reports to the U.N. Committee on the Elimination of Racial Discrimination* (2009) 37 and also 34-39.

[163] See the case of *Jarrar v JetBlue Airlines* in which a federal court held that the airline has discriminated against an individual on the basis of his ethnicity and his t-shirt, which read in Arabic and English 'We will Not Remain Silent' by refusing him permission to board the flight until he had changed his t-shirt and subjected him to additional security measures. See also K.P. Hanson, 'Suspicion-less Terrorism Checkpoints Since 9/11: Searching for Uniformity' (2007-8) 56 *Drake Law Review* 171, 186-89.

[164] See K. Shora, National Executive Division, American-Arab Anti-Discrimination Committee, *Fighting Anti-Muslim Discrimination* (2008); and M. Sherman 'Rep Issa: I was Profiling Victim' *Washington Post* (26 October 2001).

Therefore the racial effect evident in the operation of these powers – with the use of race as a proxy for increased risk of terrorist activity[165] – strongly suggests that the police will have used race-based profiles in the operation of the powers of covert surveillance and records searches.[166]

Anecdotal evidence also suggests that police powers have been used to specifically target individuals on the basis of their actual or perceived racial or religious origin. In particular, the direction of surveillance at mosques,[167] and by planning the surveillance needs of an area based on the number of mosques, suggests the existence of policing based on broad-brush racial and religious profiling.[168] The perception of government profiling is also fostered by periodic warnings 'to be on the lookout for suspicious activity', without any suggestion of what this means, other than heightening suspicion surrounding people who fulfil the broad stereotype of terrorist suspects.[169] This pattern of use of the powers is also suggested by Department of Justice policing guidance which advised that federal law enforcement officers may consider race or ethnicity only 'to the extent permitted by the constitution and law of the United States', pursuant to which it carved out a broad exception for national security policing.[170] The exception was confirmed by the fact-sheet published alongside the guidance which stated that 'race and ethnicity may be used in terrorist identification'.[171] Despite independent reiteration of the onerous constitutional restrictions that any such use would have to adhere to,[172] the fact-sheet also noted that national security policing could automatically fulfil the exceptional circumstances in which profiling may be used because of the 'incalculably high stakes involved in such investigations'.[173] Police guidelines, therefore, accommodated use of racial and religious

[165] A.A. Hawk, 'The Dangers of Racial Profiling' (2003) II *Law and Society Review at UCSB* 35, 39.
[166] B.E. Harcourt, 'Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counter-terrorist Measure and Does it Violate the Right to be Free from Discrimination?' in S.J. Gould and L. Lazarus (eds.), Security and Human Rights (Hart Publishing, 2007).
[167] See S. Grad, 'FBI Plans to Continue Mosque Monitoring Despite Concerns in Orange County' *LA Times* (9 June 2009); and S. Glover, 'FBI Monitored Members of O.C. Mosques at Gyms, Alleged Informant Says' *LA Times* (28 April 2009).
[168] See E. Lichtblau, 'FBI Tells Offices to Count Local Muslims and Mosques' *NY Times* (28 January 2003).
[169] W.J. Haddad, *Submission to State Advisory Committee USCCR. Report on the Governmental War Measures affecting Arabs and Muslims in the United States* (Arab-American Bar Association, 29 March 2002).
[170] USDOJ, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003). See also P. Sinha, 'Police Use of Race in Suspect Descriptions: Constitutional Considerations' (2006-07) 31 *NYU Rev. L. and Social Change* 131, 132.
[171] USDOJ, *Fact Sheet: Racial Profiling* (17 June 2003) 5.
[172] USDOJ, *Report to the National Commission on Terrorist Attacks upon the US: The FBI's Counterterrorism Program since September 11 2001* (14 April 2004) 71.
[173] USDOJ, *Fact Sheet: Racial Profiling* (17 June 2003) 5.

profiling and, through a process which has been labelled 'practical orientalism',[174] reified the stereotypical representations of ethnic and racial group as terrorist suspects.[175]

Anchoring the terrorist threat within minority communities meant that the threat was identifiable and, therefore, perceived as being controllable.[176] Such police behaviour corresponded with support among the general population for police use of profiling, after 9/11.[177] A further indication of the popular elision between minority groups and the threat from terrorism is suggested by the sharp rise in hate crimes in the period following 9/11.[178] Whilst its effectiveness in actually increasing security and countering terrorism are questionable,[179] by focusing stops, searches and surveillance on individuals that the public suspected of being connected to the terrorist threat, and in-line with irritants linking the threat and minority groups, such practices developed into a socially shared notion of the 'reality', and appeared to be an objective and common-sense approach to counter-terror policing.[180]

5.4 Conclusion

This chapter has identified the system-specific standards designed to uphold the even-

[174] M. Haldrup, L. Koefoed and K. Simonsen, 'Practical Orientalism Bodies, Everyday Life and the Construction of Otherness' (2006) 88B(2) *Georgr. Ann* 173, 174, 177.
[175] E.W. Said, 'Orientalism and More' (2004) 35 *Development and Change* 869. See also E.W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (Vintage Press, 1997); and E.W. Said, *Orientalism. Western Conceptions of the Orient* (Penguin, 1995).
[176] H. Joffe, *Risk and 'the Other'* (CUP, 1999) 97. See also F. Adamson and A.D. Grossman, *Framing 'Security' in a Post 9/11 Context* (Social Science Research Council, 2004) 4; S.N. MacFarlane and Y.F. Khong, *Human Security and the UN: A Critical History* (University of Indiana Press, 2006); and S. Tadjbakhsh and A.M. Chenoy, *Human Security: Concepts and Implications* (Routledge, 2007).
[177] See Public Agenda Poling, Racial Profiling and Islam at Home (2002), which found that two thirds of Americans 'Agreed that racial profiling of Middle-Easterners by law enforcement is understandable'.
[178] See, e.g., American-Arab Anti-Discrimination Committee, *Report on Hate Crimes and Discrimination against Arab Americans: The Post-September 11 Backlash* (2002) 47; M. Welch, *Scapegoats of September 11th: Hate Crimes and State Crimes in the War on Terror* (Rutgers University Press, 2006); Human Rights Watch, *'We are Not the Enemy' Hate Crimes against Arabs, Muslims and those Perceived to be Arabs or Muslims after September 11* (November 2002) 15
[179] Congressman Barney Frank summed up the limitations of the police's use of profiles in countering terrorism by noting that Terry Nichole and Timothy McVeigh would have not been caught by some of the profiles being used 'unless being slack-jawed was somehow relevant to the profile', see 'The USA PA and the American Response to terror: can we protect civil liberties after September 11? A panel discussion, 6 March 2002' (2002) 39 *Am. Crim. L. Re*v. 1501, 1519.
[180] D.A. Harris, 'Racial Profiling Revisited: 'Just Common Sense' in the fight against terrorism?' (2002) 17(2) *Criminal Justice* 36; and R. Banks, 'Racial Profiling and antiterrorism effort' (2004) 89 *Cornell Law Review* 1201. For pre-9/11 considerations, see U. Eco, *The Limits of Interpretation* (1990) 41; and P. Berger and T. Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin, 1966) 76.

handed and fair exercise of law enforcement powers positioned by the policing subsystem as making up the operationally closed mode of behaviour of the subsystem in both the US and UK. This chapter has also shown that the policing subsystems in both countries have also had direct experience of discriminatory policing, arising out of a particular organisational mind-set and patterns of behaviour, which do not adhere to contemporary delineations of subsystem-generated behaviours. As well as recognising the types of systemic behaviour which led to these forms of subsystem operation the subsystem also linked them to particular characteristics of their statutory powers, such as the absence of externally imposed safeguards against a deleterious interpretation of inter- and intra-subsystem communications. Despite examples of subsystem awareness of these problems, this chapter has also shown that the manner in which the US and UK police forces implemented the stop, search and surveillance powers and efforts to respond to the communications detected from the operational environment of each, functionally contributed to their racial effect.

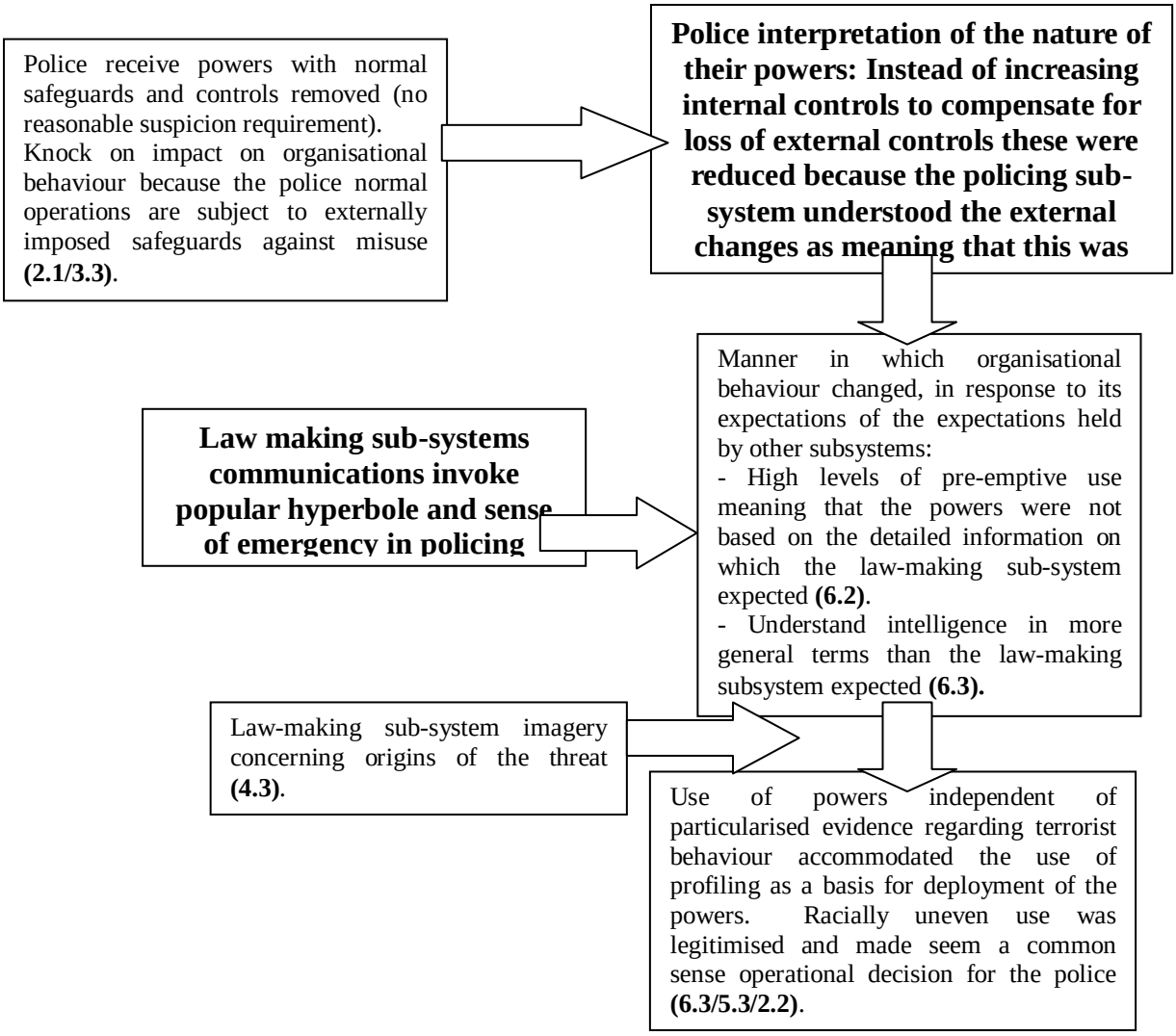
The most direct operational cause of this racial effect was the use of profiling, by which race and ethnic origin became a proxy for Muslim, which in turn was employed as a proxy for terrorist suspect.[181] The evidence suggests that the police reduced suspect-status to biographical risk profiles.[182] In line with these profiles the police disproportionately targeted their powers at individuals fulfilling a broad, race-based stereotype of a terrorist suspect.[183] Such use of proxies, and the resultant profiling, emerged as an apparently acceptable, or even necessary, police strategy post-9/11 in both the US and UK.[184] This contradiction, between the subsystem programme of operation focusing on protecting minority interests and it lapsing into readily condemned race-based suspect profiles, suggests that the policing subsystem's programme of operation is not what it initially seems to be. In addition, it is not what the law-making subsystem expects it to be. Indeed, this contradiction mirrors that demonstrated in chapters three and four in

[181] Regarding such use of powers see M. Tuck, 'Community and the Criminal Justice System' (1991) 12(3) *Policy Studies* 22; M. Feeley and J. Simon, 'The New Penology: Notes on the Emergency Strategy of Corrections and its Implications' (1992) 30 *Criminology* 449; and S. Walker, *Taming of System: The Control of Discretion in Criminal Justice: 1950-1990* (OUP, 1993).
[182] R. van Munster, 'The War on Terrorism: When Exception becomes the Rule' (2004) 17 *International Journal for the Semiotics of Law* 141, 151-52. See also G. Deleuze, 'Postscript on Control Societies' in G. Deleuze (ed.), *Negotiations. 1972-1990* (Columbia University Press, 1995).
[183] H. Joffe, *Risk and 'the Other'* (CUP, 1999) 95.
[184] A. Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15(4) *EJIL* 721; and R. Kennedy, 'Race, Law and Suspicion: Using Color as a Proxy for Dangerousness' in *Race, Crime and the Law* (Vintage Books, 2003) 137.

relation to the law-making subsystem and this dichotomy between the statutory characteristics the subsystem described itself as prioritising and the reality of those which came to the fore when the legislators were faced with the need to respond to the threat from international terrorism. In order to identify what the policing subsystem programme of operation actually is, chapter six looks more closely at the subsystem-specific operations which shaped police interpretation of the statutory powers and environmental irritants which the police detected, and which led to such racially uneven behaviour.

Chapter Six: Role of the Policing Subsystem in Establishing the Racial Effect of Counter-terrorism Stop, Search and Surveillance.

Fig. six: Policing subsystem response to 9/11



The system-specific operations and modes of understanding of the policing subsystem are important to in understanding police practice and the disjuncture between laws enacted by the legislature and the powers as deployed by the police. The analysis within this chapter takes a specifically systems-based approach to what has been analysed elsewhere as 'police occupational cultures'.[1] The analysis within this chapter focuses on three areas of inter-subsystem communications.[2] The first communications relate to the nature of the stop, search and surveillance powers. Here, it is advanced that a communicative barrier

[1] See, e.g., M. Young, *An inside job: Policing and police culture in Britain* (Oxford University Press, 1991); and J. Skolnick , *Justice without Trial. Law enforcement in a democratic society* (Macmillan, 1966).
[2] See fig. six.

existed between subsystem specific interpretations of what were intended by the law-making subsystem to be flexible powers and the policing subsystem's interpretation of these as highly discretionary. These mismatched interpretations helped to minimise the protective value of the statutory safeguards, expected by the law-making subsystem, to prevent misuse of the powers. The second set of communications relates to expectations for levels of use of the powers, and suggests that a mismatch existed between the police's understanding of law-making subsystem as expecting high levels of use and the law-making subsystem's own expectation of circumspect deployment. The final area of communications focuses on the different subsystem understandings of the requirement for intelligence, through which law-making expectations of police use based on particularised intelligence were understood by the police as including their basis on race-based profiles, broadly reflective of the national threat assessment. Double contingencies, arising from obstacles to inter-subsystem understanding can, therefore, be seen to exist behind the use of the powers based on racial profiles and, therefore, at the heart of the racial effect of the stop, search and surveillance powers. These communicative barriers indicate how 'everyday policing will tend to conspire to handle things differently' from the way envisaged by the law-making subsystem.[3] The operations of the policing subsystem are used to support the race-crit argument that the greater the level of discretion is afforded to the executive and related parts of the legal system, such as the police, the more likely that they exercise that discretion in a way which targets minority groups.[4]

6.1 Nature of the Powers

Different subsystem understandings of the nature of the stop, search and surveillance powers contributed to their racial effect and arose from the barriers to subsystem interpretations of the communications of other subsystems and environmental irritants. Consequently, law-making subsystem expectations for how the police would understand the powers, and upon which the law-making subsystem premised the statutory drafting, failed to take account of the inability of the law-making subsystem to simply 'reach out'

[3] E. Campbell, 'Police Narrativity and Discretionary Power' (2003) *31 International Journal of the Sociology of Law* 295, 298.
[4] Note, 'Developments in the Law – Race and the Criminal Process' (1988) 101 *Harvard Law Review* 1472, 1522; and C. Walker, 'Discerning Friend from Foe under Anti-terrorism Laws' (2008) 32(1) *Melbourne University Law Review* 275.

of its own subsystem through legislative powers, because of its own autopoietic nature.[5] Instead, the law-making subsystems understanding of the statutory provisions were not matched by the police's own understanding of the powers, based on its expectation of the law-making subsystems' expectations for necessary police powers.[6] This meant that the police attributed a wholly distinct significance to the absence of normal statutory safeguards against misuse, namely reasonable suspicion and probable cause, than that intended by the legislature, such that the police responded to the lack of safeguards in a way which accommodated the highly discretionary use of the powers.[7] This section examines these obstacles to understanding and double contingencies, which arose between the law-making and policing subsystems in relation to the stop, search and surveillance powers.

6.1.1 UK Policing Subsystem Interpretation of the Nature of the Powers

In the case of *Gillan*, the ECtHR expressly criticised the high levels of subjective officer discretion in contributing to police misuse of the powers.[8] In enacting the powers, however, the law-making subsystem did not purport to afford the police unchecked discretion.[9] Instead, whilst departing from the standard test of reasonable suspicion, s.44, and its predecessor stop and search powers were made subject to a mandatory, statutorily proscribed procedure prior to being used.[10] This process was described by the Government as providing operational flexibility, coupled with 'clear safeguards' against misuse.[11] However, the police's interpretation of this procedure, facilitated the use of the powers without the level of oversight by which the legislature justified their broad and highly discretionary drafting.[12] This mismatch, between intention and effect, points to the existence of a communicative barrier between the legislature and the police, arising

[5] J. Black, 'Constitutionalising Self-Regulation' (1996) 59 *MLR* 24, 45.
[6] This observation was made in relation to the 1974 Prevention of Terrorism Act in C.A. Gearty and J.A. Kimbell, *Terrorism and the Rule of Law. A Report on the Law Relating to Political Violence in Great Britain and Northern Ireland* (1995) 17.
[7] Recommendation 1402; Control of Internal Security Services in Council of Europe, European Parliament Ass. Ded, 9th Sess Doc. No. 8301 (26 April 1999), para 2-3.
[8] *Gillan*, paras 77 and 83. For a full analysis of the Gillan decisions see chapters 7 and 8 of this thesis.
[9] See, e.g., HC Deb (1995-96) 275 Michael Howard, c.213; Jack Straw, c.221, 226; David Wilshire, col.243;
[10] Prevention of Terrorism (Temporary Provisions) Act 1989, ss. 13A and 13B.
[11] Michael Howard, HC Deb (1995-96) 275, c.213.
[12] See chapter four of this thesis.

from different subsystem expectations regarding the nature of the powers,[13] which in turn diminished the effectiveness of the statutory safeguards against their misuse.

The law-making subsystem was keen to ensure that the police were 'not needlessly deterred from acting to combat terrorism' through restrictive statutory drafting or onerous legislative pre-conditions for use of the powers.[14] Instead, the law-making subsystem spoke of the need in counterterrorism policing to 'let the proper agencies off the leash… Policemen and the military, who are invariably used to working with one hand tied behind their back, if not two, must be let loose'.[15] By virtue of these safeguards the Government maintained that the powers would be flexible, but with significant safeguards to prevent their discretionary use.[16] The statutory safeguards against the wholly discretionary use of s.44 were designed to operate at a number of different levels. A key safeguard promoted by the law-making subsystem was the requirement that use of the powers be authorised by a police officer of at least the rank of Assistant Chief Constable.[17] In granting this authorisation the officer was required to confirm that use of the powers was expedient for the purposes of protecting against terrorist attack.[18] The authorisation itself was then subject to review by the Secretary of State, upon which it could be confirmed, cancelled or varied.[19] Home Office guidance designed to provide clarity on the proper execution of the authorisation procedure indicated that 'in view of their importance, authorisations are subject to considerable scrutiny before being confirmed by the Secretary of State'.[20] Each authorisation expired after a maximum of 28-days, upon which a new authorisation was required for any subsequent use of the powers.[21]

In contrast to the law-making subsystem's insistence that it was providing flexible powers coupled with strong safeguards, however, the policing subsystem treated the departure from the reasonable suspicion standard as an instruction to use the powers on the basis of

[13] G. Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 18 *Law and Society Review* 291, 299; and N. Luhmann, 'The Self-Reproduction of Law and its Limits' in G. Teubner, *Dilemmas of Law and the Welfare State* (Walter de Gruyter, 1986) 113.
[14] Lord Bassam of Brighton, HL Debs (1999-00) 612, c.239.
[15] Viscount Slim, HL Debs (2001-02) 627, c.83.
[16] Michael Howard, HC Deb (1995-96) 275, c.215.
[17] Terrorism Act 2000, s.44(3).
[18] *ibid*, s.44(3).
[19] *ibid*, s.46(3)-(7).
[20] Home Office Circular, *Authorisations of stop and search powers under section 44 of the Terrorism Act 2000* (027/2008).
[21] Terrorism Act, ss.44(1)-(2).

unfettered officer discretion.[22] One example of the modes of law-making subsystem behaviour which the police understood as indicating that the s.44 powers were highly discretionary was demonstrated in the response to Simon Hughes' suggestion that instead of s.44 authorisations being premised on its expediency in countering-terrorism, it should be based on a test of strict necessity.[23] Hughes was concerned that whilst the word 'expedient' need not be pejorative, it was highly subjective and, provided an 'officer gave any reason at all, he or she would be permitted to use the subsystem power'.[24] Hughes' comment was, however, rejected and, instead of fears that the powers would be overused, a greater fear of the law-making subsystem regarding police use of the powers was that they would be under-deployed.[25] A further indication of the highly discretionary use of the stop and search power is suggested by reports that officers using s.44 often appeared unclear how, why and when it was appropriate to deploy the powers.[26] Research by Helen Fenwick and Tufyal Choudhury cites a police source stating that use of stop and search involved 'looking for a needle in a haystack when there wasn't any evidence that a needle existed'.[27] Removal of the external safeguards against the subjective, discretionary use of stop and search, therefore, seems to have been understood by the police as demonstrating the law-making subsystem's expectation that use of the powers should not be controlled or curtailed by any objectively determined standards. The suspicion-less nature of the powers was thus seen by the police as representing 'a significant change in the relationship between the public and the police',[28] and as enabling the largely discretionary use of the powers, which rendered some groups more suspect than others.[29]

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[22] C. Pantazis and S. Pemberton, 'From the 'Old' to the 'New' Suspect Communities' (2009) 49(5) *British Journal of Criminology* 646, 653.

[23] Simon Hughes, Standing Committee, 1 February 2000. The change was rejected by the Standing Committee on the basis of a vote in which Simon Hughes voted for the change, whilst the other 12 Standing Committee members voted against it.

[24] Simon Hughes described the stop and search powers as 'entirely subjective and open to any justification that a police officer gives it….It appears to give carte blanche to the police officer… [and] seems a dangerous, broad and unqualified powers that has no justification from other history', Standing Committee (1 February 2000). See also O. Gross 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2002-3) 112 *Yale Law Journal* 1011.

[25] David Lidington, Standing Committee (1 February 2000).

[26] Home Affairs Committee, *Terrorism and Community Relations*, vol II, para 142, ev. 67.

[27] See, e.g., H. Fenwick and T. Choudhury, *The Impact of Counter Terrorism Measures* (2011) 33.

[28] NPIA, *Practice Advice on Stop and Search in Relation to Terrorism* (2008) para 2.3.1.

[29] See J.B.L. Chan, *Changing Police Culture: Policing in a Multicultural Society* (1997); M. Rowe, 'Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making' (2007) 17 *Policy and Society* 279; R. Reiner, *The Politics of the Police* (3rd ed., 2000).

The distinction between flexibility and discretion meant that in applying the powers on the basis of officer discretion the policing subsystem did not treat the powers as though they contained any statutorily imposed restrictions on use.[30] The 28-day authorisation period, for example, was rendered effectively meaningless by successive renewals, without any apparent intervention from the Secretary of State.[31] Further, the effect of the requirement that the powers be limited to a specific geographical area was minimised by authorisations routinely being obtained across entire police authorities,[32] enabling the blanket use of powers.[33] The result was that for some police forces s.44 became a permanent feature of their law enforcement capabilities.[34] An example of such use was the continued authorisation of s.44 across the entire Metropolitan Police area, from February 2001 until May 2009.[35] The police also interpreted the ability for officers to use the powers 'whether or not the constable ha[d] grounds for suspecting the presence of articles of that kind [relating to terrorist activities]',[36] as allowing an officer to stop and search anyone, provided there was a valid authorisation in place. This model of use was endorsed by a 2005 MPA report, scrutinising stop and search practice, which stated that 'the law has defined when a police officer may act, but … [i]n practice the police can stop and search almost anyone in almost any circumstances'.[37] The policing subsystem, therefore, appears to have treated the very low level of the safeguards imposed by the law-making subsystem as expecting their discretionary use, while the executive defended such use on the basis of the police's 'detailed knowledge of the circumstances of the area [which] are readily to hand'.[38]

Flexibility was, therefore, understood by the police as shorthand for them not needing to justify their use of the powers.[39] Consequently, the notion of there being any effective

[30] Such executive behaviour demonstrates the continuation of a pre-existing trend towards heightened executive power, C. Greenhouse, 'Nationalizing the Local: Comparative Notes on the Recent Restructuring of Political Space' in R.A. Wilson (ed), *Human Rights in the 'War on Terror'* (CUP, 2005) 195.
[31] *Gillan*,, para 80. Between February 2001 and February 2005 944 stop and search authorisations were confirmed by the Secretary of State, as compared to 18 instances in which they were not confirmed, see Home Affairs Committee, *Terrorism and Community Relations* para 48.
[32] Human Rights Watch, *Without Suspicion. Stop and Search under the Terrorism Act 2000* (2010) 2
[33] See comments of Paul Stephenson, describing the use of s.44, in *ibid* 58.
[34] *Gillan*, para 81.
[35] Home Affairs Committee, *Terrorism and Community Relations*, para 44; and A. Cavell, 'Capital Sees Rise in terror Stops' BBC News (6 May 2009).
[36] Terrorism Act 2000, s.45(1)(b).
[37] MPA *Report of the MPA Scrutiny on MPS Stop and Search Practice*, para 237.
[38] Charles Clarke, House of Commons Defense Select Committee, 'The Threat from Terrorism', HC348 (Session 2001-2002).
[39] M-F. Cuellar, 'Choosing Anti-Terror Targets by National Origin and Race' (2003) 6 *Harvard Latino Law*

political check upon police use of the powers was largely illusory.[40] This pattern of law enforcement behaviour was recognised by Lord Carlile who saw the high usage of s.44 as an indication of its largely discretionary deployment, and as demonstrating the lack of police understanding of the range of stop and search powers available in counter-terror policing or their intended use.[41] The statutory safeguards designed to regulate use of the stop and search powers, therefore, had a very different effect in practice than they were described as having by the law-making subsystem.[42] This mismatch appears to be linked to a gap between each subsystem's understandings of the nature of the powers and the role of police subjective discretion in deploying them, arising from each subsystem deriving its own understanding from its system-specific programme of operation and its expectations as to how the other subsystem would expect it to operate.

6.1.2 US Policing Subsystem Interpretation of the Nature of the Powers

FBI communications described the law-making subsystem's intention behind the counter-terrorism powers as being to 'strengthen the capabilities of federal law enforcement in the fight against terrorism while simultaneously protecting civil liberties'.[43] The FBI also understood the passage of the suspicion-less surveillance powers as demonstrating the expectation of the law-making subsystem that the broadly-drafted powers should be widely used, because Congress considered this necessary, on the basis of the exceptional nature of the threat.[44] By contrast, Congressional support for the powers was premised on the desire that they should be available, if and when the FBI deemed their use appropriate, but that their use would be based on a specific operational need undertake by the policing subsystem.[45] The statute was simply designed to remove 'unnecessary bureaucratic hurdles' to law enforcement operational flexibility and freedom.[46]

Review 9, 33.

[40] G. Phillipson, 'Deference, Discretion, and Democracy in the Human Rights Act Era' (2007) *Current Legal Problems* 40, 45.

[41] Carlile, *Report on the Operation in 2005 of the Terrorism Act 2000* (May 2006), para 26.

[42] N. Luhmann, 'Generalized Media and the Problem of Contingency', in J. J. Loubser, R.C. Baum, A. Effrat and V.M. Lidz (eds) *Explorations in General Theory in Social Science: Essays in Honor of Talcott Parsons.* (Free Press, 1976) 507-32.

[43] USDOJ, FBI, *Terrorism 2000/01* (Counterterrorism Threat Assessment and Warning Unit, National Security Division, 2001) 31-32.

[44] USDOJ, *FBI Terrorism, 2000/01* (2001) 31-32.

[45] See, e.g., Senator Enzi who states that '[e]veryone in America understands the need for enforcement, immigration and the intelligence community to have the tools necessary to find terrorists, cut off their financial support and bring them to justice', SCR (11 October 2001) S10594. See also, Senator Hatch, *ibid*, S10586 and Rep. Thompson, Administration's Draft Anti-Terrorism Act of 2001. Hearing before the

Patriot Act surveillance powers were described in Attorney General Guidelines as affording law enforcement organisations 'the necessary flexibility to act well in advance of the commission of planned terrorist acts or other federal crimes'.[47] In pursuing these aims the executive was confident that the surveillance provisions contained sufficient safeguards to prevent misuse of the powers, and ensure that they adhered to Constitutional requirements. The law-making subsystem, however, displayed a far more mixed approach to the purported safeguards against misuse of the powers. Endorsing the 'many safeguards built in to prevent its [s.215] misuse', Senator Orin Hatch specifically noted the safeguarding value of: the requirement that an officer of at least the level of an Assistant Special Agent in Charge had to authorise use of the power; the requirement that the records sought are necessary to protect against international terrorist or clandestine intelligence activities; and the need for the investigation to be conducted in line with Attorney General guidelines.[48] Similarly, James Sensenbrenner considered the surveillance provisions to be a successful means by which 'to address many of the shortcomings of current law, and to improve our law enforcement ability to eradicate terrorism from our borders while preserving the civil liberties of our citizens'.[49]

By contrast, raising his concern as to the likely effectiveness of the safeguards relating to the use of pen registers and trap and trace, Senator Patrick Leahy noted that the provisions allowed for the unprecedented, widespread disclosure of this tightly sensitive information without any notification to or review by the court that authorizes and supervises the wiretap'.[50] Another critic of the proposed statutory powers and the related safeguards, Barney Frank, concluded that 'the bill before us today preserve the follies of the powers, but substantially weakens the safeguards against the misuse of the powers'.[51] Frank also

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Committee on the Judiciary, House of Representatives (107th Congress, 1st Session, 24 September 2001) 53

[46] US House of Representatives Committee on the Judiciary, News Advisory, 'President Bush signs PATRIOT Anti-terrorism Bill into Law. Sensenbrenner Heralds New Era in Fight against Terrorism' (26 October 2001), www.judiciary.house.gov/legacy/news_102601.htm, accessed 30.05.2011.

[47] The *Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations* (May 2002) 2.

[48] Orin Hatch, SCR (11 October 2001) S10586.

[49] F. James Sensenbrenner, Jr., Committee on the Judiciary, Business Meeting (3 October 2001) 99.

[50] Patrick Leahy, SCR (11 October 2001) SS10555-56.

[51] HRCR (12 October 2001) H6761.

specifically pointed to the role of the executive in diminishing the safeguards proposed by the law-making subsystem.[52]

A key feature of the ss.214 and 215 powers that the executive cited as safeguarding against their misuse was the restriction of the use of the powers to 'non-content' information relating to the communications. The protective value of this restriction was limited by different subsystem understandings of the distinction between contents and non-contents of communications. Executive derived policing guidance confirmed that 'pen registers and trap and trace devices may obtain any non-content information'.[53] However, in distinguishing between what constitutes content and what is non-content successive FBI guidelines were evasive, merely referring any enquiries concerning this to the Computer Crime and Intellectual Property section of the Department of Justice, as opposed to setting out any definition or interpretive guidance.[54] Consequently, the 'contents of "contents" seems to have been a matter of mystery'.[55] Law enforcement interpretation of the breadth of 'content' necessarily had significant implications for the potential use of the powers, and there is evidence that while the law-making subsystem expected the police to adopt a very restrictive understanding of contents, a broader approach was taken by the FBI, encouraged by their operation along the lines of executive guidelines.

Appeasing the concerns of both subsystems that they fulfil their operational and constitutional mandate the Attorney General offered frequent assurance that despite the 'fundamentally different approach to law enforcement' required to counter terrorism, the police were 'think[ing] outside the box – but never outside the Constitution'.[56] Faced with a range of irritants pertaining to the nature of the powers the FBI's understanding of the powers, and the safeguards against their misuse, is most closely aligned with that expressed by the Attorney General. Police use of the surveillance powers was in fact

[52] For example, Frank refers to the proposed role of Assistant Inspector General, intended to monitor the use of the powers, and states that executive interference with the draft legislation had resulted in this being downgraded, HRCR (12 October 2001) H6761.
[53] USDOJ, *Field Guidance*, at 1234.
[54] See *ibid* and USDOJ, *Search Manual*, at 112.
[55] S. Freiwald, 'Online Surveillance: Remembering the Lessons of the Wiretap Act' (2004-05) 56 *Ala. L. Rev*. 9, 69.
[56] US AG John Ashcroft, Remarks at the Eight Circuit Judges Conference (7 August 2002). See also S.F. Keimer, 'Watching the Watchers: Surveillance, Transparency and Political Freedom in the War on Terror' (2004-05) 7 *U. Pa. J. Const. L.* 133, 162.

strongly influenced by executive communications, in particular, because the police were interpreting the powers through Attorney General guidelines.[57] Therefore, instead of responding to law-making subsystem communications either directly or through its interpretation of legislation the police responded to these irritants through its operation in accordance with the guidelines.

FBI interpretation of the surveillance powers were shaped by statutory and constitutional provisions, as well as the FBI Domestic Operations Guide, published in December 2008 and based on the Attorney General's Guidelines for Domestic FBI Operations, published in September of the same year. The 2008 Domestic Operations Guide stresses the importance of oversight and the FBI's own self-regulation, as a means of ensuring that 'all investigative and intelligence collection activities are conducted within Constitutional and statutory parameters'.[58] It further states that 'the FBI's comprehensive infrastructure of legal limitations, oversight and self-regulation effectively ensures that this commitment [to constitutional rights] is honored'.[59] The FBI Guide maintained that an important safeguard against police misuse of the power existed in the threshold requirement that investigative activities must be conducted for an 'authorized purpose'.[60] The Guide noted that 'simply stating such a purpose is not sufficient … It is critical that the authorized purpose not be, or appear to be, arbitrary or contrived; that it is well-founded and well-documented; and that the information sought and the investigative method used to obtain it be focused in scope, time and manner to achieve the underling purpose'.[61] The extent to which this limitation truly restricted FBI operations, however, is questionable when it is considered alongside other policing guidance, which described the national security threat as not being reducible to any specific time or place, so that the general national threat could seemingly always constitute an authorised purpose.

The Executive maintained that the statutory powers had sufficient safeguards in them to enable the police to use the powers freely – whereas, on enacting the powers, the law-making subsystem justified the removal and reduction of safeguards on the basis that the police would deploy the powers in a circumspect manner, driven by their own

[57] D.J. Solve, 'Reconstructing Electronic Surveillance Law' (2003-04) 72 *Geo. Wash. L. Rev* 1264, 1296.
[58] FBI, *Domestic Investigations and Operations Guide* (16 December 2008) 1.
[59] *ibid*, 21, para 4.1A and 22.
[60] This must be an authorised national security, crime or foreign intelligence purpose, *ibid* 21.
[61] *ibid* 21, para 4.1B.

professional assessment of the threat. Police interpretation of the nature of the powers was also subject to misinformation about their nature. Claims have been made against the Justice Department that it had relied upon 'spreading falsehoods and half-truths about the powers'.[62] Inaccurate statements made about the Act included that it did not apply to American citizens and that the basis of the use of its surveillance powers was probable cause.[63] In addition, whilst the Executive was insistent that it had to 'convince a judge' to allow it to use powers, including s.215, the substance of the judicial scrutiny of the powers and, therefore, its oversight was minimal.[64] James Dempsey has commented, that 'that Government can get one of those [surveillance] orders just upon the certification of a prosecutor that it is relevant to an ongoing investigation. No factual enquiry at all by the judge. The judge really just becomes a rubber stamp'.[65] Dempsey further argues that subsystem checks and balances, necessary to guard against police misunderstanding and misuse of their powers, 'weak in some key respects before 9/11, were seriously eroded by the Patriot Act and Executive Branch actions'.[66]

6.2 How the Powers Were Used

Obstructions to inter-subsystem communications between the law-making and the policing subsystems are also revealed in the differing expectations regarding the extent to which the s.44 and ss.214-215 powers were intended to become part of daily police operations, as opposed to remaining exceptional powers to be used only against the most acute national security threat. Whilst the law-making subsystems in both the US and UK described the powers being confined to exceptional circumstances, communications regarding the nature of the threat and the operational role of police in countering terrorism helped to normalise their use as part of everyday policing.[67] A systems-based approach to this mismatch, between actual and expected levels of use of the powers, suggests two possible explanations: one relating to operational constraints within the statutory powers; and the other relating to the impact of law-making subsystem

[62] ACLU, *Seeking truth from Justice, vol. 1, PATRIOT Propaganda: The Justice Department's Campaign to Mislead the Public about the USA PATRIOT Act* (July 2003) 1.
[63] *ibid*, 2-4.
[64] *ibid*, 4-5.
[65] Anti-terrorism Investigations and the Fourth Amendment after September 11, 2001 – hearing before the Subcommittee on the Judiciary, House of Representative, 108th Congress, First Session (20 May 2003)(Serial No.35) 15.
[66] *ibid*.
[67] J. Sim and P.A. Thomas, 'The Prevention of Terrorism Act: Normalising the Abnormal' (1983) *JLS* 71.

communications in shaping operationally closed police behaviour, as the following sections consider in relation to the US and secondly in relation to the US.

6.2.1 UK Policing Use of the Powers

In extending the police powers of suspicion-less stop and search in 1996, from applying to vehicle-related searches to also including pedestrian-related powers, the law-making subsystem emphasised the 'circumspection and sensitivity' with which the police would deploy the powers.[68] Setting out the government's plans Michael Howard expressed 'praise and credit' for the limited and strategic use the police had made of the pre-existing powers and emphasised his certainty 'that they will exercise the additional powers, if they are granted by Parliament, in the same way'.[69] The Government also cited the low levels of prior use as a means of justifying its expectation of the infrequent police use of the powers going forward.[70] The highly restrained manner in which the police would deploy the powers was also stated as being a key reason behind the Opposition's support of the statutory provisions, despite the accelerated enactment process adopted.[71] In addition, the police's selectivity in using the powers was explicitly cited as the basis for Lord Lloyd's recommendation, in 1996, that the suspicion-less stop and search powers be retained amongst the permanent counter-terrorism powers.[72] The powers were, therefore, enacted as 'exceptional powers…that are needed [only] exceptionally'.[73] Police use of the powers following 9/11, however, suggests that law-making subsystem expectations of police self-restraint, and the circumspect deployment of the powers, were misplaced. [74]

Whilst the increased use of the s.44 powers must, of course, be evaluated in light of the impact of 9/11 on policing priorities, law-making subsystem communications continued to reflect the executive's expectation that the powers would be used with circumspection,

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[68] Michael Howard, HC Deb (1995-96) 275, ccs.36, 215, 253, 269; and Jack Straw, *ibid*, c.221.
[69] *ibid*, c.253.
[70] Michael Howard stated that in the five metropolitan boroughs in which the powers had been used there has been 1,746 vehicle stopped, 1,695 searched and 2,373 occupants searched and in the Heathrow perimeter there had been 8,142 vehicles stopped, 6,854 searched and 40 occupants searched, *ibid*, col.210.
[71] See, e.g., *ibid* Jack Straw, cc.37-38, 184; and Ann Taylor, c.161.
[72] Lord Lloyd, *Review of Counter-terrorism Powers*, para 10.24.
[73] Michael Howard HC Deb (1995-96) 275, c.251.
[74] See Home Office Statistical Bulletin, *Statistics on Terrorism Arrests and Outcomes Great Britain, 11 September 2001 to 31 March 2008* (13 May 2009) and Home Office Statistical Bulletin, *Operation of Police Powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches, Great Britain 2008/09* (26 November 2009).

caution and proportionality.[75] With s.44, as with the previously existing powers, therefore, there remained a strong consensus within the law-making subsystem that use of the powers 'must never become the normal run of things'.[76] In contrast to such expectations, however, there is evidence that use of the powers in line with purely numerical targets was an explicit part of police counter-terrorism strategy in some police authorities.[77] For example, the City of London Police recognised that they had used s.44 'extensively; as part of on-going counter-terrorism initiatives, in order to reassure the public of their safety.[78] Evidence collected by Tufyal Choudhury and Helen Fenwick also indicates that in determining how the powers were used there was a subsystem tendency towards 'going for big numbers'.[79] In line with such aims some police authorities reported their high levels of use of the powers with apparent pride, treating it as indicative of their operational success.[80]

Looking firstly at the statutory provisions there are several features of s.44 which can be distinguished from the powers it replaced. One such change was the extension of suspicion-less stop and search from being applicable only within Northern Ireland to applying throughout the United Kingdom,[81] and from initially only relating to vehicle stops,[82] to subsequently also applying to pedestrians.[83] In addition, the pedestrian-focused powers were initially only intended for use to find articles used in terrorism – as opposed to being concerned with the individual themselves.[84] Despite this, the law-making subsystem treated the extensions and re-enactment of the powers simply as 'clear

[75] David Blunkett, HC Debs (2000-01) 375 cc.21 and 23. See also HC Debs (2005-06) 438 Elfyn Llwyd, cc.328-29; Alan Simpson, c.330; and David Davis, c.349.
[76] Fiona Mactaggart, HC Debs (1999-00) 341, c.182. David Luban also states that: 'Emergencies are temporary departures from normal conditions. September 11 was an emergency. Daily life under long-term risk is not', D. Luban, 'Eight Fallacies about Liberty and Security' in R.A. Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press, 2005) 249.
[77] S. Laville, 'More face stop and search to deter terrorists, say police' *The Guardian* (7 August 2002) quoting Commander of the Metropolitan Police, Rod Jarman.
[78] Home Affairs Committee, *Terrorism and Community Relations*, HC165-II. Written Evidence (The Stationery Office, London, 2005), Ev.17, paras 1.7 and 1.10.
[79] T. Choudhury and H. Fenwick, *The Impact of Counter Terrorism Measures* citing the comments of a Senior Police Officer, 32.
[80] See, e.g., BTP, *Annual Report 2006-07* (2007) which reported that in the year 2006-07 the BTP had carried out more than 30,000 stops and searches under s.44, 'almost as many as every other police force combined' at 9.
[81] Prevention of Terrorism (Temporary Measures) Act 1989, s.21. See also HC Debs (1993/94) 235 Michael Howard, c.30.
[82] Prevention of Terrorism (Temporary Measures) Act 1989, s.13A, inserted by Criminal Justice and Public Order Act 1994, s.81.
[83] Prevention of Terrorism (Temporary Measures) Act 1989, s.13B, inserted by the Prevention of Terrorism (Additional Powers) Act 1996, s.1.
[84] Home Office Research Study 173, *Ethnic Monitoring in the Police Forces: A beginning* (1997) 44.

practical proposals', necessary to fill 'a lacuna in the existing powers',[85] but as having no substantive impact on the nature of the powers. This suggests that Parliament's expectation of their circumspect deployment failed to account for the external constraints on the basis of which the police had previously been acting which were removed or weakened in successive re-enactments of the powers. Alongside the growing range of contexts within which the suspicion-less powers could be used the link between such use and specific terrorist actions was weakened. When the suspicion-less stop and search powers were introduced and extended they were used in response to a commissioned attack.[86] Subsequently the pre-emptive use of the powers was increasingly advocated within the law-making subsystem. This pre-emptive use was firstly intended to be at a very late stage, such that the terrorists may 'be intercepted on their way to their target'.[87] However, use of the powers was advocated increasingly far in advance of specific terrorist actions.[88] The link between the use of the powers and a terrorist attack, or planned attack, was further weakened under the Terrorism Act 2000 because of its expanded definition of terrorism, so as to include individuals 'concerned in' terrorism – a wider construction than solely meaning individuals actively involved in, or attempting to commit, acts of terrorism.[89] This expanded definition meant that the stop and search powers were operating at a higher level of abstraction than pre-existing powers,[90] facilitating increased levels of use, whilst the law-making subsystem did not consider this potential implication of the changes in the nature of the powers.

A further change in the external constraints affecting police use of the powers, which may have contributed to the misplaced nature of the law-making subsystem expectations of circumspect deployment, was the need for the earlier powers to be annually renewed by

[85] Michael Howard, HC Deb (1995-96) 275, c.35. The persistence of this view if the new legislation is demonstrated by its description in 2010 as merely 'a consolidating provision, drawing together previous anti-terror laws into a single does that could not require annual review or re-enactment', see A. Horne, Reviewing Counter-terrorism Legislation. Key Issues for a New Parliament (House of Commons Library Research, 2010) 90.

[86] HC Debs (1995-96) 273 Michael Howard, c.199 regarding police use of the powers following the South Quay bombing. See also Lord Lloyd of Berrwick who linked the 1994 powers to the planting of a number of large vehicle bombs in London, 1992-1994, and the 1996 expansion of the powers to the IRA's resumption of bombing in Great Britain, *Inquiry into Legislation against Terrorism*, para 10.16.

[87] Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol. 1 Cm 3420 (October 1996) para 10.21.

[88] See, e.g., Richard Shepherd, HC Debs (1999-00) 346, c.343.

[89] Terrorism Act 2000, s.1.

[90] R. Stone, 'Police Powers and Human Rights in the Context of Terrorism' (2006) 48 *Management Law* 384, 391. The wider definition was justified on the basis that it was not a term on which a specific criminal offence was based, see C. Walker, *Blackstone's Guide to Anti-terrorism Legislation* (OUP, 2002).

Parliament.[91] Under s.44, the powers were permanently enacted so that, although subject to the oversight of the government reviewer,[92] they could not be amended or cancelled without specific action by the law-making system. There was not the same level of active legislature reassessment of the use, utility and effect of s.44 as had previously been routine. The largely unacknowledged effect of the changes to the legislative provisions, in increasing the range of circumstances in which the power could be deployed, meant that the law-making subsystem was endorsing the police's ability to constrain and regulate itself on the basis of its behaviour in circumstances in which there were in fact external factors shaping the subsystem's programme.[93] These developments correspond with a more recent, general trend by which Parliament and the executive has extended police powers, without specific safeguards.[94] The increased use of the powers once these external constraints were removed suggests that complete reliance on police self-regulation overlooked the police's own expectation of external constraints and its interpretation of the removal of constraints as an instruction from the law-making subsystem that it should make far greater use of the powers.

Compounding the impact of the removal of the statutory constraints on police action were parliamentary discourses and other communications regarding the nature of the threat from terrorism and the role of the police in safeguarding against this.[95] These were detected by the policing subsystem and its understanding of them informed police use of the powers, to such an extent that the police themselves acknowledged that s.44 should have been used in a way that attracted societal approval, 'rather than using it because Parliament said we could'.[96] Whilst insisting that the powers should remain confined to exceptional circumstances the law-making subsystem described the level of the national security threat as making the context exceptional.[97] The law-making subsystem also described the threat as permanent, recognising that it was a 'sad but inescapable fact that

[91] Prevention of Terrorism (Temporary Provisions) Act ss.27(5)-(6).
[92] Terrorism Act 2000, s.126. The strength of this oversight function is, however, itself open to question.
[93] G. Teubner, *Law as an Autopoietic System* 13.
[94] R. Reiner suggests that this trend has been evidence since 1993, R. Reiner, *The Politics of the Police* (OUP, 2010) 222.
[95] C. Pantazis and S. Pemberton, 'Restating the Case for the Suspect Community: a reply to Greer' (2011) *British Journal of Criminology* 1054.
[96] Senior Police Officer, quoted in H. Fenwick and T. Choudhury, *The Impact of Counter-terrorism Measures* 33.
[97] See, e.g., Tom King stating that '[t]errorism is now a global activity which poses many fresh and serious challenges' HC Debs (1999-00) 341 c.177.

terrorism is here to stay for the foreseeable future'.[98] Descriptions of the exceptional nature of the circumstances became even more acute after 9/11, which was described as prompting a call to 'rethink dramatically the scale and nature of the action that the world takes to combat terrorism'.[99] Once the exceptional threat became the new state of normality in law-making subsystem communications this was interpreted within the policing subsystem's framework of understanding as justifying, even necessitating,[100] that the exceptional counter-terrorism powers were 'routinely used' in everyday policing.[101] The police echoed law-making communications which described the risk of terrorist attack as being a 'daily threat'[102] and as representing the 'new normality in policing'.[103] Responding to what it interpreted as the nature of the law-making subsystem assessment of the terrorist threat a number of police authorities described themselves as being left with effectively no option but to make use of counter-terrorism powers a central part of everyday police activities.[104] Daily use of the powers also helped to fulfil the police's 'need to be seen to be doing something to reassure the public, with little regard for the long-term consequences of what they do'.[105] Consequently, in the parts of the policing subsystem which were most closely associated with countering terrorism the police interpreted expectations that they respond to the constant threat of attack, as requiring that the powers were an important feature within day-to-day policing.[106]

Despite growing evidence of the highly discretionary use of s.44 and the blanket approach to its deployment, law-making subsystem confidence in the efficacy of police use of s.44 was sustained by its expectation that police operations were based upon detailed and expertly evaluated intelligence.[107] Such expectations, however, overlooked the fact that

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[98] Lord Bassam of Brighton, HL Debs (1999-00) 611, c.1429.
[99] Tony Blair, HC Debs (2001-02) 372, c.606.
[100] Ardau and R. van Munster, *Exceptionalism and the 'war of terror'* 689. See also R. van Munster, 'The War on Terror: When Exception becomes the Rule' (2004) 17 *International Journal for the Semiotics of the Law* 141, 146-48.
[101] MPA, *Section 44 Terrorism Act 2000 – Tactical Use Review* (May 2009), www.mpa.gov.uk/committees/sop/2009/090507/10/, accessed 13.03.2012.
[102] BTP, *Annual Report 2008/09* (2009) 23.
[103] BTP, *Annual Report 2005/06* (2006) 5.
[104] BTP, *Annual Report 2003/04* (2004) 3. See also BTP, *Annual Report 2007-08* (2008) which states that terrorism 'remains a daily threat' 23.
[105] V. Dodd, 'Asian Men Targeted in Stop and Search' *The Guardian* (17 August 2005), quoting Marian Fitzgerald University of Kent.
[106] See such descriptions of the threat in BTP, *Annual Report 2007/08* (2008) 23 and Home Office, *Stop and Search Action Team. Interim Guidance* (2005) para 2.2.
[107] See, e.g., HC Debs (2005-06) 436 Frank Dobson, c.467; Charles, c.486; Tony Blair, c.826; Michael Howard, c.826; Charles Kennedy, c.828; Robert Fello, c.829; and HC Debs (2001-02) 372 Charles Clarke, c.388. See also Charles Clarke, House of Commons Defense Select Committee, *The Threat from Terrorism*

the powers were often used by ordinary police officers, as opposed to specialist counter-terrorism operatives.[108] Further, these officers were typically amongst the most junior ranks within the force,[109] and not given any adequate training or briefings on how to use the powers.[110] Despite this police expertise was cited to justify the continuation of the undemanding 'expediency' standard for using the powers, because '[t]he police are well used to – and highly expert at – deciding, almost daily what level of action should be taken in response to all sorts of circumstances; they take such decisions all the time'.[111] By endorsing the adequacy of the provisions the law-making subsystem downplayed the complexity of the threat and the role of the statutory powers in countering it, deferring on all questions of expertise and professionalism to the police.[112]

Indeed, the professional judgement of the police and their experience in dealing with security matters were cited as justifying the law-making subsystem's refusal to scrutinise police use of the powers, despite criticism of this use.[113] Even in the face of empirical evidence revealing the disproportionate and operationally ineffective deployment of s.44 against racial minorities, Parliament, therefore, sustained its 'universal praise'[114] of the police in protecting the country against further terrorist attacks.[115] This relationship is at odds with the earlier-stated law-making subsystem expectation that the police would have to justify their decisions to use the powers. Parliamentary deference to policing subsystem decisions is further suggested by Tony Blair's pledge to work 'in close consultation with the police and the agencies to see whether there are additional powers that they might need to prevent further attacks'.[116] As well as describing the threat posed by international terrorism as one of uncaveated exceptionalism, so as to justify the

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HC348 (Session 2001-02).

[108] Human Rights Watch, *Without Suspicion* (2010).

[109] T. Choudhury and H. Fenwick, *The Impact of Counter Terrorism Measures on Muslims Communities in Britain*, Research Report 72 (ECHR, 2011) quoting from an interview with a police office, 36. See also N. Bland, J. Miller and P. Quinton, Home Office Policy Research Series Paper 128, *Upping the PACE? An evaluation of the recommendations of the Stephen Lawrence Inquiry on Stops and Searches* (2000) para 9.

[110] Memorandum written by a superintendent in the Metropolitan Police and Home Affairs Committee, Terrorism and Community Relations, HC165-II, para 142, Ev.62.

[111] Charles Clarke, Terrorism Bill, Standing Committee D (1 February 2000).

[112] See D.C. Anderson, *Crime and the Politics of Hysteria. How the Willie Horton Story Changed American Justice* (Random House, 1995).

[113] Charles Clarke, HC Debs (2005-06) 375, c.338.

[114] Keith Vaz, HC Debs (2005-06) 436, c.1269.

[115] In relation to the events of 7/7 see HC Debs (2005-06) 436, Frank Dobson (c.467), Charles Clarke (c.466), Tony Blair (c.826), Michael Howard (c.826), Charles Kennedy (c.828) and Robert Flello (c.829) and HL Debs (2005-06) 673 Lord Howell of Guildford (c.780) and Lord Williamson (c.781); and Lord Dholakia (c.904).

[116] Tony Blair, HC Debs (2005-06) 436, c.566. See also Charles Clarke, *ibid*, c.1254.

passage of the heightened discretionary counter-terrorism powers, the UK government, therefore, also praised the operational expertise and independence of the police.[117] The government described the police as able to offer complete protection against the menace of terrorism, as well as reassuring a worried public of their safety.[118]

Expectations of police professionalism and ability for self-regulation are exemplified by the review of Lord Carlile of the operation of the powers, which initially concluded that 'their use works well and is used to protect the public interest, institutions and in the cause of public safety'. [119] Despite concluding that the stop and search powers, and the Act overall, were 'working well',[120] however, by the time of Lord Carlile's second review he reported some 'difficult problems' arising from the use of the stop and search powers.[121] Thereafter, year-on-year the criticism Lord Carlile voiced in relation to s.44 increased. In his report concerning 2004 Lord Carlile stated that his views on the powers had 'developed' and that 'their use gave some rise for anxiety'.[122] By 2007 Carlile had 'no doubt that its use could be halved from present levels without risk to national security or to the public'.[123] The reports, however, continued to conclude that the powers were 'necessary and proportional to the continuing and serious risk of terrorism'.[124]

Parliament sanctified the 'courage and commitment' of law enforcement services and used this to justify affording them a high level of discretion in utilising the s.44 powers.[125] Police expertise was used to justify the incorporation of the undemanding 'expediency' standard as the basis for using the powers,[126] because '[t]he police are well used to – and highly expert at – deciding, almost daily what level of action should be taken in response

[117] See, e.g., HC Debs (2005-06) 436 Charles Clarke, c.1262; David Lidington, cc.1262-63, Keith Vaz, c.1269; 26 October 2005, Mark Oaten, c.356.
[118] D. Garland, *The Culture of Control: Crime and Order in Contemporary Society* (OUP, 2001) 134. See also V.E. Kappeler and P.B. Kraska, 'A textual critique of community policing: police adaption to high modernity' (1998) 21(2) *Policing: An International Journal of Police Strategies & Management* 293.
[119] Lord Carlile of Berriew, *Report on the Operation in 2002 and 2003 of the Terrorism Act 2000* (2004), para 22
[120] *ibid*, para 111.
[121] Lord Carlile of Berriew, *Report on the Operation in 2004 of the Terrorism Act 2000* (2005), para 25.
[122] *ibid*, para 96 and 106.
[123] Lord Carlile of Berriew, *Report on the Operation in 2007 of the Terrorism Act 2000* (2008), para 131.
[124] *ibid*, para 34.
[125] Lord Bassam of Brighton, HL Debs 6 April 2000, cc.1428-29.
[126] This exemplifies a broader trend whereby management of risk is delegated to 'experts', see U. Beck, *Risk Society: Towards a New Modernity* (1992) 57-58.

to all sorts of circumstances; they take such decisions all the time'.[127] The legislature's deference was bolstered by individual MPs praising police professionalism and levels of expertise, both before and after 9/11.[128] MP Oliver Letwin, for example, stated that the 'Home Secretary believes that he needs powers now to protect us against an appalling attack on our fellow citizens. I am unwilling on behalf of my party to put my country at the risk of the Home Secretary being proved right'.[129] Such pronouncements continued throughout the period immediately post-9/11 with the MPA describing counter-terrorism stops and searches in 2008 as 'vital tools in the fight against crime and terrorism'[130] and the NPIA referring to it as an 'essential tool for the Police Service in reducing terrorist crime'.[131] However, these claims do not appear to have been founded in operational utility, relating to the prevention of terrorist attacks. Both Parliament and the Police, therefore, understood the other as expecting it to use the powers in particular way, which failed to match the others expectation of this, a pattern repeated in the US, as the next section shows.

6.2.2 US Policing Use of the Powers

One indication that the FBI was affording a broader interpretation of possible use of the surveillance powers, than was expected by the law-making subsystem, is indicated by the sheer volume of covert surveillance undertaken following 9/11. The volume of secret wiretaps undertaken grew so significantly after 9/11 that the Justice Department, at times, fell behind in processing applications despite the allocation of additional resources.[132] However, views as to the practical impact of the Patriot Act on the ability of the FBI to conduct surveillance and the safeguards protecting against its misuse vary from those who have claimed that in passing the Patriot Act Congress and the President substantially

[127] Charles Clarkes, Terrorism Bill, Standing Committee D (1 February 2000).
[128] See, e.g., HC Debs (2005-06) 436, Charles Clarke, c.1262 and David Lidington, cc.1262-63; HC Debs (2005-06) 438, Mark Oaten, c.356
[129] HC Debs (2001-02) 375, c.40
[130] Quoting John Roberts, MPS Leader for Stop and Search Scrutiny, *MPA, Stop and Search – Potential Changes must be Fully Debated* (31 January 2008), www.mpa.gov.uk/news/press/2008/08-2004, accessed 25.08.2010.
[131] NPIA, *Practice Advice on Stop and Search in Relation to Terrorism* (2008) para 1.1. The British Transport Police also described s.44 as 'an important part of its counter-terrorism strategy', *Annual Report 2008/09* (2009).
[132] D. Eggen and S. Schmidt, 'Data Show Different Spy Game since 9/11; Justice Department Shifts its Focus to Battling Terrorism' *Washington Post* (1 May 2004) at A1.

altered the government's ability to carry out electronic surveillance;[133] to those who have argued that the legislation made little change to the powers, in practice.[134] One way in which the congressional debate marginalised calls for any additional legislative safeguards on the powers was through descriptions of the powers as achieving little more than 'making the statutes technology neutral'.[135] The provisions were described as simply enabling law enforcement to keep up with modern technology'[136] and being 'primarily directed at allowing law enforcement agents to work smarter and more effectively'.[137] For the law-making subsystem, therefore, the powers did not require additional safeguards because they did not pose any additional risk to individual rights or risk of misuse than the previous powers. These claims minimised descriptions of the impact of the new surveillance powers on the existing legal framework.[138]

Despite such claims the powers can be seen as constituting a more substantive revision of the nation's surveillance laws,[139] while simultaneously helping to reduce the perceived need for checks and balances in overseeing use of these powers.[140] The Government had clear political incentives to minimise the perception of the statutory changes because this meant that the compatibility of the statute with constitutional considerations was an unnecessary area of congressional debate.[141] Descriptions of the powers as representing only a minimal change from those previously existing were primarily offered by the

[133] S. Zoffer, 'E-Patriotism: The Patriot Act of 2001' *PA Law Weekly* (17 December 2001) at 12.
[134] C. Colm, 'EEF Analysis of the Provisions of the USA Patriot Act that Relate to Online Activities' 1201 (PLI Intellectual Property Handbook, Series No.G-701 (2002)).
[135] Orrin Hatch, SCR 25 October 2001, S11054.
[136] Joe Biden, *ibid*, S11048. This interpretation of the Act is also supported by R.A. Pikowsky, 'An Overview of the Law of Electronic Surveillance Post September 11, 2001' (2001) 94 *Law Lib. Journal* 601.
[137] Orrin Hatch, SCR 11 October 2001, S10560.
[138] See, e.g., Sensenbrenner who assesses the impact of the new powers as being that 'the Patriot Act modernizes surveillance capabilities by ensuring that pen registers and trap and trace court orders apply to new technologies', Committee on the Judiciary, 2 October 2001, 98. See also Gene Green who states that 'what we are doing today primarily is modernizing our laws, helping law enforcement to deal with evolving technology and evolving threats' HRCR 12 October 2001, H6764; and J. Walsh, 'Security Comes before Liberty' *Wall St. Journal* (23 October 2001) at A26.
[139] For example, whilst the expansion of the powers to electronic communications was described as a purely technical development they raised unresolved issues, such as the distinction between content and non-content of communications which had a huge potential impact on the intrusiveness of the powers, see O.S. Kerr, 'Internet Surveillance Law after the USA Patriot Act: The Big Brother that isn't' (2003) Nw. U.L. Rev 607, 645-47, acknowledging the ambiguity of the meaning of 'contents' under the PA.
[140] ACLU, *Surveillance Under the USA PATRIOT Act* (10 December 2010). See also ACLU, *Unpatriotic Acts. The FBI's Powers to Rifle through your Records and Personal Belongings Without Telling You* (July 2003) 1; S.N. Mart, 'Protecting the Lady from Toledo: Post-USA PATRIOT Act Electronic Surveillance at the Library' (2004) 96(3) *Law Library Journal* 450; and J.V. Bergen, *The Twilight of Democracy. The Bush Plan for America* (Common Courage Press, 2005).
[141] ACLU, *Seeking Truth from Justice*, vol 1, 'PATRIOT Propaganda: The Justice Department's Campaign to Mislead the Public about the USA Patriot Act' (July 2000) 8.

executive, and in particular the Attorney General.[142] Ashcroft insisted that without such developments 'we are vulnerable and this, our vulnerability, is elevated as long as we don't have the tools we need to have'.[143] Alongside the need for the powers, Ashcroft described them as having little effect apart from enabling law enforcement powers to develop as technology advances.[144] The limited extent to which the law-making subsystem to incorporated legislative safeguards into the draft bills can, therefore, be linked to the strength of the nexus between executive communications and to the law-making subsystem programme of operation. The legislature's desire to shape its own behaviour in response to these communications is reflective of the steady accumulation of powers in the executive branch, which was occurring even before 9/11, and its impact on the law-making process.[145] Congress enacted potentially rights-infringing legislation whilst being certain it was avoiding a repeat of previous legislative failings.[146]

Despite such claims a number of differences can be identified between the Patriot Act surveillance provisions and those that had previously existing and those relating to criminal investigations. In relation to criminal investigations, for example, federal agents must meet the requirements to title III,[147] which necessitate that a judge finds that there is probable cause to believe that 'an individual is committing, has committed, or is about to commit' an enumerated predicate offence and that 'particular communications concerning such offence will be obtained through … interception'.[148] Consequently, the judicial inquiry focuses on the conduct of the target of the surveillance and whether the surveillance will uncover evidence of crime. By contrast, under the counter-terrorism powers a law enforcement agent must establish probable cause that the target of the surveillance is a 'foreign power' or the 'agent of a foreign power'.[149] There is no requirement for the probable cause to be linked to belief that the surveillance will uncover evidence of crime and so does not correspond with the traditional criminal standard.[150]

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[142] See AG Ashcroft, Administration's Draft Anti-terrorism Act of 2001, Hearing before the Committee on the Judiciary, House of Representatives, 107th Congress (24 September 2001) 14, 23.
[143] Ashcroft, Administration's Draft Anti-terrorism Act of 2001, Hearing before the Committee on the Judiciary 23.
[144] *ibid* 16.
[145] N.C. Bay, 'Executive Power and the War on Terror' (2005-06) 83 *Denv. U.L. Rev.* 335, 343-52.
[146] D. Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard C.R.-C.L. L Rev* 1, 1-2.
[147] 18 USC ss.2519.
[148] 18 USC ss2518(3)(a)-(b).
[149] 50 USC ss1801(b)(2)(C).
[150] *In re Sealed Case* 310F.3d 717 (FISCR 2002).

Substantive differences between the Patriot Act provisions and previous legal position also arose from the dependence of Internet and other electronic communications on intermediary parties. Information held by third parties is excluded from constitutional rules concerning the expectation of privacy.[151] This opened up a vast array of communications to government surveillance.[152] Whilst these factors were not a change arising from the Patriot Act powers themselves they were ignored in executive comments that there was no change in the effect of the powers from when they were originally handed down. The Patriot Act also enacted a change in the centrality of the investigative purpose of the FISA surveillance from that of the 'primary purpose' to 'a significant purpose',[153] so that the link between countering terrorism and the law enforcement behaviour was weakened. That this change was not part of Congress' intention behind the powers was suggested by the claims of two senators involved in the enactment of the powers – Patrick Leahy and Diane Feinstein – that their comments on this matter had been misconstrued by the Department of Justice.[154] Despite being an apparent misinterpretation the requirement of 'significant purpose', it was treated by the FBI as eliminating the 'wall' between criminal and foreign intelligence investigations.[155] By contrast Leahy and Feinstein protested that this had never been the intention of the law-making subsystem.[156] Each subsystem's programme of operations, therefore, was affected by the communications arising from the other, without accounting for the fact that those communications had been shaped through a process by which the emitting and receiving subsystem interpreted the communications arising from the other through its own subsystem communicative redundancies.

As well as cutting the FBI loose from the criminal standard, neither the statutory powers, nor executive guidelines, gave any indication as to how the police should prioritise its

[151] *Cal. Bankers Association v Shultz*, 416 US 21, 54 (1974).
[152] S.F. Kreimer, 'Watching the Watchers: Surveillance, Transparency and Political Freedom in the War on Terror' (2004-05) 7 *U. Pa. J. Const. L.* 133.
[153] *In re Sealed Case* 727, 736.
[154] See comments of Chairman Leahy, 'The USA Patriot Act in Practice: Shedding Light on the FISA Process',
Hearing before the Committee on the Judiciary of the United States Senate, 107th Congress (10 September 2002).
[155] USDOJ, *Report to the National Commission on Terrorist Attacks upon the US: The FBI's Counterterrorism Program Since September 2001* (14 April 2004) 23.
[156] See comments of Chairman Leahy and Senator Feinstein, 'The USA Patriot Act in Practice: Shedding Light on the FISA Process', Hearing before the Committee on the Judiciary of the United States Senate, 107th Congress (10 September 2002).

efforts.[157] The extensive deployment of the counter-terrorism surveillance powers in the US was, for example, encouraged by descriptions of the severity of the terrorist threat, in terms of its nature and scale. Members of the Executive warned that Islamic radicalization exists nationwide, across the United States.[158] The threat was portrayed as being all pervasive, and accordingly linked to the use of exceptional powers on a frequent basis.[159] The effect of these communications was that use of the 'emergency' police powers became an emerging normality.[160] This sentiment was entrenched within the post-9/11 policing context by President Bush placing the country on a 'war-footing'.[161] This helped to blur the lines between external security and foreign intelligence with internal security and domestic law enforcement.[162]

The FBI's operational programme was also affected by expectations that culpability for any future attack would reside with the policing subsystem.[163] The executive criticised the 'limited FBI aggressiveness' and their uneven response to terrorism, with only some FBI field offices devoting significant resources to Islamic extremists, whilst others remained 'clueless' with regard to counter-terrorism.[164] Policing guidance also emphasised the Executive's expectation that 'federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's border, and deter those who would cause devastating harm to our Nation and its people'.[165] In response to these communicative irritants the FBI launched 'unprecedented collection activities' enabled by

[157] Comments of James X. Dempsey, Anti-terrorism Investigations and the Fourth Amendment after September 11, 2001 – hearing before the Subcommittee on the Judiciary, House of Representative, 108th Congress, First Session (20 May 2003)(Serial No.35) 20.
[158] D. Van Duyn, Department Assistant, Counter-terrorism Division, FBI House Homeland Security Committee on Intelligence, *Information Sharing and Terrorist Risk Assessment* (Washington D.C., 20 September 2006).
[159] See case studies in A.D. Romero, 'Living in Fear: How the US Government's War on Terror Impacts American Lives' in C. Brown (ed.), *Lost Liberties. Ashcroft and the Assault on Personal Freedom* (The New Press, 2003) 112-31.
[160] O. Gross, 'What "Emergency" Regime?' (2006) 13(1) *Constellations* 74.
[161] M. Buckley and R. Singh, *The Bush Doctrine and the War on Terrorism. Global Responses, Global Consequences* (Routledge, 2006).
[162] N.C. Bay, 'Executive Power and the War on Terror' (2005-06) 83 *Denv. U. L. Rev*. 3305 and R.S. Malnick, 'The Courts, Jurisprudence and the Executive Branch' in J.D. Aberbach and M.A. Peterson (eds), *The Executive Branch* (OUP, 2005) 461.
[163] USDOJ, *Report to the National Commission on Terrorist Attacks upon on the US: The FBI's Counterterrorism Program since September 2001* (14 April 2004) 7.
[164] Joint Inquiry Staff Statement, Hearing on the Intelligence Community's Response to Past Terrorist Attacks against the US from February 1993 to September 2001, Eleanor Hill, Staff Director, Joint Inquiry Staff (8 October 2002).
[165] USDOJ, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003) 5. See also USDOJ, *Fact Sheet: Racial Profiling* (17 June 2003) 5.

the use of counter-terror surveillance.[166] This sentiment was further fuelled by executive communications, such as briefings from the Government Counter-terrorism Organizations, which were highly critical of the failure amongst the FBI, and other security organisations, during the 1990s, to take the growing threat from international terrorism more seriously.[167] In turn, the law-making subsystem interpreted these activities as an endorsement of their own descriptions of the severity of the threat and further encouraged the police to be afforded operational freedom to use the powers widely and at their own discretion.[168]

The Attorney General's Guidelines state the purpose of the surveillance and search powers as being to 'enable the FBI to perform its duties with effectiveness, certainty and confidence' and to 'provide the American people with a firm assurance that the FBI is acting properly under the law'.[169] In line with its enabling tone the guide states that the 'FBI shall not hesitate to use any lawful method … even if intrusive, where the degree of intrusiveness is warranted in light of the seriousness of a criminal or national security threat or the strength of the information indicating its existence, or in light of the importance of foreign intelligence sought to be United States interests. This point is to be particularly observed in investigations relating to terrorism'.[170] The Guidelines also note that 'in the exercise of its protective functions, the FBI is not constrained to wait until information is received indicating that a particular event, activity, or facility has drawn the attention of those who would threaten the national security. Rather, the FBI must take the initiative to secure and protect activities and entities whose character may make them attractive targets for terrorism or espionage'.[171] On top of its descriptions of the significant threat of terrorist attack, therefore, the independence of FBI operations were supported by successive Congressional declarations of the importance of FBI expertise and professional knowledge in countering terrorism.[172] Law enforcement officers were

[166] Officer of the Inspector General of the Department of Defence, DOJ, CIA, NSA, Office of the Division of National Intelligence, Unclassified Report on the Presidents' Surveillance Program (July 2009)(Rep-2009-0013-AS) 38.
[167] Joint Inquiry Briefing by Staff on US Government Counter-terrorism Organizations (Before September 11, 2001) and on the Evolution of the Terrorist Threat and US Response: 1986-2001 (11 June 2002).
[168] The Attorney General Guidelines for Domestic FBI Operations (September 2008) 12.
[169] *ibid* 5.
[170] *ibid* 13.
[171] *ibid* 17.
[172] Tony Hall, HRCR (14 September 2001) E1655. George Bush, Message from the President, Report on Recovery and Response to Terrorist Attacks on the World Trade Center and Pentagon, (20 September 2001) S9554.

described as 'pillars of our community'[173] and as deserving '[o]ur nation's admiration and respect',[174] as well as 'hard-working public servants who perform a dangerous job with dedication, fairness and honor'.[175]

Such deference to police actions disregarded the normal congressional oversight function against the abuse of police powers.[176] Against the relevant background communications, regarding the threat faced and the role of the police in protecting against this, the US policing subsystem promoted the powers as a necessary response to their '[i]ncreased awareness of the need for compiling essential information on those who threaten the safety of all Americans'.[177] The reality of the police's particular expertise, and its role in constraining police action is, however, further brought into question by research such as that undertaken by Richard Ericson and Aaron Doyle which studied risk modelling in the insurance industry.[178] Ericson and Doyle found that despite the heavy reliance on the 'expertise' of former counter-terrorism officers, these individuals, by their own admission, saw the process 'as little more than converting guesses into threats'.[179] Consequently, the police's commitment to deploy the powers on the basis of their 'professional judgment'[180] did not necessarily invoke the narrow and discerning deployment of the powers. Consequently, the FBI was operating in ways that over-extended its institutional competencies, while the law-making subsystem was advocating a deferential approach to its activities on the basis of its high levels of professional and expert knowledge.[181]

This section has shown that the policing subsystem's use of their suspicion-less stop, search and surveillance powers was based on its system-specific interpretation of the law-making subsystem and government expectations regarding their use. However, in

[173] Benjamin Gilman, HRCR 14 September 2001, E1649.
[174] Rosa DeLauro, HRCR 11 September 2001, E1656.
[175] USDOJ, *Fact Sheet: Racial Prof*iling (17 June 2003).
[176] ACLU, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act* (ACLU, March 2009) 31.
[177] D.L. Carter, 'The Law Enforcement Intelligence Function. State, Local and Tribal Agencies' (June 2005) 74(6) *FBI Law Enforcement Bulletin* 1, 8.
[178] R. Ericson and A. Doyle, *Uncertain Business: Risk, Insurance and the Limits of Knowledge* (University of Toronto Press, 2004).
[179] *ibid* 150.
[180] See, e,g., BTP, *'Monitoring of Stop and Account' and 'Stop and Search'*, http://www.btp.police.uk/freedom_of_information/publication_scheme/monitoring_records.aspx, accessed 27.03.2012.
[181] See. S. Kareen, 'Activism against Racial Injustice in times of War' (2006) vol XIII *Harvard Univ. Asian American Policy Review.* See also P.B. Heyman, *Terrorism, Freedom and Security: Winning without War* (MIT Press, 2003) 21.

interpreting law-making subsystem communications through system-specific communicative redundancies the law-making subsystem's objective of providing the police with flexible powers, but containing significant safeguards against misuse, was understood by the police as affording them entirely discretionary powers. In addition, the police interpreted law-making subsystem expectations for the frequency with which the powers would be used differently from the law-making subsystem intentions for its interpretation. Consequently, while the policing subsystem deployed the discretionary powers in accordance with the daily, but exceptional threat described by the executive and adopted by the law-making subsystem, the law-making subsystem premised the statutory powers on the expectation that their use would be based on a professional assessment of the terrorist threat that was temporally and geographically specific. The mismatch regarding the circumstances in which the powers were used also led to a further disjunct in understanding regarding the grounds on which this use was based. In particular, further inter-subsystem communicative barrier appear to have given rise to different system-specific understandings of what precisely an expertise-led approach to the police entailed, [182] so that its role in safeguarding against misuse of the powers was diminished. [183] Specifically, the role of intelligence in using the stop, search and surveillance powers was interpreted differently by each subsystem, so that the powers were implemented on the basis of general, as opposed to particularised, intelligence regarding the terrorist threat, as is shown in the next section.

6.3 Role Afforded to Intelligence

Despite recognition from within the policing subsystems that to defeat terrorists 'we must be intelligence-driven', [184] in practice a mismatch between the requirement for intelligence as expected by the law-making subsystem, and the understanding of this requirement by the policing subsystem emerged on the basis of the communications arising from each subsystem. [185] This section shows how this different interpretation, coupled with

[182] D. Moeckli, 'Discriminatory Profiles: Law Enforcement after 9/11 and 7/7' (2005) 5 *EHRLR* 517, 517-20.
[183] I. Loader, 'Policing and the Social: Question of Symbolic Power' (1997) 48(1) *British Journal of Sociology* 1, 3.
[184] See, e.g., M.A. Baginski, Executive Assistant for Intelligence, Before the Senate Judiciary Committee (19 August 2004), http://www.fbi.gov/news/testimony/intelligence-information-sharing, accessed 14.06.2011.
[185] D. Moeckli, 'Discriminatory Profiles: Law Enforcement after 9/11 and 7/7' (2005) 5 *EHRLR* 517, 517-20; and D.A. Harris, 'Racial Profiling Redux' (2003) 22 *St. Louis U. Pub. L. Rev*. 73, 88; and D. Minam et

expectations of the police that they should make frequent use of the powers, and a context in which law-making subsystem communications echoed popular and media connections between terrorists and racial minorities,[186] encouraged the police to deploy the powers based on broad-brush, race-based profiled of terrorist suspects.[187]

6.3.1 UK Policing Interpretation of the Intelligence Requirement

In the UK, the law-making subsystem's expectation that s.44 would be based on intelligence reflects the normal operational prioritisation of 'intelligence-led policing [which] underpins all aspects of policing'.[188] Indeed, the policing subsystem expressly advocated an intelligence-led approach to s.44.[189] When the powers were initially debated this was an implicit requirement because of their largely responsive nature.[190] Further, in 1996, David Trimble suggested that the powers should only be used 'when there is intelligence that such an outrage [a terrorist attack] may be committed in a particular area'.[191] Trimble's expectations were shared by other MPs, including Jack Straw.[192] Following 9/11 the intelligence-based use of the powers continued to be described as vital in ensuring that the powers were effectively used. David Blunkett, for example, stated that '[o]btaining good intelligence and being able to target potential terrorists is essential',[193] and after 7/7 Charles Clarke reaffirmed that 'intelligence is our key weapon' in fighting terrorism.[194]

Communications from within the policing subsystem also expressly advocated the intelligence-led implementation of s.44,[195] so as to avoid their 'arbitrary'[196] use. However, the role of intelligence as interpreted by the police subsystem was very different from the

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al, 'Sixty Years after Internment: Civil Rights, Identity Politics and Racial Profiling' (2004) 11 *Asian LJ* 151, 154-55.

[186] See section 4.3 of this thesis.

[187] See section 5.3 of this thesis.

[188] ACPO, *Introduction to Intelligence-Led Policing* (2007) 3.

[189] Metropolitan Police Service, *Stop and Search Equality Impact Assessment* (October 2008), and Home Office, *Stop and Search Action Team, Interim Guidance* (2004).

[190] Michael Howard, HC Debs (1995-96) 275 c.211, 213.

[191] David Trimble, HC Deb (1995-96) 275, c.213.

[192] Jack Straw, *ibid*, c.224.

[193] HC Debs (2001-02) 372, c.924.

[194] HC Debs (2005-06) 436, c.1266.

[195] See comments of Detective Superintendent Tucker, Home Affairs Committee, *Terrorism and Community Relations*, HC165-III, Ev.69. See also MPS, *Stop and Search Equality Impact Assessment* (October 2008), and Home Office, *Stop and Search Action Team, Interim Guidance* (2004).

[196] NPIA, *Practice Advice on Stop and Search in relation to Terrorism* (2008).

role the law-making subsystem assumed it would have. For example, police practice advice recognised that stops and searches could only be carried out if supported by evaluated intelligence,[197] whilst simultaneously advising officers to look at the demographic make-up of the area in which the searches are based, and in so-doing to be mindful of ethnicity and religion as a factor in the conduct of a stop and search.[198] In addition, although policing guidance cautioned against conducting 'arbitrary' stops and searches it linked intelligence to demographic factors, before suggesting that use of these factors could ensure that the police avoided any arbitrary and unlawful stops.[199] Despite the range of views expressed in subsystem communications, therefore, the law-making subsystem consistently linked intelligence with evidence of suspected terrorist activity, while the policing subsystem treated the intelligence requirement as being linked to factors such as the demographic make-up of an area.[200]

The heightened calls for the police to pre-emptively act against terrorist after 9/11,[201] encouraged a purportedly 'intelligence-led', but one that was based on wide net-casting.[202] Consequently, despite the consistent invocation of the importance of intelligence in using the powers, the role that it was afforded, as interpreted by the police subsystem, was very different from the role the law-making subsystem assumed it would have.[203] The effect of these different interpretations was that while the law-making subsystem consistently linked intelligence with specific evidence of terrorist activity, the policing subsystem treated intelligence as potentially existing irrespective of such evidence thus affording the intelligence-based police powers a far wider potential applicability than that expected by the law-making subsystem.[204]

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[197] See interview with Mike Franklin, in Human Rights Watch, *Without Suspicion. Stop and Search under the Terrorism Act 2000* (2010) 29.
[198] *ibid*.
[199] The inappropriateness of arbitrary stops is also supported by Lord Carlile who stated in his 2008 annual review that 'Any arbitrariness on the part of the police is unlawful', see Carlile, *Report of the Operation in 2008 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006* (June 2009), para 137.
[200] D. Garland, *The Culture of Control Crime and Social Order in Contemporary Society* (Oxford University Press, 2002) 12.
[201] See, e.g., Julian Lewis, HC Debs (2001-02) 372, c.638.
[202] See C. Walker, 'Intelligence and Anti-terrorism Law in the United Kingdom' (2003) 44(4-5) *Crime, Law and Social Change* 387.
[203] Liberty, *National Centre for Policing Excellence. Stop and Search Practice Advice. Liberty's Response to Consultation* (May 2006) para 7. For a social systems explanation for these different understandings see, G. Teubner, *Law as an Autopoietic System* 72.
[204] See, e.g., Fenwick and Choudhury, *The impact of Counter Terrorism Measures* 32, which cites a senior police officer confirming that use was 'a bit blanket because it's not really intelligence led other than there is intelligence in the system' (32-33). See also D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (OUP, 2000) 12.

Police interpretation of the legislature's communications as not necessitating the existence of particularised intelligence is suggested by NPIA guidance, which stated that '[i]f police are in possession of specific intelligence about possible terrorists then searches under section 43 may be more appropriate than under s.44'.[205] This advice does not simply indicate that the policing subsystem understood particularised intelligence to be unnecessary for use of s.44 but that if any such information was present s.44 should not in fact be used. Police use of s.44, despite the absence of particularised intelligence, is also indicated by oral evidence given to the House of Commons Home Affairs Committee, by Assistant Chief Constable Rob Beckley.[206] Beckley stated that s.44 could be based on either 'broad *or* specific intelligence in an area', demonstrating that the particularised nature of the intelligence was not exclusively maintained through the use of the powers.[207] Beckley also confirmed that police used the powers 'in a pretty random way', [208] further suggesting the absence of a link between their use and specific intelligence.[209] In line with subsystem understandings that no particularised intelligence concerning terrorist activities was necessary prior to use of s.44, British Transport Police guidance described the primary basis for deployment of the s.44 powers as being the existence of the authorisation.[210] Most explicitly of all there is some evidence that the police consciously eschewed the intelligence basis for the powers, instead maintaining that the stops and searches 'should not be based on intelligence', but rather on their ability to be a 'disruptive element against terrorist cells'.[211] Instead of a shared approach to the application of intelligence requirements between the law-making and policing subsystem guidance,[212] was interpreted in accordance with each subsystem's own understandings of

[205] NPIA, *Practice Advice on Stop and Search in Relation to Terrorism* (2008) para 2.3.2.
[206] House of Commons Home Affairs Committee, *Terrorism and Community Relations*, HC165-III, Oral and Additional Written Evidence (6 April 2005)(The Stationery Office, London) Oral evidence taken before the Home Affairs Committee, (25 January 2005).
[207] *ibid*, Ev.68 (emphasis added).
[208] House of Commons Home Affairs Committee, *Terrorism and Community Relations*, HC165-I, Report together with Formal Minutes and Appendix (6 April 2005)(The Stationery Office, London) qq 342-43, para 54.
[209] See, e.g., Fenwick and Choudhury which cites one source stating that police use of stop and search involved 'looking for a needle in a haystack when there wasn't any evidence that a needle existed' 33.
[210] BTP, *Annual Report 2006-07* (2007) 8.
[211] Home Affairs Committee, *Terrorism and Community Relations*, HC 165-II, Written Evidence (The Stationery Office, 2005), para 20, ev.67.
[212] See, e.g., Home Office, *Circular: S.44 of the Terrorism Act 2000*, 38/2004. The Circular describes the authorisation process as requiring 'a detailed account of the justification for authorising the powers, and information of their prospective use'.[212] The guidance further notes that '[a]lthough a high state of alert may seem enough in itself to justify authorisation of powers, it is important to set out in detail the relation between the threat assessment and the decision to authorise'. However, the effect of this advice on the

the type of intelligence expected by the other.[213] The law-making subsystem's expectations for temporally and geographically specific intelligence, prior to police use of s.44, were not reflected police approaches to the requirement.

One example of the different interpretations of the role of intelligence in deploying the s.44 powers relates to the authorisation process relating to the powers. The law-making subsystem described the requirement for Secretary of State authorisation,[214] as an important safeguard against the misuse of the power,[215] particularly in light of the highly flexible nature of the powers.[216] Home Office guidance, described the authorisation process as requiring 'a detailed account of the justification for authorising the powers, and information of their prospective use'.[217] The guidance also noted that '[a]lthough a high state of alert may seem enough in itself to justify authorisation of powers, it is important to set out in detail the relation between the threat assessment and the decision to authorise'.[218] The detailed intelligence expected by the law-making subsystem was not, however, reflected in the actual police applications for authorisations, which responded to contradictory advice emanating from the Home Office. In particular, despite confirming law-making subsystem expectations that the authorisation would be based on detailed intelligence Home Office notes for completion of the application warned that because the s.44 application is a publically disclosable document 'care must be taken not to include direct reference to the matter that could compromise the broader counter-terrorist activities'.[219] Consequently, the notes concluded that 'it is sufficient to refer to the existing national threat level at the time of the application without the need to elaborate on the basis upon which it was reached'.[220] This advice directly contradicts the expectation of a detailed justification, based on particularised intelligence. Instead it ties the existence of intelligence to the national threat level, whilst elsewhere this was

police's approach to intelligence was to act merely as an irritant, so that it failed to align police and law-making subsystem approaches to intelligence. One reason for this failure was that whilst the guidance confirmed law-making subsystem expectations that the authorisation must be based on detailed intelligence, it warns that 'care must be taken not to include direct reference to the matter that could compromise the broader counter-terrorist activities'. Accordingly, the notes state that 'it is sufficient to refer to the existing national threat level at the time of the application without the need to elaborate on the basis upon which it was reached'.

[213] N. Luhmann, *A Sociological Theory of Law* (Routledge and Keegan Paul, 1985) 73-210.
[214] Terrorism Act 2000, s.42.
[215] See, e.g., Attorney General, Baroness Scotland of Asthal, HL Debs 16 January 2010, c.1299.
[216] Richard Shepherd, HC Debs (1999-00) 346, c.357.
[217] Home Office, *Circular: S.44 of the Terrorism Act 2000*, 38/2004.
[218] *ibid.*
[219] *ibid*, para 5.
[220] *ibid.*

described as an inappropriate ground for the authorisation of use of s.44.[221] Instead the national threat level was intended principally to provide a general public reflection of the national security situation, as indicated by the rudimentary five-point scale upon which the threat level was based.[222] The non-expert nature of the national threat assessment is further suggested by the fact that between June 2006, following the discovery of two potentially viable car bombs in London and the terrorist incident at Glasgow Airport, and 2008 the national threat level remained at either 'severe' or 'critical'.[223] By basing the authorisation and renewal requirements on a non-professional appraisal of the security threat, while the law-making subsystem treated this as a detailed and expert assessment, the authorisation process became little more than a 'rubber stamp exercise', as opposed to a means of testing the operational need for s.44.[224] Therefore, instead of mediating between the two subsystems and attempting to cultivate a shared approach the police guidance perpetuated subsystem-specific understandings of the requirement for intelligence, and one that meant authorisation of the powers was linked to a broad understanding of the existence and nature of the terrorist threat, as opposed to the professional, circumspect evaluation expected by the law-making subsystem.[225] A comparable mismatch can be observed in relation to the US powers, as is considered in the next section.

6.3.2 US Policing Interpretation of Intelligence

Congressional and police briefings following 9/11 readily acknowledged 'that the most effective way to fight [international] terrorist is to gather as much intelligence as possible'.[226] Intelligence was recognised as law enforcement's 'information advantage' over terrorists,[227] and its collection and analysis was 'a priority of the highest measure'.[228] The statutory powers to use pen registers and trap and trace mechanisms required

[221] *ibid*.
[222] Comprising: critical – an attack is expected imminently; severe – an attack is highly likely; substantial – an attack is a strong possibility; moderate – an attack is possible but not likely; and low – an attack is unlikely, see www.homeoffice,gov.uk/counter-terrorism/current-threat-level/, accessed 02.06.2011.
[223] See, BTP, *Annual Report 2007/08* (2008) 23.
[224] Human Rights Watch, *Without Suspicion. Stop and Search under the Terrorism Act 2000* (2010) 2, 18.
[225] Liberty's Response to the Home Office Consultation on the Draft Manual on Stop and Search (March 2005) paras 3, 4 and 14.
[226] R.E. Peri, CRS Issues Brief for Congress, *Terrorism, the Future and US Foreign Policy* (September 2001) 4.
[227] Mike Hayden, Director of National Security Agency, *Opening Remarks: Partnerships for Combating Terrorism Forum* (4 March 2002).
[228] Office of Homeland Security, *National Strategy for Homeland Security* 17 (2002) 8.

governmental certification that the information likely to be obtained was foreign intelligence information, not concerning a US person, or was relevant to on-going investigations to protect against terrorism or clandestine intelligence activity.[229] Prior to the passage of the Patriot Act authorisation for use of the pre-existing policing powers was contingent on the existence of a relevant investigation, together with reason to believe that the individual using the tapped line was an agent of a foreign power, or someone in communication with such an agent under certain circumstances.[230] Police intelligence, therefore, was at the heart of the law-making subsystem's drafting of ss.214-15 powers. While the law-making subsystem promoted the certification processes as safeguarding mechanisms against police misuse of the powers, the FBI's use of the powers demonstrated the policing subsystem's inclination instead to operate on the basis of highly generalised intelligence of the terrorist threat faced.

Police justification for use of the powers without detailed intelligence was that '[t]he absence of evidence is not the absence of a threat',[231] despite law-making subsystem communications specifically criticising the breadth of the discretionary powers and the risks of misuse associated with their application without particularised intelligence.[232] A key illustration of the way in which executive guidelines which pre-dated 9/11 facilitated police use of the powers without particularised intelligence is the change between the 1976 guidelines and the 1983 version, which resulted in the possibility of starting an investigation 'when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the US'.[233] This standard explicitly did 'not require specific facts or circumstances indicating a past, current or impending violation'.[234] This threshold represented a less particularised standard than the need for 'specific and articulable facts, upon which an investigation could previously be launched.[235] It was this lower standard,

[229] Patriot Act, s.214.
[230] FISA 1978.
[231] Maureen Baginski, FBI Executive Assistant Director, *Police Executive Research Forum Conference on Intelligence*, Washington DC, (16 December 2005).
[232] See, e.g., Bob Conyers, Committee on the Judiciary, Business Meeting (3 October 2001) 99; Congressional Record, Russ Feingold, S10585; Barney Frank (12 October 2001), H6761.
[233] The AG's Guidelines on General Racketeering, Enterprise and Domestic Security/ Terrorism Investigations (1989), ss.III.B.1.a.
[234] *ibid*, ss.II.c.1.
[235] The Attorney General's Guidelines for Reporting on Civil Disorders and demonstrations involving a

as renewed through the 1989 guidelines, which regulated FBI surveillance immediately following 9/11.[236]

The broad and non-particularised nature of the intelligence-basis upon which law enforcement could undertake surveillance and records searches was further entrenched by the 2003 guidelines, in accordance with which the FBI could gather information without any requirement that it relate to suspected criminal activity.[237] Along the same lines the 2008 guidelines stated that authorisation for use of the powers only required that they were needed 'for an authorized purpose … [which] must be an authorized national security, criminal or foreign intelligence collection purpose'.[238] The guidelines also did not limit use of the powers to 'investigations in a narrow sense', for example in relation to a particular investigation, but sanctioned them for 'broader analytic and intelligence purposes'.[239] The requirements for intelligence set out in the executive guidelines were justified on the basis that normal '[l]aw enforcement standards of evidence are high: [and] making a case that meets these standards often requires unattainable intelligence and compromises sensitive sources or methods'.[240] However, the guidelines were enacted 'through executive fiat, rather than through legislative discussion or debate,[241] and departed from the forms of intelligence which the law-making subsystem has described as essential to avoid misuse of the powers, during their enactment.[242]

A further way in which the FBI departed from the intelligence requirements expected by the law-making subsystem was by avoiding the authorisation procedure entirely, by undertaking 'assessments', as opposed to commencing an investigation.[243] FBI

Federal Interest (April 1976).

[236] The AG's Guidelines on General Racketeering, Enterprise and Domestic Security/ Terrorism Investigations (1989), ss.II.c.1.

[237] The AG's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, ss.VI (2002).

[238] FBI, *Domestic Investigations and Operations Guide* (16 December 2008) 21.

[239] *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection* (31 October 2003)11.

[240] Joint Inquiry Staff Statement, *Hearing on the Intelligence Community's Response to Past Terrorist Attacks against the US from February 1993 to September 2001*, Eleanor Hill, Staff Director, Joint Inquiry Staff, 8 October 2002.

[241] D.J. Solve, 'Reconstructing Electronic Surveillance Law' (2003-04) 72 *Geo. Wash. L. Rev*. 1264, 1298.

[242] See chapter 4 of this thesis.

[243] FBI Guidelines (2003) 4 which state that 'Since the legal predicate for mail openings, physical searches and electronic surveillance that require a judicial order or warrant generally entails more substantial information or evidence than would be available outside of a full investigation, the Guidelines specify that these methods are not available in preliminary investigations.

guidelines sanctioned the separation of the ss.214 and 215 powers from direct investigative activities by enabling the FBI to undertake assessments without any factual or suspicion-based premise.[244] There was, therefore, no required connection between intelligence concerning the individual's behaviour and the policing operation. In addition, unlike investigative uses of the powers, FBI agents were also entitled to commence an assessment without any need for specific authorisation and without reporting the fact to FBI headquarters or the Department of Justice.[245] Consequently, whilst the law-making subsystem continued to endorse the requirement for detailed intelligence of a threat before the FBI was authorised to use their powers the practical restriction that this placed on police conduct was limited by the modes of operation the police used.

Aside from conducting assessments the lack of an intelligence-based connection between the use of the suspicion-less surveillance powers and the individual targeted is further suggested by guidance for the FBI stating that the powers are 'concerned with the investigation of entire enterprises, rather than just individual participants and specific criminal acts'.[246] This broad conception of the threat separated use of the powers from the existence of detailed intelligence about specific terrorist operations. This development was recognised by the policing subsystem itself which noted, in 2005, that '[l]aw enforcement intelligence has changed dramatically since the terrorist attacks of September 11, 2001'.[247] The tie between intelligence, the start of an investigative activity and evidence of a crime was thus weakened significantly.[248] Executive guidance also confirmed that surveillance could be used to establish the scope of any suspected terrorist enterprise, and to collect information about the finances of the enterprise, its geographical parameters, and its past and future activities.[249] In accordance with such descriptions of executive expectations for police use of the surveillance powers the guidance stressed that instead of the surveillance powers being used on the basis of

[244] FBI Guidelines (2008) 17-18. See also ACLU, *The Persistence of Racial and Ethnic Profiling in the United States. A Follow-Up Report to the UN Committee of the Elimination of Racial Discrimination* (June 2009) 33-34.
[245] Guidelines 2008, 18-19, 28 and 35.
[246] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 2002) 15.
[247] D.L. Carter, 'The Law Enforcement Intelligence Function. State, Local and Tribal Agencies' (June 2005) 74(6) *FBI Law enforcement Bulletin* 1.
[248] ACLU, *Seeking truth from Justice, vol. 1. PATRIOT Propaganda: The Justice Department's Campaign to Mislead the Public about the USA PATRIOT Ac*t (July 2003) 8.
[249] The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 2002) 17.

detailed intelligence, they were a means of obtaining such intelligence.[250] These communications demonstrate that the prior to the police commencing surveillance failed to take into account the inherent limitations of these subsystems to adhere to these standards, as a result of its interpretation of the operational expectations placed on the police by the Executive and the law-making subsystem.[251]

The organisational shift marked by these new priorities,[252] meant that the FBI's policing aims focused on the high levels of use of the powers, as opposed to the link between the surveillance and searches conducted and positive law enforcement outcomes. The pursuit of these objectives is indicated by FBI guidance which notes that the information-seeking function of the surveillance powers is 'perhaps more important' than the other FBI functions of analysing, and even of responding to, information.[253] Indeed, the small likelihood of the powers actually contributing to arrests and convictions is suggested by the description of the suspicion-less powers as only likely to discover terrorists through 'serendipitous interception'.[254] FBI publications also note that in relation to national security policing while the 'investigation clearly constitutes part of the information collection process, the intelligence function often is more exploratory and broadly focused than a criminal investigation *per se*'.[255] The same FBI guidance urges law enforcement departments to 'focus on what they do not know',[256] and in so-doing appears to advocate the use of surveillance techniques without any link to suspected terrorist activity or received intelligence, despite this directly contradicting the intelligence-base on which the law-making subsystem expected the FBI to use the powers.

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[250] In particular, a statement made from a Hearing on the Intelligence Community's response to terrorism stated critically that 'foreign governments often knew more about radical Islamic activity in the United States than did the US Government' and that it was the task of the FBI to prioritise terrorism to uncover such information and intelligence itself, see Joint Inquiry Staff Statement, Hearing on the Intelligence Community's Response to Past Terrorist Attacks against the US from February 1993 to September 2001, Eleanor Hill, Staff Director, Joint Inquiry Staff (8 October 2002).
[251] M.T. McCarthy, 'Recent Developments: USA Patriot Act' (2002) 39 *Harv J. on Legislation* 435, 453.
[252] See US General Accounting Office, *FBI Reorganization, Initial Steps Encouraging by Broad Transformation Needed. Statement of David M. Walker, Comptroller General of the US* (21 June 2002) 4.
[253] M.E. Buerger and B.H. Levin, 'The Future of Officer Safety in an Age of Terrorism' (September 2008) 71(9) *FBI Law Enforcement Bulletin* 3.
[254] *ibid*, 6.
[255] D.L. Carter, 'The Law Enforcement Intelligence Function. State, Local and Tribal Agencies' (June 2005) 74(6) *FBI Law Enforcement Bulletin* 1, 3.
[256] *ibid*, 5.

6.4 Conclusion

This chapter has shown that police interpretation of operational flexibility as subjective discretion rendered the already limited statutory safeguards against misuse of the powers further reduced, whilst both the law-making and police subsystems maintained that the statutory safeguards represented strong protectors against any misuse, especially when coupled with expertise and professional decision-making skills of the policing subsystem. However. the policing subsystem interpreted the law-making subsystem's removal of the suspicion requirements as indicating its expectation that the powers would be deployed at the entire discretion of the policing subsystem.[257] Further communicative barriers between the law-making and policing subsystems arose from the fact that the law-making subsystems' expectations for circumspect deployment of the powers based on particularised intelligence regarding the terrorist threat were interpreted by the police as an expectation for high levels of pre-emptive use of the powers, which were, therefore, by necessity based on generalised intelligence relating to the national security threat. Each of these understandings aligned with popular and media demands for a 'community policing' response, whereby police behaviour is shaped by popular concerns.[258] Despite awareness inside and outside the policing subsystems of the risks arising from police popular responsiveness,[259] this chapter has shown that a number of communicative barriers arose between the police and the legislatures concerning how the powers should be deployed. These, alongside the lack of safeguards against misuse within the powers themselves, facilitated a racially uneven pattern of use of the powers.

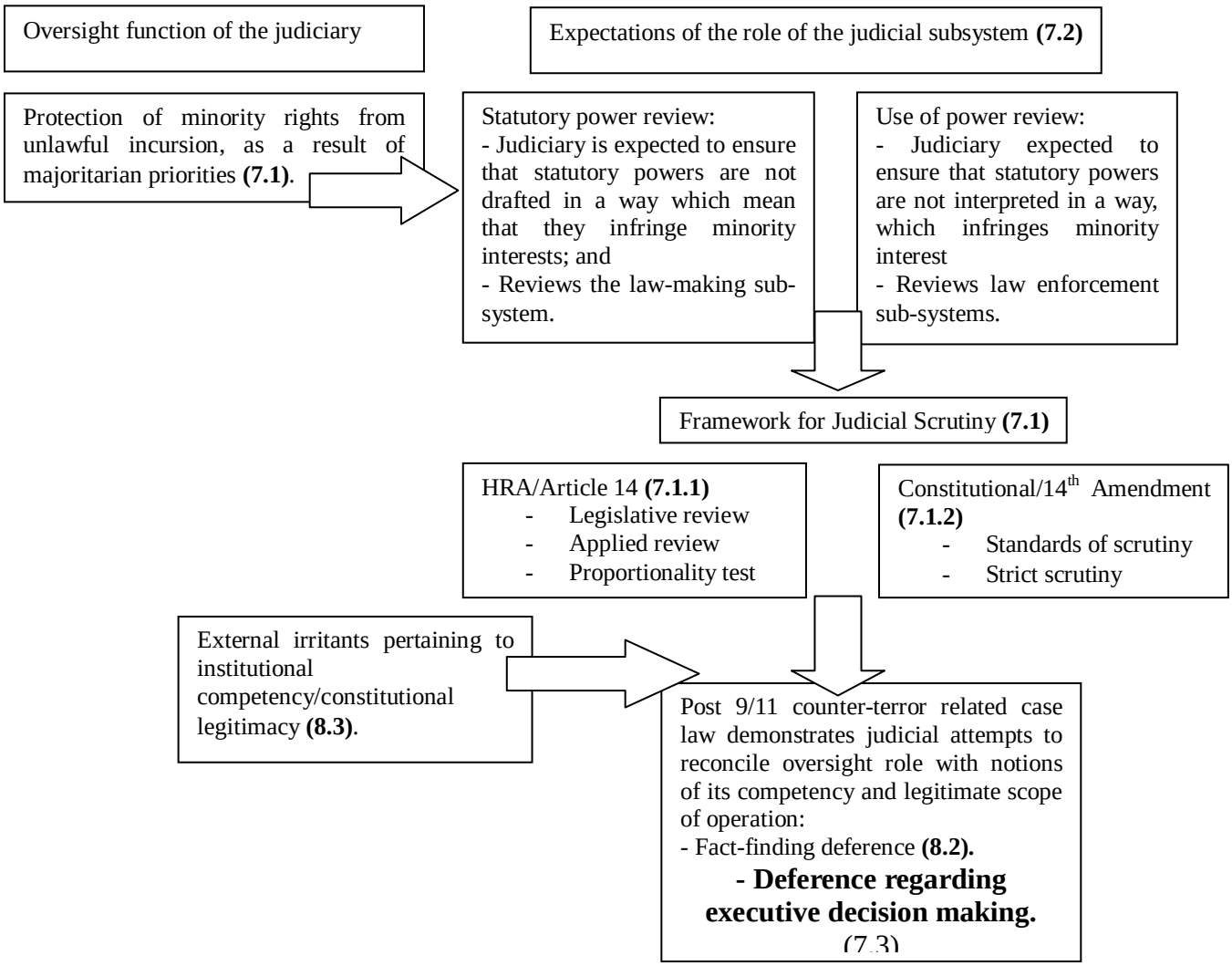
Despite the communicative barriers between the law-making and policing subsystems both subsystems expected that any misuse of the powers would be subject to judicial challenge and overturning.[260] Consequently, just as the law-making subsystem relied upon the operational expertise of the police in determining how and when the suspicion-less powers should be used both the law-making subsystem and the policing subsystem

[257] See NPIA, *Practice Advice on Stop and Search in Relation to Terrorism* (2008) 14, para 2.3.1. The Practice Advice also affords the police discretion in how they use the powers by advising that 'there are too many ways the powers can be used to allow them to be comprehensively listed here', 15, para 2.3.2.
[258] N. Fielding, *Community Policing* (Clarendon Press, 1995).
[259] M. Innes and N. Fielding, 'From Community to Communicative Policing: 'Signal Crimes' and the Problem of Public Reassurances' (2002) 7(2) *Sociological Research Online*.
[260] See, e.g., Lord Carlile's report in which he concludes that the evidence of the arbitrary use of s.44 'would not find favour with the courts', *Carlile, Review of the Use in 2005 of the Terrorism Act 2000* (May 2006) para 100.

cited the role of the judiciary as able to ensure the legality, legitimacy and fairness of the powers. As will be shown in chapters seven and eight, however, expectations that the judicial subsystem perform this role are not borne out either by past experience, nor were they fulfilled in relation to the s.44 and ss.214-215 powers. Again, a social systems-based explanation is offered for this mismatch between expectations of the role of the courts and the reality experienced.

Chapter Seven: The Judicial Sub-system Standards for Sub-system Behaviour: Normative versus Empirical

Fig. seven: Judicial subsystem – adjudication of rights-based claims



It is a tenet of social systems theory that subsystems exist in largely horizontal relationships with one another. In contrast, traditional conceptions of the relationship between the judicial subsystem and the other parts of the legal system consider them to exist in a more pyramidal relationship, with the judiciary as an 'overseer', regulating the mechanisms of government, including safeguarding against misuse of statutory powers.[1] For the purposes of this thesis, one relevance of this description, is that while the law-making and policing subsystems contributed to the *causes* of the racial effect of the stop, search and surveillance powers, the role of the judicial subsystem is more accurately

[1] M. Foucault, 'Governmentality' in M. Foucault (auth), J.D. Faubion (ed.), R. Horley *et al* (trans), *Power: the Essential Works of Foucault* (The New Press, 2000) 201-02.

characterised as *failing to prevent* this effect. Supporting this distinction Gavin Phillipson has suggested that 'the primary mover against civil liberties was Parliament or the Executive. All that happened was that the judges failed in a number of cases effectively to challenge them'.[2] Despite Phillipson's assertion that failing to stop this effect was *all* that the judiciary did, chapters seven and eight of this thesis demonstrate that the expectations of the law-making and policing subsystems that the courts would perform this rights-protecting function and the impact that this had on police and legislative behaviour meant that the judicial subsystem played an instrumental role in the racial effect of the stop, search and surveillance powers.

This chapter outlines the normal, constitutionally ordained role of the judiciary in both the US and UK, and argues that this centres on enforcing legislatively protected rights, including equal treatment.[3] The analysis of judicial subsystem behaviour in safeguarding against the racial effect of the counter-terrorism powers in chapter eight is undertaken against this framework. Before looking at how the judiciary did behave, this chapter considers the rights-safeguarding role that the law-making and policing subsystems in each country expected the judiciary to perform in reviewing police use of the counter-terrorism stop, search and surveillance powers. Finally, this chapter explores the proclivity of both the US and UK judicial subsystems to depart from their safeguarding functions, particularly based on notions of its institutional competency and constitutional legitimacy. This section draws on some of the themes previously explored in this thesis which equate legitimate behaviour with behaviour that corresponds with popular expectations, but also explores the arguments specific to judicial legitimacy, surrounding expectations of judicial deference/ activism in relation to law-making decisions. These competencies arise both from the judiciary itself and also from external irritants observed and interpreted by the judiciary.

7.1 The Constitutional and Rights-Protecting Role of the Courts

In the US and UK the role of the judiciary involves bridging the gap between law and

[2] G. Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act Era' (2007) *Current Legal Problems* 40, 60.
[3] See fig. seven.

society, and in so doing upholding the rule of law and the legitimacy of democracy itself.[4] In order that the judicial subsystem can perform this function social and political questions are translated into legal ones, which are resolved in accordance with distinct constitutional and legal frameworks in the US and UK. Within each country's legal system judges are relied upon to demonstrate 'practical wisdom': balancing legal expertise with understanding of context and compassion with detachment, in order to evaluate different arguments on the basis of impersonal reasons and values.[5] Within the UK's constitutional model of parliamentary supremacy three characteristics are commonly attributed to the judiciary. These are: firstly that, in line with the principle of the separation of powers and classical constitutional theory, the courts are limited to the settlement of specific disputes by applying positive law;[6] secondly, that the judiciary functions as an important actor in a continuous multi-participant process or network of decision-making; and thirdly, that the courts play a central role in protecting and promoting core societal values.[7]

In the US, federal courts are vested under the Constitution with the authority of the supreme determinant of the law, which includes the interpretation of statutes and common law.[8] The court's supremacy in legal interpretation is only rebutted where a particular constitutional provision entrusts Congress or the President exclusive and conclusive power to interpret and enforce it.[9] Crucially, the US judiciary has a whole different power from that of the UK courts, in that it can strike down legislation. The UK courts, by contrast, only have interpretive and declaratory powers. The UK doctrine of parliamentary supremacy affords Parliament the ultimate law-making authority, and a statute found to be inconsistent with Convention rights remains valid and of full effect.

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[4] A. Barak, 'Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy' (2002) 116 *Harv. L. Rev* 16, 25-26.

[5] A.T. Kronman, *The Lost Lawyer* (Harvard University Press, 1995) 66-74, 117-18. See also O. Fiss, 'The Supreme Court 1978 Term: The Forms of Justice' (1979) 93(1) *Harvard L. Rev.* 13-14.

[6] R. Warner, 'Adjudication and Legal Reasoning' in M.P. Golding and W.A. Edmondson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Online, 2004).

[7] M. Cohn and M. Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 *Canadian Journal of Law and Jurisprudence* 333.

[8] US Constitution, art.III, s.1: 'The judicial power of the United States, shall be vested in one supreme Court and in such inferior Court as the Congress may from time to time ordain and establish'. See also *Worcester v Georgia*, 31 US 515 (1932) which President Jackson claimed did not bind his actions and Abraham Lincoln's denouncement of the court's ruling in *Dred Scott v Sanford*, 60 US 393 (1857); and D.M. O'Brien, *Constitutional Law and Politics, vol. 1: Struggle for Power and Government Accountability* (Norton and Co., 2005).

[9] The Federalist No. 78 (Madison) 524-25. See also R.J. Pushaw, 'Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption"' (2002) 80 *NCL Rev* 1165.

By contrast, within the US 'it is emphatically the province and duty of the judicial department to say what the law is' and a statute found by the Courts to be inconsistent with the Constitution can be rendered null and void.[10]

In both the US and UK as well as the judicial function being affected by the relative hierarchy of the different branches of government it is also shaped by their degree of separation.[11] The rationale behind the separation between the branches is the need to maintain a system of checks and balances to prevent any single government branch from being able to wield unchecked power over the others.[12] Within this constitutional model the existence of an independent judiciary is seen as a necessary pre-requisite for upholding the rule of law. Despite constitutional and structural differences in each country, therefore, the judiciary is expected to operate as a neutral, adjudicating forum, safeguarding against the effects of any decision-making in the law-making subsystem, which departs from the normal range of considerations, as well as any unintended outcomes arising from the implementation of legislative provisions.[13] The judiciary is deemed to be a more competent forum for resolving such matters than either the subsystem out of which the legal measure originated, or through which it was implemented, because it has an ability to engage in an impartial contemplation of the arguments before it. The other systems may be unable to do because of contextual influences on them. This function is particularly important in reviewing the behaviour of the law enforcement subsystem, which should be undertaken 'by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime'.[14] Through the separation of powers, therefore, there is a distinction between matters which ought to rightly be within the jurisdictions of the

[10] *Marbury v Madison*, 5 US 137 (1803) per John Marshall J. An even stronger articulation of the strength of the courts to strike down offending legislation was expressed by John Marshall in *Marbury* which maintained that under the doctrine of 'Constitution Supremacy' any such conflicts should result in the court applying the Constitution and thereby striking down the law. This argument has, however, been labelled as fallacious by Alexander Bickel, see A.M. Bickel, *The Least Dangerous Branch* (2nd ed Yale University Press, 1986) 8-10.

[11] For judicial definitions of this doctrine see *ex p. Fire Brigades*, per Lord Mustill, para 567; and

[12] C.R. Sunstein, *The Partial Constitution* (Harvard University Press, 1993) 7-13. The doctrine of the separation of powers was originated by Aristotle before gaining widespread constitutional influence through the writings of Montesquieu and John Locke. See C. de Montesquieu (C.W. Carrithers (ed.)), *The Spirit of Laws, A Compendium of the First English Edition* (University of California Press, 1977); and J. Locke, *Second Treatise of Civil Government*, ss.143, 144, 150 and 159, http://www.constitution.org/jl/2ndtreat.htm, accessed 30.07.2011.

[13] Alexis de Tocqueville has noted that 'scarcely a political question arises in the United States that is not resolved sooner or later into a judicial question', A. de Tocqueville, *Democracy in America* (1984) 280.

[14] *Johnson v United States* 33 US 10 (1948) at 13-14.

courts and those which are matters for political determination.[15]

In undertaking their adjudicatory function, US and UK courts have a central role in upholding individual rights and liberties, and in so-doing are charged with interpreting the boundaries of legal protection for individual rights against government actions.[16] This judicial function is part of the 'judicialisation of rights'.[17] In the UK the key individual rights instruments informing judicial decision-making are the Human Rights Act 1998 ('HRA') and the ECHR, and in the US it is the Bill of Rights. These regimes form the legal basis for the operational expectations held by the law-making and policing subsystems, pertaining to the judiciary's role in protecting individuals against infringement of their rights. In particular, both HRA and Bill of Rights include equal treatment and protection requirements, which the courts are charged with applying. System expectations regarding the nature of these provisions and judicial implementation of them, are considered in the following sections.

7.1.1 The UK Human Rights Act and Article 14 ECHR

The legal framework for rights protection under the HRA mirrors the ECHR's distinction between absolute,[18] narrowly qualified[19] and generally qualified rights.[20] In claims alleging the infringement of an absolute right judicial consideration is focused on whether court accepts that the State conduct in question engages the rights as there are no exceptions to these. Narrowly qualified rights require the court to determine both whether the State conduct engages the rights, but then to consider whether any of the specific exceptions to the right apply. In determining whether one of the generally qualified rights has been unlawfully infringed the court also considers whether the infringement is proportional. The court, then, is then charged with determining whether this infringement is justified on the basis of its 'proportionality'.[21] Prior to the enactment

[15] See, e.g., D.R. Williams, 'After the Gold Rush – Part II: Hamdi, the Jury Trial and Our Degraded Public Sphere' (2008-09) 113 *Penn St. L. Rev* 55, 109.
[16] J. Jowell, 'Judicial Deference: Servility, civility or institutional capacity?' [2003] *Public Law* 597.
[17] I. Cram, 'Judging Rights in the United Kingdom: the Human Rights Act and the New Relationship between Parliament and the Courts' (2006-07) 12 *Rev. Constitutional Studies* 53, 62.
[18] E.g., ECHR, art. 3.
[19] E.g. ECHR, arts. 2 and 5.
[20] E.g. ECHR arts. 8 to 11 (inclusive).
[21] *Belgian Linguistics (No.2)* held that' the principle of equality of treatment is violated it the distinction has no objective and reasonable justification' (1968) 1 EHRR 252 at para 34. Applied in *Petrovich v Austria*

of the HRA the court's review of public authority and governmental decisions undertaken in accordance with the *Wednesbury* doctrine of reasonableness.[22] The *Wednesbury* standard restricted judicial intervention to clearly unreasonable administrative action and in so-doing maintained a high level of separation between judicial, legislative and executive branches of government.[23] By contrast, the HRA proportionality assessment evaluates whether the measure pursues a legitimate aim;[24] and whether it is a proportionate means of achieving that aim. The justification inquiry read into article 14 by the European Court in *Belgian Linguistics (No.2)* requires the State to demonstrate that the relevant measures do not produce discriminatory effects that are disproportionate to the advancement of government interests which prompted the measures.[25] In order that a measure can be defended against a finding of discrimination, therefore, the societal or governmental benefit must be proportionate to its negative individual or group impact.[26] Judicial understanding and application of proportionality is, therefore, central to the parameters of the protection afforded by constitutionally protected rights, such as the right to equal enjoyment of protected rights under article 14.[27]

Domestic incorporation of the protections within the ECHR through the HRA has required the UK courts to establish its own test of proportionality.[28] The European test of proportionality was interpreted by the UK courts through the pre-HRA case of *de Freitas.*[29] The *de Freitas* judgment articulated the determinants of proportionality as being whether: the legislative objective is sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objectives are rationally

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(1998) 33 EHRR 207; *Gaygusuz v Austria* (1997) 23 EHRR 364; See also J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell, 2000) C14-20-C14-23.

[22] *Associated Provincial Picture House v Wednesbury Corp* [1948] 1 KB 223.

[23] *ibid.*

[24] The ECtHR has only very rarely failed to fine a legitimate aim, including within: *Darby v Sweden*, application No. 11581/85 (23 October 1990) para 33; and *Thlimmenos v Greece* (2001) EHRR 411 para 47. Counter-Terrorism measures are unlikely not to meet this standard because of the important objective of safeguarding national security, see *Klass v Germany* (1978) 2 EHRR 214, para 46.

[25] *Belgian Linguistics (No.2)* (1968) 1 EHRR 252 at para 10. See also *Ghaidan* at para 133.

[26] A. McColgan, 'Discrimination Law and the Human Rights Act' in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (OUP, 2001) 232.

[27] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 144; S. Livingstone, 'Article 14 and the Prevention of Discrimination in the European Convention on Human Rights' (1997) 1 *EHRLR* 25, 32-33.

[28] D. Keene, 'Principles of Deference under the Human Rights Act' in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 206-12.

[29] *De Freitas v Secretary of Agriculture* [1999] 1 AC 69. See also Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999) 107.

connected to it; and the means used to impair the right to give freedom are no more than is necessary to accomplish the objective.[30] Despite subsequent application of the *de Freitas* test[31] it has been criticised as not constituting a comprehensive test of proportionality.[32] This perceived failing was addressed in the case of *Huang*, in which the court held that assessing proportionality required a fourth question on top of the three established limbs, which considered the balance struck between different interests.[33] The Court in *Huang*, however, failed to indicate how this 'balance' should be arrived at, including determining which values are relevant and the weight that should be attributed to competing factors. As such, *Huang* acts more as a restatement of the balance intrinsic in any assessment of proportionality, as opposed to a refinement or clarification of the substance of the test itself. This failing has led to on-going uncertainty as to the role and meaning of 'balance' in an objective judicial assessment of proportionality.[34]

As well as some general uncertainty about the substance of judicial review regarding the HRA, and protection of individual rights, judicial enforcement of rights to equal treatment by racial minorities have presented some particular challenges.[35] These are exacerbated in cases also invoking issues relating to national security. Firstly, whilst domestic legislation prohibiting racial discrimination does extend to public authorities including the police,[36] it contains a blanket exemption for justified acts done for the purpose of safeguarding national security.[37] This standard, coupled with the judicial proclivity towards deferring to the executive's assessment of justifiable action, for protecting national security, effectively removes domestic race relations legislation as a potential basis for challenging the racial effect of counter-terrorism measures. The result is that any claims of this nature are largely confined to the framework of article 14 ECHR. Despite the importance of this avenue of protection, however, the UK courts have been

[30] *De Freitas*, at 80. For an evaluation of the relationship between the *de Freitas* and *Wednesbury* tests see M. Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 *CLJ* 301.
[31] See, e.g., *R (on the application of Daly) v Secretary of State for Home Department* at 27, per Lord Steyn.
[32] R. Clayton and H. Tomlinson, *The Law of Human Rights* (OUP, 2000) 278.
[33] *Huang v Home Secretary* [2007] UKHL 11 at 19. See also *R (Samaroo) v Secretary of State for the Home Department*, [2001] EWCA Civ 1139 at 67, per Dyson LJ; and *Poplar Housing*, at 69, per Lord Woolf.
[34] See, e.g., the leading judgment in *R (SB) v Governors of Denbigh High School* [2006] UKLHL 15 at 30-34 (per Lord Bingham) which noted the necessity to balance and judge proportionality objectively, but then rejected the appeal, relying solely on the strength of the justification for the challenged measures, without balancing these against the impact on the claimant.
[35] As anticipated before the enactment of HRA see, e.g., M. Koskenniemi, 'The Effects of Rights on Political Culture' in P. Alston (ed.), *The EU and Human Rights* (1999) ch.2.
[36] RRA, s.19B.
[37] TA, s.42.

criticised for their limited engagement with Convention issues, and showing a particular 'structural passivity' to rights protection, where they fear being seen as acting outside a traditional judicial role.[38] The ECHR/HRA protections, themselves also have characteristics which limit their potential utility to a litigant. Firstly, the nature of the proportionality test focuses judicial decision-making on governmental justifications for measures. However, because the court has no means of qualitatively assessing national security claims, they are liable to be treated as an all or nothing justification. Consequently, because the court cannot evaluative the claim of the evidence upon which the claim is based, it perceives itself as having to either reject it, or wholly defer to the government. Any balance between rights and security is, therefore, invariably going to weigh heavily in favour of national security concerns. These factors contribute to the arguably low human rights hurdle created by the HRA and imposed on courts, with large numbers of caveats and exemptions, especially in relation to national security.[39]

A further limitation to the protective value of article 14 is that it is only activated once another protected right has been invoked, albeit that it does not require that the other right has been unlawfully infringed.[40] In other words, article 14 is 'parasitic' on one or more free-standing rights.[41] The effect of this is that article 14 has been described as a 'second class' status,[42] despite there being nothing within the Convention rights that indicates a hierarchy to their protection.[43] Protocol 12 to the ECHR does provide a free-standing equality guarantee within European Law thus strengthening the equality duty, but the UK is not currently a signatory to it.[44] The comparator requirement within article 14 has also been linked to the weakness of the provisions in protecting individuals against unequal treatment, because of the judicial tendency to confuse the comparator with the

[38] C. Gearty, 'Are Judges Now Out of their Depth?' JUSTICE Tom Sargant Memorial Annual Lecture (October 2007) 4.
[39] H. Fenwick, 'The ATCSA: A Proportionate Response' (2002) 65(5) *MLR* 724.
[40] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at 10-11.
[41] See, e.g., *Whaley v Lord Advocate* 2004 SLT 425, para 95. See also *Chassagnou v France* (1999) has 'no independent existence', para 18; and *Clarke v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 800, at para 5.
[42] L. Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights: A Second Class Guarantee?' (2002) 2 *Baltic Yearbook of International Law* 71.
[43] H. Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act' (2004) 67 *MLR* 889, 906.
[44] See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=7/6/2009&CL=ENG, accessed 27.07.2011.

justification test in determining the proportionality of a measure.[45] The amalgamation of these distinct limbs risks the court assessing whether the government justification for using the proxy matches its actual use, as opposed to evaluating whether the proxy itself was justified.[46] This mode of adjudication, therefore, fails to uncover the effects of decision-making processes based on discriminatory and unjustifiable presumptions about people.[47]

By giving the courts the duty to interpret away human rights incursions not necessarily implied by statutory provisions,[48] Parliament effectively charged the judiciary with assessing the prima facie case of infringement without reference to governmental policy objectives.[49] Instead, the court's focus in the first instance was expected to be on the effect of the legislative provision, as opposed to the provision itself or its motivating force.[50] Only an analysis of circumstances other than government aims, however, will reveal the full extent of any discriminatory effects of a measure, including those that are unanticipated or arise from unquestioned social behaviours.[51] Despite this, the UK courts have shown some hesitancy in adopting this new focus and have also failed to revise the range of evidential sources through which they assess the alleged infringement.[52] The HRA provides the statutory framework through which the courts oversee the operation of the legislative, the police, and protect individual rights from unlawful incursion. 9/11 provided an unexpectedly early test of the framework, and the court's application of it.[53]

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[45] A. Baker, 'Article 14 ECHR: a protector, not a prosecutor' in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007) 348, 363.
[46] See, e.g., judicial reasoning in *R(Carson) Secretary of State for Work and Pensions* 3 All ER 984, paras 61-67; [2003] EWCA Civ 797, para 61-63 in which, instead of evaluating justification of the measure Lord Justice Laws merged the comparator and justification considerations and based the court's judgment of the state's rational for the decision, as opposed to the appropriateness of the proxy deployed. See also *Pearce v Mayfield Secondary School Governing Body and Attorney General for Scotland v MacDonald* [2003] UKHL 34 [2003] IRLR 512.
[47] A. McColgan, 'Discrimination Law and the Human Rights Act' in T. Campbell, K.D. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (OUP, 2001) 232.
[48] HRA, s.3(1).
[49] A. Baker, 'Comparison tainted by justification: against a "compendious question" in Article 14 discrimination' [2006] *Public Law* 476, 487.
[50] S. Fredman, 'Equality: A New Generation?' (2001) 3(2) *Industrial Law Journal* 145.
[51] A. Baker, 'Comparison tainted by justification' 497.
[52] A. Baker, 'A Protector not a Prosecutor' 349.
[53] Justice, *The Future of the Rule of Law* (October 2007) 19.

7.1.2 The US Constitution and the 14th Amendment

The ability of the US judiciary to determine the meaning and scope of statutory provisions is premised upon its application of the conditional and unconditional rights protections, set down in the US Constitution. The positive protection of individual rights within the country's core legal document has been described as withdrawing such issues from the vicissitudes of political controversy, and placing them beyond the reach of majorities.[54] In adjudicating alleged infringements of conditionally protected rights the courts must strike a balance between governmental and individual interests. This judicial balancing of individual rights and governmental aims is an inherent part of judicial interpretation of the equal protection guarantee, contained within the Equal Protection Clause ('EPC') of the 14th Constitutional Amendment.[55]

The Equal Protection Clause provides that 'no state shall … deny to any person within its jurisdiction the equal protection of the laws'.[56] The Clause originally afforded equality of treatment under the law to all US citizens, building on the narrow interpretation of the articulation of equality within the Declaration of Independence.[57] The protection was later afforded irrespective of citizenship, thus applying the Equal Protection Clause 'to all persons within the territorial jurisdiction, without any regard to any differences of race, color, or of nationality',[58] and 'whatever his status under immigration law'.[59] Whilst equality is at the heart of US constitutional law it has also proved to be an elusive concept for the courts to identify.[60] Judicial interpretation of the EPC has, therefore, been important in realising the protective value of the 14th Amendment. This was seminally demonstrated by Justice Stone's famous footnote in *United States v Carolene Products Co.* decrying prejudices against discrete and insular minorities that curtail the operation of political processes ordinarily to be relied upon to protect minorities.[61] The *Carolene* judgment has been described as having laid the seed for modern court analysis and

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[54] *West Virginia State Board v Barnette*, 319 US 625 (1942) at 638 (per Justice Jackson). See also J. Rawls, *A Theory of Justice* (Clarendon Press, 1972).
[55] 14th Amendment US Constitution (1886).
[56] *ibid*, sec.1.
[57] The Declaration of Independence states that: 'We hold these truths to be self-evident: That all men are created equal. That they are endowed by their creator with certain inalienable rights'(1776).
[58] *Yick Ho v Hopkins*, 118 US 356, 369 (1886).
[59] *Plyler v Doe*, 457 US 202, 210 (1982). See also *Zadvydas v Davis*, 533 US 678, 693 (2001); *Kwong Hai Chew v Colding*, 344 US 590, 596-97, n. 5 (1953); and *Shaughnessy v Mezei*, 345 US 206, 212 (1953).
[60] N. Devins and D.M. Douglas, *Redefining Equality* (OUP, 1998).
[61] *United States v Carolene Products Co*., 304 US 144, 152-53 (1938) ft nt 4.

application of the EPC.[62]

Infringement of the 14th Amendment requires a finding of intentionally discriminatory behaviour,[63] or an adverse effect coupled with discriminatory intent.[64] The importance of intent means that statistical evidence of disparate impact is rarely held to be sufficient to show that 'the decision makers in the case acted with discriminatory purpose'.[65] Further, where race is one of a number of factors behind the unequal treatment even if it is the dominant factor prompting or determining the unequal treatment, it remains compliant with the constitutional protection, providing that some of those criteria are legitimate and non-discriminatory.[66] Even where the US courts have not adhered to the intent requirement in EPC-based cases the Supreme Court has developed a high threshold standard for establishing the existence of discrimination.[67] In *United States v Armstrong*, for example, the Court held that to establish that capital punishment was racially discriminatory the claimants' would have to 'produce some evidence that similarly situated defendants of other races could have been prosecuted and were not' to support their claim that they had been singled out for prosecution on the basis of their race'.[68] The judicial subsystem itself has recognised that this is a high standard for any litigant to fulfil.[69]

In the event that the requisite intent or disparate impact is found the court must then determine whether the infringement is justified. The courts apply one of three levels of judicial scrutiny in order to assess justifications for infringing the EPC, namely: rational

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[62] D.M. O'Brien, *Constitutional Law and Politics, vol. II: Civil Rights and Civil Liberties* (W.W. Norton, 2005) 1326-27.

[63] See, e.g., *Brown v Oneonta*, 221 F. 3d 329, 337 (2nd Cir 1999) citing *Yick Wo v Hopkins*, 118 US 356, 373-74 (1886), in which the police stopped and searched every black student on a college campus, and inspected their hands for cuts, in response to a witness description (at 334). The court ruled that the police was 'race-neutral' despite race being the single witness-described characteristic upon which the search was made. The court ruled that the police was 'race-neutral' despite race being the single witness-described characteristic upon which the search was made (at 337). See also *Washington v Davis*, 426 US 229, 239 (1976); *City of Mobile v Golden*, 446 US 555 (1980); *Memphis v Greene*, 451 US 100 (1981); and *City of Richmond v Croson*, 488 US 469 (1989).

[64] *Brown v City of Oneonta*, citing *Village of Arlington Heights v Metro. Housing Development Corporation*, 429 US 252, 264-65 (1977).

[65] *McCleskey v Kemp*, 481 US 279, 292-93 (1987).

[66] *United States v Travis*, 62 F.3d (1995) at 174.

[67] See, e.g., *Marshall v Columbia Lea Reg'l Hosp* 345 F.3D 1157 (10th Cir. 2003); *Chavez v Ill State Police*, 251 F.3d 612 (7th Cir. 2001); *United States v Mesa-Roche*, 288 F. Supp 2d 1172 (D. Kan. 2003); *Rodriguez v Cal. Highway Patrol*, 89 F. Supp 2d 1131 (ND Cal. 2000).

[68] *United States v Armstrong*, 517 US 456, 469 (1996).

[69] See, e.g., *Chavez v Ill. State* 251 F.3d 612, 636 (7th Cir. 2001); *United States v Mesa-Roche*, 288 F.Supp 2d 1172, 1184-85 (D. Kan. 2003).

relationship scrutiny; intermediate scrutiny; and strict scrutiny.[70] Rational relationship scrutiny requires that the measure under consideration is rationally related to a legitimate governmental interest,[71] which may be either real or hypothetical.[72] This form of review is predominantly used in assessing government economic policies and entails a strong presumption of the constitutionality of the provision.[73] Intermediate scrutiny requires the court to consider whether the law or policy being challenged furthers an important government interest in a way that is fairly and substantially related to the achievement of that interest.[74] This form of scrutiny is used in claims such as those based upon gender inequality.[75] The final level of review, strict scrutiny, is applied to differential treatment on the grounds of 'suspect categories', such as race-based distinctions.[76] The strict scrutiny test requires the court to consider whether the measure constitutes a justifiable response to a 'compelling state interest'.[77] The strict scrutiny test is usually interpreted as meaning that the provision must be 'narrowly tailored' and finite in duration so the impact on minority individuals is no more than is necessary to pursue the governmental interest.[78] This level of scrutiny is intended to create a strong presumption against the permissibility of unequal treatment based on so-called 'suspect categories' in virtually every aspect of US law.[79] The high hurdle for validity represented by strict scrutiny has even resulted in declaring racial classifications intended to benefit underrepresented minority groups, such as those used in affirmative action programmes, as unlawful.[80] The strict scrutiny standard of review necessitates that the court's focus is on the governmental motivation behind the policy, to determine whether it is unlawful or not, as opposed to its effect.[81]

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[70] A.W. Heringa, 'Standard of Review for Discrimination' in T. Loenen and P. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives* (Kluwer International, 1999) 25, 26-27.
[71] Originated in *McCullock v Maryland*, 17 US 316 (1819), but labelled as such in *United States v Carolene Products Co.*, 304 US 144 (1938) distinguishing rational review from other levels of scrutiny.
[72] K.M. Sullivan and G. Gerald, *Constitutional Law* (16th ed., Foundation Press, 2007) ch.9.
[73] Applied in *City of Cleburne v Cleburne Living Center Inc*., 473 US 432 (1985); *Plyer v Do,* 457 US 202 (1982); and *Romer v Evans,* 517 US 620 (1996).
[74] *Wengler v Druggist Mutual Insurance Co.,* 446 US 142, 150.
[75] *Craig v Boren* 429 US 190 (1976) and *Mississippi University for Women v Hogan,* 458 US 718 (1982).
[76]Standard applied first in *Hirabyashi v United States,* 320 US 81 (1943) and *Korematsu v United States,* 323 US 214 (1944), but first labelled 'strict scrutiny' in *Loving v Virginia,* 388 US 1 (1967). The present form of the doctrine developed out of *Palmore v Sidoti*, 466 US 429 (1984).
[77] See *Grutter v Bollinger*, 539 US 326 (2003).
[78] Justice O'Conor in *Adarand v Peña* , 515 US 200 (1995), paras 212-39.
[79] G. Chin, 'Segregations Last Stronghold: Race Discrimination and the Constitutional Law of Immigration' (1998) 46 *UCLA L. Rev* 1, 34; and A. Chen, 'The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests' (1995) 81 *Iowa L. Rev* 261, 298.
[80] See, e.g., *Adarand Constructors v Peña*, 515 US 200 (1995); *Gratz v Bollinger*, 539 US 244 (2003).
[81] See *Washington v Davis* 426 US 229 (1976)*; Brown v City of Oneonta,* 235 F.3d 769 (2d Cir. 2000)*;* and

Claims of discriminatory policing under the EPC have been particularly difficult to pursue through the courts.[82] One reason for this is that whilst express racial classifications are rare, without one, it is necessary for a claimant to prove 'discriminatory purpose'.[83] This pre-condition effectively prevents constitutional challenges to racial disparities where invidious bias is difficult to establish,[84] and without comprehensive data indicating the impact on minority communities.[85] Even where such data are available and accessible, two significant hurdles in themselves,[86] the intent standard has been interpreted as necessitating a state of mind which is approaching malice and judicial determination that the potentially discriminatory measure should have been adopted 'because of' and not merely 'in spite of' the unlawful outcome.[87] A central challenge to showing this is the need to present adequate proof, as the police are unlikely to openly identify their actions as racially motivated, or make publicly available internal documents that would show discriminatory intent.[88] Litigants can attempt to demonstrate intent through statistical evidence of disparate impact, but courts have been reluctant to accept this form of proof in the context of policing claims.[89] These reasons have contributed to the lack of development of equal protection in this area.[90] Some of the difficulties faced by litigants when asserting a claim of discrimination under EPC are demonstrated by the

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United States v Travis 385 US 491 (1995).

[82] See, e.g., D.A. Sklansky, 'Traffic Stops, Minority Motorists and the Future of the Fourth Amendment' (1997) *Sup. Ct. Rev.* 271, 326; and J.A. Larrabee, '"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice' (1997) 6 *J.L. and Policy* 291, 295.

[83] *Washington v Davis*, 426 US 229, 239-42 (1976) and reasserted in *Village of Arlington Heights v Metro Housing Development Corporation*, 429 US 252, 265 (1977). This standard has been followed by lower courts see, e.g., *Brown v City of Oneonta*, 221 F.3d 329, 337 (2d Cir 2000); *United States v Travis*, 62 F.3d 170, 174 (6th Cir. 1995); *United States v Weaver*, 966 F.2d 391, 394 (8th Cir 1992).

[84] O.C.A. Johnson, 'Legislating Racial Fairness in Criminal Justice' (2007-08) 39 *Colum. Human Rights Law Rev*. 233.

[85] ACLU, *The Persistence of Racial and Ethnic Profiling in the United States. A Follow-Up Report to the UN Committee of the Elimination of Racial Discrimination* (June 2009).

[86] Therefore requiring rights groups to file Freedom of Information Act requests which have frequently resulted in significant time delays as requests are refused and even where granted evidence has to be assembled. Activities of ACLU suggest that such information has only recently been being sought, see ACLU, 'ACLU Seeks Records about FBI Collection of Racial and Ethnic Data in 29 States' (27 July 2010).

[87] *Administrator of Massachusetts v Feeney*, 442 US 256 (1979) at 279; and *Johnson v Wing*, 178 F.3d 611, 615 (2d Cir. 1999).

[88] I. LaFavre, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed., 2004) ss1.4(f) at 148; J.A. Larrabee, '"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice' (1997) 6 *J.L. and Policy* 291, 305-09.

[89] J.A. Larrabee, '"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice' (1997) 6 *J.L. and Policy* 291, 309-11; S.R. Gross and K.Y. Barnes, 'Road Work: Racial Profiling and Drug Interdiction on the Highway' (2002) 101 *Mich L. Rev* 651, 741-44.

[90] P. Shinka, 'Police Use of Race in Suspect Descriptions: Constitutional Considerations' (2006-07) 31 *NYU Rev. L. and Social Change* 131, 171; and S.R. Gross and K.Y. Barnes, 'Road Work: Racial Profiling and Drug Interdiction on the Highway' (2002) 101 *Mich L. Rev* 651, 741.

Second Circuit Court's opinion in *Brown v Oneonta*.[91] The Court ultimately declined to apply the EPC to the police conduct after finding that the plaintiffs had not identified a law or policy containing an express racial classification.[92] Indeed, the Court asserted that police activity based on race might be more effective when undertaken in relation to racial groups that comprise a minority in a community, because there would be fewer individuals fitting the description and, therefore, fewer potential suspects to eliminate.

The Court distinguished *Brown* from the decision in *United States v Avery*, which had applied equal protection guarantees to claims of race-based police actions,[93] because although both scenarios were based on a suspect description in *Brown* the officers were given, and therefore had no control over, the nature of the 'tip' they were provided with.[94] In declining to find breach of the EPC the Court stated that the role of the judiciary in such matters 'is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the EPC'.[95] The endorsement of the use of race by the police in *Brown* has been described as showing that 'the centrality of race in suspect descriptions represents a form of racial discrimination so ingrained ... as to be immune to legal remediation and beyond moral recognition … signal[ing] the bluntness not only of our doctrinal tools, but of our moral assessments as well'.[96]

Judicial reluctance to move away from considering motive as opposed to effect and utility of police powers further heightens the barriers to establishing breach of the 14th amendment in the context of counter-terrorism law enforcement.[97] In particular, in cases involving race-based profiling the primary statutory provision enabling victims of alleged discrimination to file criminal charges requires that the law enforcement officer specifically intended to violate the individual's constitutional rights, as opposed to merely intending to commit the acts which resulted in the violation.[98] The intent requirement has

[91] *Brown v Oneonta*, 221 F.3d 329, 336-39 (2nd Cir, 2000).
[92] *ibid* at 337.
[93] *United States v Avery*, 137 F.3d 343, 354-55 and n.5 (6th Cir. 1997) applying *Whren v United States.*
[94] *Brown v Oneonta* 338, n.8.
[95] *ibid*, at 338.
[96] R.R. Banks, 'The Story of Brown v City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing under the EPC' in M.C. Dorf (ed) *Constitutional Law Stories* (2004) 223, 247.
[97] M-F Cuellar, 'Choosing Anti-terror targets by national origin and race' (2003) 6 *Harvard Latino L. Rev* 31.
[98] 18 U.S.C. ss.242 and *Screws v US* 325 IS 91, 101 (1945). See also M.J. Pastor, 'A Tragedy and a Crime?:

been described as meaning that the Supreme Court can 'in every practical sense … [turn] a blind eye to the use of race as a central factor in focusing police suspicion and activity'.[99] Allegations of discrimination, which result from informal ethnic profiling are, therefore, very difficult to prove in a judicial setting. Further, even if a claimant manages to establish the requisite intent, an officer's reasonable belief that his conduct is reasonable under the circumstances constitutes a defence to any charge pertaining to his rights-infringing conduct.[100] The intent requirement behind the 14th amendment also fails to recognise and protect against the more subtle forms of discrimination that can lead to unequal treatment and results, such as the unquestioned adherence to formally race-neutral practices, which nevertheless have a racially-uneven effect.[101] The effect of intent in discouraging plaintiffs to bring article 14 claims is likely exacerbated because breaches of other constitutional protections are determined without recourse to individual motivations, including the 4th amendment protection against unreasonable searches and seizures.[102] There are, therefore, strong incentives for plaintiffs to avoid claiming on 14th amendment grounds, in favour of restricting their claims to breach of other protected rights.

The causes of inaccessibility within the judicial process are particularly acute at the intersection of racial equality and national security, as a result of the sensitive nature of both subjects. Rights groups, which are largely responsible for bringing such claims have reported a number of difficulties litigating issues in which race-based issues intersect with other rights, such as privacy. This has encouraged these groups to focus on challenging the powers on the basis of more broadly applicable rights, such as the right to privacy. Further, in undertaking such litigation interest groups frequently start by having to counter cases that do not fit clearly in with their own arguments.[103] Group led claims can also face potential difficulties as a result of any negative judicial finding in terms of the

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Amadou Diallo, 'Specific Intent and the Federal Prosecution of Civil Rights Violations' (2002/03) 6 *NY University J. Legis and Pub Policy* 171,

[99] D.A. Harris, *Profiles in Injustice. Why Racial Profiling Cannot Work* (The New Press, 2002) 224.

[100] See USCCR, *Revisiting Who is Guarding the Guardians: A Report on Police Practices and Civil Rights in America* (2000).

[101] R.R. Banks and R. Thompson-Ford, '(How) Does Unconscious Bias Matter? Law, Politics and Racial Inequality' (2008-09) *Emory L.J*. 1053, 1095.

[102] *Whren v United States*, 517 US 806 (1996).

[103] See S.L. Wasby, 'Civil Rights Litigation by Organisation: Constraints and Choices' (1985) 68 *Judicature* 337; M. Tushnet, *The NAACP's Legal Strategy against Segregated Education* (University of North Carolina Press, 1987); and R.B. Cowan, 'Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Right's Project, 1971-1976' (1976) 8 *Columbia Human Rights L. Rev* 373.

prospects of later litigation. Such groups can, therefore, be put on the defensive even before they seek to challenge their direct opponent and may be forced to disassociate themselves with legal arguments of purported allies.[104] All of these factors mean that cases are only undertaken on the most clear-cut grounds, which can mean excluding more controversial lines of argument, including those citing race as an additional ground of claim.

Both the US and UK have rights regimes which afford the judiciary a key role in upholding individual rights, including the right to equality and equal treatment. In determining whether a particular protection has been infringed both countries' courts assess whether the measure, and its impact, are justified, albeit that the precise form of the protection and evaluation differ. Based on their own interpretations of these frameworks the law-making and policing subsystems in both the US and UK expressed their own expectations for the protective function of the courts, including in relation to s.44 and ss.214 and 215, as will now be shown.

7.2 Expectations of the Judiciary's Rights Safeguarding Role

The importance placed by other subsystems on the judiciary's power to protect against any unjustified infringement of individual rights is demonstrated by direct references by both the US and UK law-making and policing subsystems to this judicial role. Such statements indicate the external expectations projected onto the judicial subsystem in respect of the subsystem's behaviour after 9/11. In the UK the law-making subsystem's expectations regarding the role of the courts took two distinct forms, one arising from the enactment debate surrounding the Terrorism Act 2000; and the other from the subsystem discourse in the immediate aftermath of 9/11, as the statutory powers were brought into use.

In the pre-9/11 period the law-making subsystem was unified in its positive endorsement of the judiciary as a strong overseeing power in respect of parliamentary behaviour, through the application of the HRA protections in their decision-making.[105] Jack Straw, for example, explicitly referred to the 'profound safeguard against the disproportionate

[104] G.N. Rosenberg, *The Hollow Hope* 18.
[105] See chapters 3 and 4 of this thesis.

use of the powers … [represented by] the Human Rights Act 1998'.[106] Straw exhorted other MPs to 'have some confidence' in the courts and said that, in light of their protective role, there should be no hesitation in enacting statutory powers which 'go beyond the normal criminal law'.[107] Straw cited judicial oversight as constituting an important part of the checks and balances that the counter-terrorism powers would be subject to following their enactment.[108]

Even the mere expectation of judicial review of the powers was described as being a means of ensuring that the pressures from the Executive did not prevent the law-making subsystem from adhering to a balanced and appropriate programme of law-making. Tom King, for example, suggested that the 'integrity of Ministers is often bolstered by the knowledge of the existence of judicial review',[109] and Charles Clarke described the judicial model of legislative oversight for the new powers as a 'positive and progressive change'.[110] Therefore, although arguably the rights-protecting standard set by the ECHR in the field of anti-terrorism law was a relatively low one,[111] it was held up by the Government as providing a 'powerful control over police use of the powers set out in the Bill'.[112] Amongst opponents of the counter-terrorism statutory powers the review function of the judiciary was described as an important means of protecting against any infringement of rights occasioned by legislative action. For example, in questioning the Home Secretary's declaration of compatibility relating to the Terrorism Bill, Kevin McNamara stated that ultimately this question would be decided in the courts.[113] Similarly, John Taylor, noted that '[i]f there were any question that the police officer had acted improperly, it would be for the court to interpret'.[114] Both governmental and non-governmental components of the law-making subsystem, therefore, premised the verity of the subsystems' actions on the expectation that the judicial subsystem would remedy any rights-infringing effects arising either from the law-making function of parliament, or the

[106] Jack Straw, HC Debs (1999-00) 341, c.159. See also Charles Clarke, Standing Committee D (3 February 2000), who described the HRA as 'an important new safeguard'.
[107] Jack Straw, HC Debs (1999-00) 341, cc.155-56.
[108] *ibid*, c.163.
[109] Tom King *ibid*, c.165.
[110] Charles Clarke, *ibid*, c.229.
[111] C. Gearty, '11 September 2001, Counter-terrorism and the Human Rights Act' (2005) 32(1) *Journal of Law and Society* 18, 22.
[112] Jack Straw, HC Debs (1999-00) 341, cc.160-61. See also Simon Hughes, Terrorism Bill Standing Committee D (27 January 2000).
[113] Kevin McNamara, HC Debs (1999-00) 341, c.176.
[114] See Standing Committee D, (1 February 2000).

law-enforcement behaviour of the police.

Against the generally positive endorsement of the safeguarding potential of the courts some concerns were expressed regarding the protective strength of judicial oversight. The ability for the courts to offer the promised protection was, for example, described as 'not deliverable' by Alan Simpson.[115] Aside from pockets of scepticism, however, the main consensus in the debate concerning the Terrorism Bill, reflected by the large margin by which the Bill was passed,[116] was that the adjudicating function of the courts would be able to prevent any rights-infringing effect arising from use of the powers Parliament was enacting. Concern as to whether the courts would be able to fulfil this role was dismissed as a fringe and unhelpful sentiment.

In the aftermath of 9/11 the law-making subsystem's expectations for the role of judicial review sharply diverged from its previous position.[117] Departing from prior expressions of the importance of its protectionist role a number of MPs were concerned that neither the Courts nor the HRA should be allowed to inhibit counter-terror policing.[118] As already explored in this thesis,[119] support was also voiced for the need for the Home Secretary to be able to act 'without the threat of his decisions being overturned as a result of the HRA'.[120] Alongside these demands the constitutional legitimacy of the judiciary in scrutinising primary legislation was questioned, with the Government, accountable through Parliament and on the basis of popular opinion, being described as having the sole authority to balance rights and security.[121] On the basis of its popular mandate Gerald Howarth asserted that 'the time has come when judges must no longer be allowed to determine policy. Parliament must determine policy'.[122] Both the constitutional competency of the role of the judiciary and its institutional capability were questioned within the law-making subsystem, although such views have been criticised as

[115] Alan Simpson, HC Debs (1999-00) 341, c.200.
[116] The third reading of the Terrorism Bill was passed by an overwhelming majority, in a vote of 210 'ayes' against 1 'noe' (Paul Flynn, MP), HC Debs (1999-00) 346, cc.471-73.
[117] As well as reflecting the significant change in context after 9/11 the legislature's behaviour supports the suggestion that the counter-majoritarian nature of the HRA meant that it worked better when conceived, in opposition, than when implemented, in government, I. Leigh and R. Masterman, *Making Rights Real*, 4. See also J. Croft, *Whitehall and the HRA 1998* (Constitutional Unit, 2002) 27 which refers to the government's containment strategy in relation to the HRA following its implementation.
[118] See, e.g., HC Debs (2001-02) 372, Ian Duncan Smith, (c.677) and Gerald Howarth (c.722).
[119] See chapters 3 and 4 of this thesis.
[120] Ian Duncan Smith, *ibid*, c.677.
[121] Tony Lloyd, *ibid*, c.726. See also Edward Garnier, *ibid*, c.725.
[122] Gerald Howarth, *ibid*, c.722.

misconceiving the effect of the HRA.[123] Charles Clarke, for example, suggested that government ministers, as opposed to the courts, were more adept at evaluating the facts in national security cases.[124] Consequently, whilst in advance of 9/11 the protective role of the courts was advocated as a safeguard against rights infringements arising from the legislative powers, in the febrile atmosphere after the attacks the legitimacy of this judicial role was rejected in favour of heightened government and police authority.

In the US, Congress sought to justify the passage of counter-terrorism powers, despite them lacking the normal safeguards to protect against misuse of statutory powers, on the grounds of externally imposed rights protections which would be administered by the judiciary. During the debates Congress was divided in its belief that either the constitutional rights protections were in no way endangered by the legislative provisions,[125] or that the draft provisions infringed the constitutional guarantees.[126] One such comment was made by Edward Bryant who noted that '[t]he provisions of this Patriot Act will undoubtedly be tested and must withstand challenge in a court of law'.[127] Bryant's reassurance was given in confident support that the powers adhered to constitutional standards. A further mention of judicial review immediately preceded the Senate's passage of the draft legislation, when Senator Patrick Leahy noted that the legislation would 'face difficult tests in the courts' and that in the event that 'the courts find an infirmity' in the provisions it may be necessary for Congress to revisit the issues in the future.[128] This comment was designed to appease remaining critics of the Bill by reassuring them that it would be made to adhere to constitutional standards. Whichever opinion was being promoted, therefore, members of Congress were overwhelmingly confident in the ability of the courts to safeguard rights against any possible incursion by police behaviour.

In contrast to the congressional confidence in the review function of the courts, some concerns were expressed within the Committee on the Judiciary about the judiciary's

[123] See H. Fenwick, G. Phillipson and R. Masterman, 'The HRA in Contemporary Context' in H. Fenwick, G. Phillipson and R. Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act* (OUP, 2007); and F. Klug, 'A Bill of Rights: Do We Need One, or do we already have one?' [2007] *Public Law* 701.
[124] Charles Clarke, HC Debs (2004-05) 430, c.695.
[125] Orin Hatch, SCR (11 October 2001) S10560.
[126] See, e.g., Harriman, HRCR (12 October 2001) H6774.
[127] HRCR (12 October 2001) H6762.
[128] Patrick Leahy, SCR (25 October 2001) S10991.

ability to provide a substantial oversight function. For example, Robert Scott warned that in the context of a national security threat 'robust judicial review of legislative powers was not a reliable safeguard, and so rigorous judicial scrutiny should not be presumed in the drafting of the powers'.[129] Similarly, reflecting on the relationship between the law-making and judicial subsystems, William Delahunt concluded that the 'bill fails constitutional muster' and that the tendency towards deference of the judiciary in times of national emergency excluded the courts from offering the sought after safeguard against executive misuse of the powers.[130] To minimise its concerns regarding the weakness of the judicial oversight function the Committee recommended the creation of a new office within the Department of Justice to oversee the maintenance of civil liberties amidst deployment of the powers.[131] However, this recommendation was lost from the enacted legislation by the rejection of the Committee's version of the draft legislation, in favour of the executive's proposals.[132]

Internal communications also seem to indicate that the US policing subsystem premised its operational decisions on an expectation that the judiciary would protect individual rights from any resulting infringement. FBI operational publications, for example, cited the courts as an important safeguard against its own misuse of statutory powers, including in the context of national security policing.[133] Similarly, subsystem communications confirmed an expectation that '[w]hile the USA Patriot Act removed many of the obstacles that hindered terrorist and intelligence investigations in the past, it did not give law enforcement and intelligence agencies a free hand. The actions of the government still are conducted under the watchful eye of the courts'.[134] The Department of Justice's 2003 guidance concerning the use of race by federal law enforcement agencies included a section delineating the constitutional prohibition of selective law enforcement based on considerations such as race, and concluded that such operational behaviour would face strict judicial scrutiny by the courts and be invalidated in the event of the use of impermissible racial classifications.[135] Only in guidelines issued more than seven years

[129] Robert Scott, Committee on the Judiciary (3 October 2002) 110.
[130] William Delahunt, *ibid*, 110.
[131] John Conyers, *ibid*, 99.
[132] See chapter 4 of this thesis.
[133] See R.G. Schott, 'The Role of Race in Law Enforcement. Racial Profiling or Legitimate Use?' *FBI Law Enforcement Bulletin* (November 2001) 70(11) 24-32.
[134] M.J. Bulzoni, 'Foreign Intelligence Surveillance Act. Before and After the USA Patriot Act' *FBI Law Enforcement Bulletin* (June 2003).
[135] US Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law*

after 9/11 did the police subsystem acknowledge that the judicial safeguarding function may be in any way limited.[136] During the most operationally critical years, in terms of both national security and potential rights infringements following 9/11, therefore, the police cited the judiciary as a means of defending itself against criticism of its rights-infringing behaviour. The expectations of the external safeguard, therefore, did not match its actual protective value.

In both the US and UK the judicial subsystem was championed, directly and indirectly, as an important and powerful protector of individual rights. Invocation of the protective value of judicial review arose from both supporters and critics of the statutory provisions, and maintained that the law-making and policing subsystems would be held to account for their legislative actions. However, in expecting the courts to perform this function the subsystems failed to effectively take into account the fact that when faced with national security threats the judiciary may falter,[137] or indeed may be by-passed completely.[138] Indeed, this restricted judicial role was explicitly demanded by the UK law-making subsystem after the 9/11 attacks: the same subsystem that had promoted the courts as a safeguard when enacting broad and unrestrained police powers. In the US, on-going concerns about the strength of the courts' protective power were silenced by the executive's rejection of committee proposals, designed to reinforce judicial oversight. The contents of cases concerning the stop, search and surveillance powers, as well as analogous counter-terrorist powers, therefore did not demonstrate the rights protecting role the judicial was described as expected to fulfil, as will now be shown.[139]

7.3 Judicial Approaches to Counter-terrorism Cases

Having set out the rights frameworks through which the judicial subsystems are expected

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Enforcement Agencies (June 2003) 3-4. Also per *Chavez v Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001).

[136] FBI, *Domestic Investigations and Operations Guide* (16 December 2008) 22.

[137] Judicial reluctance to investigate state decisions regarding security threats is seen in the case of *Liversidge v Anderson* [1941] 2 All ER 612. See also Jeffrey Jowell who contends that judicial deference may be an appropriate response to threats to national security, particularly in light of the executive's superior intelligence gathering capacity, J. Jowell, 'Judicial Deference: Servility, civility or institutional capacity?' [2003] *Public Law* 592, 598.

[138] For example, public emergencies are closely associated with the increased use of non-judicial means of prosecution and executive detention. See for example, Anti-terrorism Crime and Security Act 2001, part IV, which provided for executive detention but was found to be an unlawful breach of the ECHR by the House of Lords in *A (FC) and Others (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

[139] Lord Philips, 'Impact of Terrorism on the Rule of Law' (2008) 40 *Bracton Law Journal* 47, 59.

to perform their safeguarding function, as well as the express use of those expected behaviour to justify the actions of the law-making and policing subsystems, this section undertakes a brief review of some case law concerning the s.44 stop and search powers and the ss.214 and 215 surveillance and records search powers, as a means of uncovering the extent to which the judicial subsystem, was able to fulfil this role.

The role of the courts in protecting individual rights is of particular importance in the face of threats to national security. Such contexts, however, also create additional pressures on the subsystems' ability to perform its normal adjudicatory function. In times of war, for example, the courts have frequently been described as a non-political safeguard against executive excesses.[140] Conversely, cases invoking national security have also given rise to particularly high levels of judicial deference.[141] High levels of deference in such circumstances have been endorsed by the judiciary itself on the basis that 'no government interest is more compelling than the security of the Nation'.[142] Lord Diplock, speaking from within the UK judicial subsystem, even described issues surrounding national security as 'par excellence a non-justiciable question'.[143] Judicial approaches to national security issues incorporates a variety of forms of deference, ranging from the application of proportionality and scrutiny tests; to fact deference concerning the existence of the emergency conditions, and regarding the utility of the measures enacted and their non-rights-infringing nature. Cases invoking issues concerning war, emergency and national security, therefore, inhabit a highpoint in the tension between the rights-protecting role of the courts and its desire not to usurp the will of the legislature or executive.[144]

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[140] *Milligan*, 71 US at 124. E. Keynes, 'Democracy, Judicial Review and War Powers' (1981) 8 *Ohio N.U.L. Rev* 69, 75; J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1981); and D. Dyzenhaus and R. Thwaite, 'Legality and Emergency. The Judiciary in a Time of Terror' in A. Lynch, E. MacDonald and G. Williams (eds.), *Law and Liberty in the War on Terror* (The Federation Press, 2007) 9.

[141] See, e.g., Lord Hope in *ex parte Kebeline* opined that 'different choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or the persons whose act or decision is said to be incompatible with the Convention' at 31. See also *Brown v Stott* [2001] 2 WLR 817 at 834, 835 (per Lord Bingham) and 842, 843 (per Lord Steyn). For comment on these trend see W.H. Rehnquist, *All the Laws but One* (1998) 202; E. Benevenisti, 'National Courts and the "war on terrorism"' in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Hart Publishing, 2004) 307; and M. Tushnet, 'Defending Korematsu: Reflections on Civil Liberties in Wartime' (2003) *Wis. L. Rev* 273, 274.

[142] *Haig v Agee*, 453 US 280, 307 (1981). See also Lord Steyn, 'Deference a Tangled Story' [2005] *Public Law* 346, 349.

[143] *Council of Civil Services Union v Minister for the Civil Service* [1985] AC 374 at 412, per Lord Diplock.

[144] T. Scaramuzza, 'Judicial Deference versus Effective Control: the English Courts and the Protection of

7.3.1 UK Case Law

The key illustration of the adjudicatory approach of the UK courts to the suspicion-less stop and search powers within s.44 is the case of *Gillan.*[145] The two claimants in *Gillan* were subject to s.44 stops and searches while on their way to the Docklands Arms Fair: one, Kevin Gillan, who was a student, to join a peaceful demonstration against the fair; and the other, Pennie Quinton, who was a film-journalist, to record the protesters.[146] There were no grounds for suspecting either claimant of any offence, but they were both stopped and searched, despite Quinton showing her press card. The case progressed through the UK courts before being finally being brought before the ECtHR. Despite relating to a single claim each of the judgments is useful in revealing particular facets of the approach of the UK courts to reconciling national security needs with the protection of individual rights.

In the Divisional Court the claimants challenged the lawfulness of the police use of s.44 on three grounds. Firstly, the claimants claimed that the authorisation for use of the power was unlawful and *ultra vires.*[147] Secondly, the claimants argued that s.44 was only intended to be used in response to an imminent terrorist threat to a specific location in respect of which normal police powers of stop and search were inadequate. Accordingly, it was claimed that the powers were never intended to be used arbitrarily against those engaged in peaceful protest.[148] In the alternative, the claimants argued that the Police Commissioner had failed in his duty to give appropriate instructions to officers under his command in relation to their exercise of the powers, which had the potential to cause unjustified and disproportionate interference to individual human rights.[149] Thirdly, the claimants claimed that the police were using s.44 as part of day-to-day policing, which constituted a disproportionate interference with their rights under articles 5, 8, 9, 10 and 11 of the ECHR.[150] The Court found against the claimants in relation to each of the three

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Human Rights in the Context of Terrorism' (2008) *Coventry Law Journal* 2, 2.

[145] *R (on the application of Gillan and another) v Metropolitan Police Commissioner and another* [2003] EWHC 2545 (Admin).

[146] *The Queen on the Application of Gillan and another v The Commissioner of Police for the Metropolis and another* [2004] EWHC 2545 (Admin), para 2.

[147] *ibid*, para 30.

[148] *ibid*, paras 36-37.

[149] *ibid*, para 37.

[150] *ibid*, para 60.

arguments. The Court rejected the claimants' first argument on the grounds that, although its scrutiny in this area was 'necessarily a limited one', the claimants' interpretation of parliamentary intention regarding use of the power was overly narrow.[151] Further, while the Court expressed its concern regarding the lack of evidence of police guidance controlling use of s.44,[152] it held that there was 'just enough' to reject the second head of claim.[153] In particular, the Court determined that the deputy police commissioner had 'clearly understood the purpose of the s.44 powers and the need to ensure that they were not misused'.[154] Finally, responding to the third claim, the Court found that there was no evidence that the powers had become part of day-to-day policing, so that their use infringed ECHR protections.[155] The Court remarked that if there had been any such evidence this claim would have had 'considerable force',[156] but concluded that instead of use of s.44 infringing the Claimants' rights the 'annoyance' experienced by the Claimants was primarily due to the 'slow bureaucratic process' and the delay occasioned by the stop and search.[157] Despite rejecting the claim the Court granted the claimants the right to appeal against the decision, due to the importance of the issues raised.[158]

The Court of Appeal's judgment divided the grounds of appeal into five areas of adjudication. These were that: (i) the s.44 power, as an incursion into liberties, should be construed restrictively (the 'interpretation question'); (ii) the exercise of discretion to issue the authorisation on behalf of the Commissioner of the Police was unlawful ('the authorisation question'); (iii) the Secretary of State had exceeded his powers in confirming the authorisation (the 'confirmation question'); (iv) the officer in charge of the police operation wrongly invoked the powers in that place and time (the 'command question'); and (v) there was excessive action by the operational officers who had stopped and searched the appellants (the 'operational question').[159] In relation to each of the areas of argument the Court also considered the claim that s.44 breached individual rights

[151] *ibid*, para 35.
[152] *ibid*, para 44. This evidence came in the form of later guidance from the National Centre for Policing Excellence which detailed the different stop and search powers available to the police, but which failed to give advice as to which factors guided the choice between normal and exceptional powers, see National Centre for Policing Excellence, *Practice Advice* (2006) para 4.4.1.
[153] *Gillan*, para 58.
[154] *ibid*, para 52.
[155] *ibid*, para 60.
[156] *ibid*, para 61.
[157] *ibid*, para 64.
[158] *The Queen on the Application of Gillan and Anr v The Commissioner of Police for the Metropolis and Anr* [2004] EWCA Civ 1067, para 2.
[159] *ibid*, para 27.

within the common law and articles 5, 8, 10 and 11 ECHR.[160] Looking firstly at the interpretation question, the Court held that the wording of the statute was clear, but that even if it was unclear an expansive interpretation was obviously intended by Parliament as evidenced by the use of the word 'expedient' in determining when the power could be used.[161] Dealing with the authorisation and confirmation questions together the Court held that evidence of global and national terrorist incidents justified the rolling authorisation of the power, and did not consider that such use of s.44 meant that it had become part of day-to-day policing.[162] The Court also rejected the command question claim on the basis that, provided the Police Commander could imagine possible reasons for terrorists targeting the arms fair, the authorisation was justified.[163] Echoing the concerns of the Divisional Court, the Court of Appeal observed that the evidence produced to demonstrate the rationale behind the invocation of the powers was 'lamentable'.[164] Nevertheless, it rejected this claim. Further, in addressing the operational question, although the Court stated that it had received 'no satisfactory explanation' for the inadequacies of the evidence,[165] it rejected the claim following its evaluation of the 'limited evidence available'.[166] The Court, therefore, rejected the appeal, whilst maintaining that this did not mean that it had, or would in future, adopt a deferential approach to executive decisions relating to national security.[167]

The Claimants launched a further appeal to the House of Lords. The Lords divided its judgment into four heads of claim, largely mirroring those articulated by the Court of Appeal, namely: (i) construction; (ii) authorisation and confirmation; (iii) breach of ECHR articles 5, 8, 10 and 11; and (iv) lawfulness. The Court's judgment affirmed the findings of the lower courts and rejected all of the claimants' arguments.[168] Their Lordships held that construction of the legislative power indicated the law-making subsystem's grant of a broad and discretionary power, but that significant safeguards against misuse of the power had been incorporated into the legislation to protect against

[160] *ibid*, para 28.
[161] *ibid*, para 44.
[162] *ibid*, paras 50- 51.
[163] *ibid*, para 52.
[164] *ibid*, para 53.
[165] *ibid*, para 55.
[166] *ibid*, para 56.
[167] *ibid*, para 35. See also *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para 42.
[168] *R* (on the application of *Gillan (FC) and another (FC) (Appellants) v Commissioner of the Police of the Metropolis and another (Respondents)* [2006] UKHL 12, paras 12-35 (per Lord Bingham) and para 37.

the misuse of the power.[169] The Court further ruled that whilst Parliament had perhaps not envisaged a rolling authorisation it had clearly intended that the s.44 power should be available whenever a terrorist threat was apprehended[170] and, therefore, rejected the authorisation and confirmation claims.[171] As regards the ECHR claims their Lordships concluded that the stops and searches had breached neither article 5[172] nor article 8 ECHR.[173] Further, even if there had been a *prima facie* breach of either Convention right, the Court considered that this would have been justified on the basis of the proportionality of the police action, in light of the threat posed by terrorism.[174] The Court held that the powers, if misused, could conceivably infringe articles 10 and 11, but provided they were used 'subject to compliance with the 'prescribed by law' condition' such use would be likely to fall within the article 10(2) and 11(2) justifications.[175] Although the Claimants' in *Gillan* did not argue that the powers had a discriminatory impact this possibility was nevertheless considered and rejected by several judges in the House of Lords. Lord Brown, for example, concluded that ethnic origin 'can and properly should be take into account in deciding whether and whom to stop and search, provided always that the power is used selectively and the selection is made for reasons connected with the perceived terrorist threat'.[176]

Having exhausted all domestic avenues for challenging the use of the powers the Claimants' applied to the ECtHR.[177] The application was based on the alleged breach of articles 8, 5, 10 and 11, although only the article 8 claim was examined by the Court.[178] The ECtHR's judgment diverged from that of the House of Lords, holding that the use of s.44 constituted a *prima facie* breach of article 8 and was a clear and unequivocal interference with the right to respect for private life.[179] The Court held that s.44 granted such broad discretion to police officers that it amounted to an arbitrary power. Thus the requirement within article 8(2) ECHR that infringements of article 8(1) be 'in accordance

[169] *ibid* , paras 14-15, per Lord Bingham.
[170] *ibid*, para 18, per Lord Bingham.
[171] *ibid* , paras 16-18, per Lord Bingham.
[172] *ibid*, paras 21-25.
[173] *ibid* , paras 27-28.
[174] *ibid*, paras 26 and 29, per Lord Bingham.
[175] *ibid*, para 30 per Lord Bingham.
[176] *ibid*, para 81.
[177] *Case of Gillan and Quinton v The United Kingdom* (Application no. 4158/05), 12 January 2010.
[178] *ibid*, para 90.
[179] *ibid*, paras 63-65.

with law' was not met.[180] The ECtHR considered that '[t]here are simply no effective safeguards against such abuse'.[181] The European Court's decision on this matter arose not solely from its reading of the statutory provisions, as was the case with the UK courts, but from its examination of the provisions as implemented.[182] In particular, the ECtHR noted that while the Secretary of State was given a statutory power to decline or amend applications for authorisation to use s.44 in practice this was never used.[183] To the European Court, therefore, it did not constitute a meaningful limitation to the discretionary nature of the powers or, therefore, a safeguard against their misuse. By contrast, for the UK courts the statutory provision was presumptively treated as indicating the reality of the oversight provided for. Further, the ECtHR described the role of the Independent Reviewer of counter-terrorism legislation as limited and weak, because it lacked the power to cancel or alter the authorisations.[184] By contrast, the UK courts were satisfied that the mere existence of such a review function necessarily gave rise to an adequate level of statutory oversight. Of even greater concern to the ECtHR was the level of discretion afforded to individual police officers, which it described as giving rise to a 'clear risk of arbitrariness'.[185] The ECtHR was also adamant that the possibility for the discriminatory use of the powers was an unquestionable risk arising from their deployment.[186]

The distinct approaches of the UK courts and the ECtHR not only meant that two different outcomes were reached but also indicates the ability of the European Court to detect infringements of individual rights in situations in which the UK courts fail to see any such wrongdoing. Demonstrative of the greater awareness of the ECtHR of the potential difficulty of protecting individual rights through the judicial subsystem was the fact that the ECtHR even explicitly rejected the utility of judicial review as a safeguard against misuse of the powers, because of the lack of requirement for reasonable suspicion in use of s.44.[187]

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[180] *ibid*, para 76.
[181] *ibid* ,para 76.
[182] *ibid*, paras 77-79.
[183] *ibid*, para 80.
[184] *ibid*, para 82.
[185] *ibid*, para 83.
[186] *ibid* , para 85.
[187] *ibid*, para 86.

Further case law demonstrating the approach of the UK courts to expectations of their rights protecting role is explored in chapter eight. However, what *Gillan* demonstrates is that the reality of judicial oversight of the police and statutory provisions was not comparable to that described by the policing and law-making subsystems themselves.

7.3.2 US Case law

Unlike *Gillan* in the UK, in the US there is not a single case squarely concerning the ss.214 and 215 powers which was argued at all stages of the country's court system. Nevertheless, the US' judicial approach to counter-terrorism police powers is indicated by several judgments regarding police counter-terrorism powers. One of the key cases regarding counter-terrorism surveillance is *American Civil Liberties Union v National Security Agency,* in which the ACLU challenged the use of suspicion-less wiretaps by the law enforcement subsystem on the basis that it was unconstitutional and infringed federal law.[188] In an opinion written by Judge Taylor, the District Court found that the surveillance programme violated federal law in the FISA, as well as the constitutional provisions of the first and fourth amendments and the doctrine of separation of powers.[189] On appeal, however, the District Court decision was overturned.[190] The Appeal Court's decision was driven by its acceptance of the government's invocation of the state secrets doctrine.[191] The Appeal Court recognised that 'even to the extent that additional evidence may exist, which might establish standing for one or more of the plaintiffs on one or more of their claims, discovery of such evidence would, under the circumstances of this case, be prevented by the State Secrets Doctrine'.[192] Acceptance of the state secrets doctrine deprived the plaintiffs of the standing necessary to successfully make out their claim because they were unable to show 'concrete' and 'actual' harm.[193] The Court also refused to acknowledge that the presence of illegal wiretaps had a qualitatively different impact on those subject to the surveillance than in relation to legal wiretaps.[194]

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[188] *American Civil Liberties Union v National Security Agency,* 438 F. Supp 2d 7pp 2d 754, 775, 776 (E.D.Mich 2006).
[189] *ibid*, paras 23-24 (Justice Taylor).
[190] *ibid.*
[191] See similar judicial reasoning in, e.g., *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992); and *Laird v Tatum*, 444 F.2d 947, 963 (DC Cir. 1979) revd 408 US 1 (1972).
[192] *ibid* at para 687 citing *United States v Reynolds*, 345 US 1, 1-11 (1953), *Tenebaum v Simioni*, 372 F.3d 776, 777 (6th Cir. 2004); and *Halkin v Helms,* 690 F. 2d 977, 981 (D.C Cir 1982).
[193] *ACLU v NSA* para 672.
[194] *ibid*.

Invocation of the state secrets doctrine thus meant that because the surveillance *could* be undertaken lawfully, it *was* held to have been lawful.

A further illustration of the approach of the US court to the FBI's use of covert, suspicion-less counter-terrorism surveillance is the case of *Al-Haramain Islamic Foundation v Bush*.[195] In *Al-Haramain* the state secrets hurdle appeared to have been cleared as a result of the inadvertent disclosure of a 'top secret' document. This document alerted the Foundation to the fact that it was the subject of covert surveillance, and on the basis of which it launched a claim alleging that the surveillance constituted an infringement of its eighth amendment right to privacy. In its judgment the Court confirmed that 'simply saying "military secret", "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation' was insufficient to automatically support a claim of privilege.[196] Despite this statement, however, the Court proceeded to show a high level of deference to the executive's determination that the national security threat was sufficient to invoke the state secrets doctrine. Ultimately, therefore, although the disclosed document was essential to verifying the allegations, its admission as evidence was precluded and the claim was frustrated, as a result of the Claimant's lack of standing.[197]

The case of *El-Masri v United States* concerned the threshold dismissal, on state secrets grounds, of a tort suit alleging that US government officials conspired to violate the Petitioner's rights under the Constitution and international law to be protected from abduction, arbitrary detention and inhumane treatment. Without permitting any discovery, or considering any non-privileged evidence, and based solely on two government affidavits and speculation about what evidence might be needed to sustain the claims or to make possible defences, the District Court dismissed the case at the pleading stage, based on state secrets privilege. This decision was affirmed by the Fourth Circuit. *El-Masri* provides a clear demonstration of the Court's approach to the government's use of state secrets privilege and how the exercise of privilege relates to judicial review of executive action. The decisions also considered broader issues surrounding the issue of the separation of powers. Rejecting the plaintiff's claims that '[w]hen the Executive

[195] *Al-Haramain Islamic Foundation v Bush*, 507 F. 3d 1190, 1203 (9th Cir., 2007).
[196] *ibid.*
[197] *ibid*, para 1205.

unilaterally asserts a need for secrecy in a manner that disables judicial power and threatens individual liberties, courts have a special duty to probe deeply before acceding to judicial demands',[198] the Court held that *El-Masri* incorrectly 'envisions a judicial that processes a roving writ to ferret out and strike down executive excess'.[199] Instead, the Court described the risk of it being 'guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us – especially when the challenged action pertains to military or foreign policy'.[200] In reaching its decision the Court reflected the law as set down in cases such as *Youngstown Sheet and Tube Company v Sawyer*.[201] However, the Court's response to El-Masri's arguments presupposed that its decision on the applicability of the claims of privilege adhered to the principles set out in *United States v Reynolds*.[202] *Reynolds* explicitly recognised that it was pre-eminently the decision of the judiciary whether an executive assertion of the judiciary is valid.[203] The Court in *El-Masri* noted that the *Reynolds* Court also cautioned against the possibility that the state secrets doctrine could be used to allow the Court to 'avoid the constitutional conflict that might have arisen had the judiciary required that the executive disclose highly sensitive military secrets'.[204] However, while the *El-Masri* decision may appear to constitute an evaluation of powers it raises a question regarding the degree to which the judiciary was in fact exercising control over the state privileges doctrine, as under *Reynolds* it is bound to do.

Concerns relating to governmental secrecy were also a motivating factor behind the claim in *Re Sealed Case*.[205] In this case the ACLU sought the unsealing of orders issued by the Courts and related legal briefs submitted by the Government relating to this programme. The Court recognised that without the disclosure of the sealed materials 'it will be impossible for the public to assess whether any gap [in the executive's authority to conduct necessary surveillance] is a significant problem'.[206] Demonstrating an assurance in its own constitutional legitimacy the Court held itself out as having 'the authority and,

[198] Opening Brief for Plaintiff-Appellant, 12 -13 (quoting *Hamdi v Rumsfeld* 542 US 507, 536 (2004)).
[199] *El-Masri*, para 213.
[200] *ibid*, para 213.
[201] *Youngstown Sheet and Tube Company v Sawyer* 343 US 579, 584-95 (Frankfurter concurring).
[202] *United Status v Reynolds* 345 US 1.
[203] *Reynolds*, paras 9-10, quoted in *El-Masri*, paras 304-05.
[204] *El-Masri*, para 303, referring to *Reynolds*, para 6.
[205] *Re Sealed Case FISC* (No.002-001 and 002).
[206] *ibid*, para 10.

indeed, the obligation to independently review whether information in the sealed materials is properly classified'.[207] On this basis the Court stated that 'information should remain classified only if the executive can demonstrate, with specificity, that its release would harm national security'.[208] However, while the US courts consistently held that the state secrecy doctrine could not be unquestioningly invoked it nevertheless readily accepted governmental claims of its need.

The Court's decision in the case of *Former Attorney General Ashcroft v Iqbal* provides a final example of the nature of its adjudicatory approach to counter-terrorism measures.[209] Iqbal was arrested by federal officials and detained under restrictive conditions. Iqbal filed a Bivens action alleging that his designation as a person 'of high interest' was on account of his 'race, religion or national origin', in contravention of the first and fifth amendments. Iqbal further alleged that the FBI had arrested and detained thousands of Arab Muslim men as part of its 9/11 investigation and as part of this had willingly and maliciously subjected Iqbal to harsh conditions of confinement as a matter of policy, solely on account of prohibited factors and for no legitimate penological reasons.[210] The Supreme Court held that Iqbal's complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination.[211] The Court held that to make out his claim Iqbal needed to have presented sufficient factual matter to show that the FBI had adopted and implemented the detention policies not for neutral investigative reasons but for the purpose of discriminating on account of race, religion or national origin. The Court, therefore, adhered to the intent requirement in its approach to the claims on the first and fifth amendments.[212]

The Court in *Iqbal* further held that the pleadings did not comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure which requires that a complaint must contain a 'short and plain statement of claim showing that the pleader is entitled to relief'.[213] Applying the interpretation of Rule 8 delineated in the case of *Twombly*,[214] the Court in *Iqbal*

[207] *ibid*, para 20.
[208] *ibid*, para 21.
[209] *Former Attorney General Ashcroft v Iqbal*.
[210] *ibid*, paras 4-5.
[211] *ibid*, paras 11-23 (Kennedy, J., delivering the opinion of the Court).
[212] *ibid*, para 12, citing *Church of Lukumi Babalu Aye, Inc. v Hialech*, 508 US 520, 540-041 (1993)(first amendment); and *Washington v Davis*, 426 US 229 (1976) (fifth amendment).
[213] *ibid* para 13.
[214] *Twombly* 550 US 555.

concluded that the complaint had not 'nudged claims' of invidious discrimination 'across the line from conceivable to plausible'.[215] The Court, instead, held that several of Iqbal's allegations, including his subjection to harsh conditions on a discriminatory basis, were conclusory and not entitled to be assumed true, without independent evidence. Further, the Court held that the factual allegations that the FBI arrested and detained thousands of Arab Muslim men, and that Mueller and Ashcroft had approved the detention policy, did not plausibly suggest that there had been purposeful discrimination. Indeed, given that the 9/11 attacks were perpetrated by Arab Muslims, the Court noted that it was wholly unsurprising that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected links to the attacks would produce a disparate, incidental impact on Arab Muslims. The Court concluded that Iqbal's claim rested solely on the petitioners' ostensible policy of holding detainees categorised as 'of high interest' but that his complaint did not contain facts plausibly showing that the policy was based on discriminatory motives.[216] Even the dissenting opinion, written by Justice Souter, and joined by Justices Stevens, Ginsberg and Breyer, did not explicitly disagree with the majority's opinion that targeting Muslim and Arab individuals was an entirely common-sense approach to protecting against terrorist attacks. In addition, whilst dissenting with the majority opinion Justice Breyer wrote separately to agree with the other Justices regarding the importance of preventing such 'unwarranted litigation from interfering with the proper executive of the work of the Government'.[217]

This section has outlined some of the key cases that the US and UK judiciaries have heard against the background of the national security threat in the aftermath of 9/11. What these cases suggest, both in their reasoning and outcomes, is that the factors affecting the subsystem's adjudicatory role are not uniformly those professed within the subsystem, or those expected by agents and subsystems outside the judiciary. The courts have declined to challenge decisions of other subsystems, such as the existence of an emergency or the need for a statutory power, in circumstances where the subsystem under scrutiny expected a possible challenge. Similarly, the court's application of rights protections, at times, was relegated behind other priorities as a result of the mode in which it was applied. At times, within such modes of judicial behaviour the particular interests and vulnerabilities

[215] *Former Attorney General Ashcroft v Iqbal* , para 16, citing *Twombly*, para 570.
[216] *ibid*, paras16-20.
[217] *ibid*, para 21.

of racial minorities were effectively lost within the range of judicial decision-making, or passed over with only a minor reference.

7.4 Conclusion

Despite the known judicial proclivity to defer to executive, legislative and police decisions in times of national security crisis and the difficulties experienced within the judicial subsystem regarding its application of statutory and constitutional rights protection, the law-making and policing subsystems in the US and UK portrayed the courts as able to provide a strong and testing oversight of the use and effect of the law enforcement powers in relation to the terrorist threat. This mismatch demonstrates the lacuna between the ideal of judicial review at its most searching and the tendency towards deference, which is exacerbated in periods of national emergency. This gap is largely unobserved by the law-making and policing subsystems and reflects the failure of different subsystems to understand the behavioural patterns of other subsystems, whilst continuing to premise their own behaviours on erroneously held expectations regarding other subsystem programmes.

As well as the characteristics of the judicial decision-making that related to the counter-terror powers suggesting that the gap between the expected and actual rights-protecting role of the judiciary the number of cases is also suggestive of this situation. The limited number of cases specifically concerning the racial impact of the stop, search and surveillance powers could be interpreted as showing that the powers lacked any significant race-based effect. The expectations of the law-making and policing subsystems regarding the safeguarding role of the courts certainly imply that any infringement of individual rights arising from the scope or use of the statutory powers they would have been subject to judicial scrutiny.[218] However, the limitations on the ability of the judicial subsystem to protect individual rights, including the right to equal treatment, do not solely arise out of its adjudication of such issues but also from the occasions in which rights-infringing behaviour is not litigated. Indeed, the cases that reach the courts are only the 'tip of the iceberg'.[219] Consequently, instead of the lack of

[218] As shown in section 7.2 of this thesis.
[219] J. Jowell, *Politics and the Law. Constitutional balance or Institutional Confusion*? (JUSTICE, Tom Sargant Memorial Annual Lecture, 2006) 4.

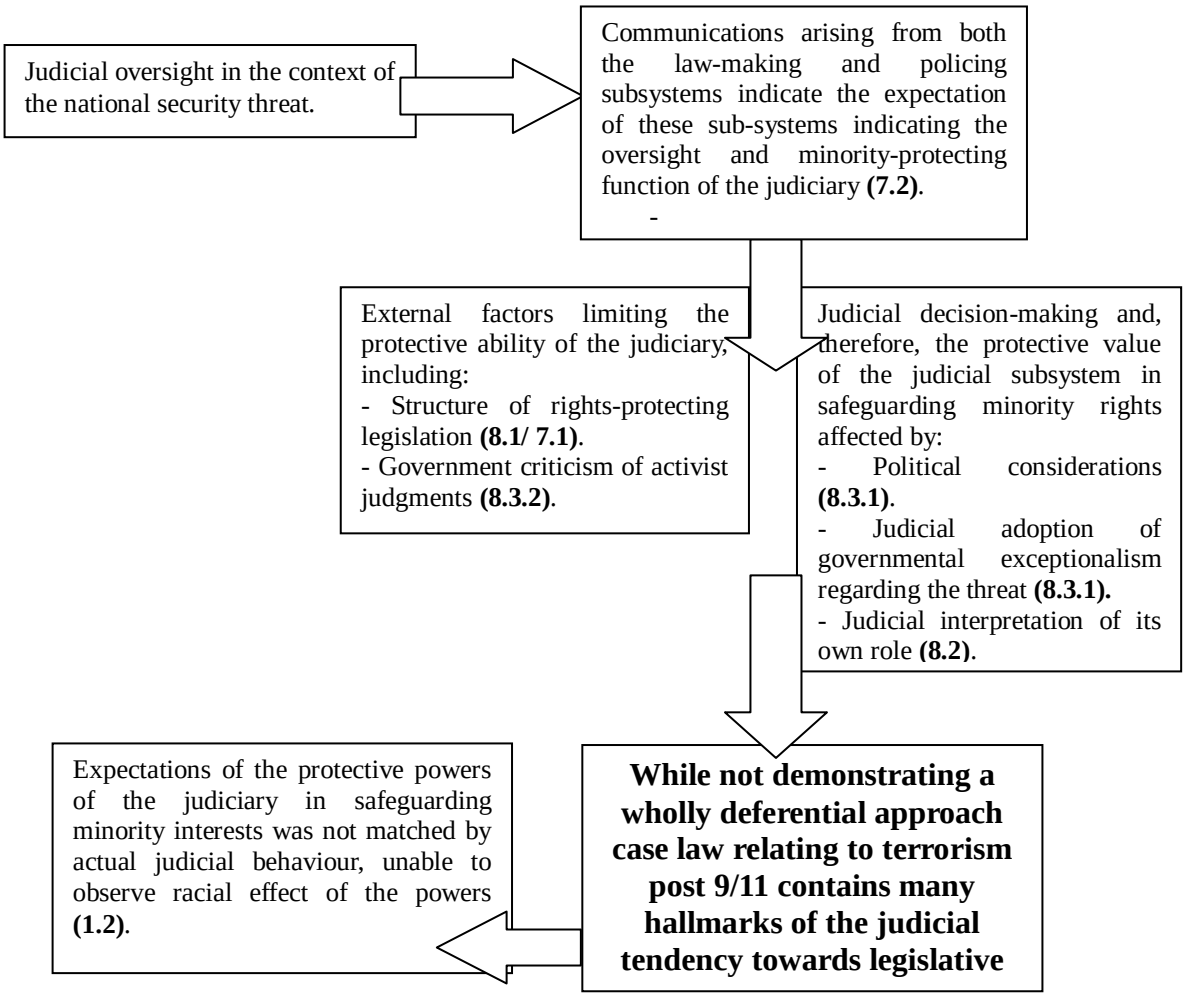
case law indicating either that the powers had no rights-infringing effect of that the judicial subsystem did not play any role in the racial effect of the powers it actually demonstrates one way in which it contributed to this outcome.[220] Thus the appearance of judicial oversight did not fully match the reality of their protective ability.[221]

In light of the gap between the appearance of judicial oversight and rights-protecting power as compared to the reality of it as borne out in post-9/11 counter-terrorism case law, chapter eight considers which particular self-creating, but cognitively open, subsystem behaviour which contributed to the limitations to the ability of the judicial subsystem to perform the safeguarding function delineated by the constitutional framework and expected by the other subsystems.

[220] S.N. Herman, 'The USA Patriot Act and the Submajoritarian Fourth Amendment' (2006) *Harvard CR-CL L. Rev* 67 (2006) at 71.
[221] G. Phillipson and H. Fenwick, 'Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond' (2011) *McGill Law Journal* 56(4) 863.

Chapter Eight: The Role of Judicial Subsystem in Failing to Protect Against the Racial Effect of Counter-terror Stop, Search and Surveillance Powers

Fig. eight: Judicial subsystem behaviour regarding s44 and ss214-5



Chapter seven demonstrated that in its adjudicatory role the judicial subsystem provided limited protection to the interests of minority individuals from discriminatory treatment arising from police use of the s.44 and ss.214-215 counter-terrorism powers. Such modes of operation meant that the courts departed from their ideally portrayed role of rights-protection and overseer of legislators and police behaviour – despite these two subsystems expressly endorsing this function of the courts as a safeguard against the effects of their own departure from normal patterns of behaviour. Adopting the same approach as was taken in relation to the law-making and policing subsystems this chapter analyses the judicial subsystem behaviour which gave rise to the gap between the ideal and actual patterns of subsystem operation.[1] These behaviours and communications are

[1] See fig. eight.

used to suggest why, instead of fulfilling this rights-protecting function the judiciary was expected to provide, it has been described as acting 'almost as though they were in the centre of a repressive maelstrom, but unable to do anything about it'.[2] Such judicial behaviour corresponds with the race-crit claim that the impact of external factors and notions of judicial legitimacy in its decision-making constitute a key factor in the racial bias of the law.[3] These limitations are analysed firstly by focusing on the external irritants affecting the US and UK judicial subsystems; and secondly on the internal programme of operation of the two countries' judiciaries.

8.1 Structural Obstacles to the Rights-Protecting Role of the Judicial Subsystem

This section offers examples of structural obstacles to the enforcement of rights through the judicial process has meant that the 'lure of litigation, while powerful, is by no means irresistible' both generally, and more particularly, challenging counter-terrorism powers.[4] This section considers what these obstacles were and how they affected judicial subsystem behaviour and consequently, its fulfilment of the rights-protecting mandate attributed to it by the law-making and policing subsystems. One key obstacle to the judiciary's oversight function is its tendency towards deferential approach in particular contexts and in response to certain sources of opinion.

Whilst US and UK frameworks for equal treatment mandate an intensive standard of review by the courts for race-based treatment, judicial legitimacy in performing this oversight is regularly under attack.[5] Such criticism primarily manifests itself in arguments concerning the level of deference that the courts are expected to show to legislative and executive decision-making in order that the judiciary furthers, as opposed to detracts from, democratic ideals of directly and popularly accountable decision-making.[6]

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[2] C. Gearty, '11 September 2001. Counter-terrorism and the Human Rights Act' (2005) 32(1) *JLS* 18, 30.
[3] T. Ying, '"I do not think [implausible] means what you thinks it means: Iqbal v Ashcroft and Judicial Vouching for Government Officials' (2010) 14 *Lewis and Clark L. Rev* 203; and L. Arbour, 'In our Name and One Our Behalf' (2006) *EHRLR* 371.
[4] M. McCann and H. Silverstein, 'Rethinking Law's Allurement: A Relational Analysis of Social Movement Lawyers in the United States' in A. Sarat and S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP, 1999).
[5] Lord Steyn, 'Deference – A Tangled Story' para 29. For a relatively recent survey of literature regarding the amount of deference that the judiciary should show to the executive see R.M. Chesney, 'Disaggregating Deference: The Judicial Power and Executive Treaty Interpretation' (2007) 92 *Iowa L. Rev.*
[6] See, e.g., M.A. Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7

Deference involves the judge-made principle that the court reviews a particular legal issue in a restrained way, giving some weight to the view of the primary decision-maker. The obligation for deference to democratic institutions stems from arguments relating to their directly and democratically elected nature.[7] The rationale for judicial deference towards the executive is based on the perceived importance of the separation of powers.[8] The HRA made a clear change to the traditional approach of the judiciary on national security cases, which has affected the deference the courts have shown to legislative and executive decisions. In particular, the HRA enables the courts to resolve human rights arguments by going beyond its traditional constitutional role of applying the law, and instead expecting that the courts assess the merits and reasonableness of particular provisions and practices. This has led to the UK courts adopting the principle of proportionality, which it has previously rejected.[9]

Irrespective of the enactment of the HRA, some continuing judicial tendency towards national security deference remains.[10] One example of this is the case of *Secretary of State for the Home Department v Rehman*, in which the Court dismissed an appeal by Rehman, a Pakistani national, against the refusal to grant him indefinite leave to remain in the UK on the basis that he was likely to pose a national security threat.[11] In its judgment the Court demonstrated a high level of fact deference particularly in response to the government's claims regarding the threat posed by Rehman, unquestioningly upholding the Home Office's decision despite its basis on undisclosed information from confidential sources.[12] Underlining the Court's competency-based rationale for its deference, Lord Slynn cited the Government's ability to gather 'a wide range of advice from people with

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Studies in American Political Development 35; J.H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (University of Chicago Press, 1980) 9-10; L.H. Tribe, *American Constitutional Law* (The Foundation Press, 1978) 51; M.J. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (Yale University Press, 1982) 32-60.

[7] See comments in *R v Lambert* [2002] QB 1112 para 16; *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48, para 69; *Brown v Stott* [2003] 1 AC 681, 703, 711; and *R (Pretty) v DPP* [2002] 1 AC 800 para 2.

[8] See *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1160 per Lord Halsham; and generally Lord Irvine 'Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review' [1996] PL 59.

[9] See *R v Secretary of State for the Home Department, ex. P. Brind* [1991] 1 AC 696.

[10] K. Ewing, 'The Futility of the HRA' [2004] *Public Law* 829.

[11] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

[12] *ibid* at para 44.

day to day involvement in security matters'.[13] Further, Lord Hoffmann described the constitutionally motivated reason behind the Court's deference, on the basis that the question of whether 'something is in the interests of national security', is a matter of judgement and policy, and therefore within the remit of the Executive as opposed to the courts.[14] In justifying the wide discretion afforded to executive decision-making Hoffmann cited governmental expertise and access to information, as well as the fact that 'decisions, with such serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process'.[15] Hoffmann's approach in *Rehman* indicates a judicial willingness to adhere to a long-standing, pre-HRA conception of institutional legitimacy in which direct democratic accountability outweighs the court's rights-protecting mandate.[16]

In *A and Others v Secretary of State for the Home Department*, the House of Lords held that the detention provisions of the ATCSA 2001 were incompatible with article 5 ECHR, and were not justified under article 15 ECHR, which allows for derogations to some rights in times of war or other emergency threatening the life of the nation. In making their decision the majority of their Lordships[17] accepted that there was such a threat, stressing too that significant weight should be attached to the assessment of the Home Secretary and Parliament in this regard. However, their Lordships also held that the measures taken were not proportional and strictly required by the exigencies of the situation. Lord Bingham noted that even in situations where national security may be threatened, the courts were not precluded from scrutinising the relevant issues and deciding on the proportionality and necessity of the measures. The measures were deemed disproportionate because they did not deal with the threat of terrorism other than in relation to foreign national and permitted those suspected terrorists to carry on their activities elsewhere provided there was a safe country for them to go to. Further, the HL held that if the threat posed by UK national terrorist suspect could be addressed without

[13] *ibid* at para 52, per Lord Slynn.
[14] *ibid* at para 50 per Lord Hoffmann.
[15] *ibid* at para 62, per Lord Hoffmann.
[16] See D. Feldman, 'Human Rights, Terrorism and Risk: the Rules of Politicians and Judges' (2006) *Public Law* 364, 374-82.
[17] Lord Hoffmann dissenting on the basis that there was merely a threat of serious physical damage and loss of life. Hoffmann concluded that the real threat of the life of the nation came from provisions such as those within the ATCSA that were the subject of the case.

infringing individual liberty it had to be shown why this was not the same for foreign national suspects.

A has been described as the epitome of judicial activism in UK jurisprudence since 9/11: 'the first significant blow in the battle against the UK government to protect the human rights of suspected terrorists',[18] and an 'extraordinary[ily] rights-enforcing judgment'.[19] Commenting on the impact of the HRA on judicial review in *A* Lord Bingham noted that the statute affords 'the courts a very specific, wholly democratic mandate'.[20] In *A* the House of Lords held that the statutory power at the centre of the case, which permitted the indefinite detention of non-British terrorist suspects,[21] constituted an unlawful breach of article 14 ECHR.[22]

However, despite the ruling that the detention had breached articles 5 and 14 ECHR by the time the case reached the ECtHR the law-making subsystem had developed an alternative method of dealing with suspected terrorists, through control orders, meaning that the practical impact of the judgment was minimised.[23] The need to exhaust all domestic remedies before recourse to Strasbourg also helps to choke off, or at least delay actions, reducing their utility as a means of safeguarding individual rights.[24] In response to the decision in *A*, which condemned the executive detention power as discriminatory, the Government announced that it would consider its options, while the detainees remained in detention. It was only when the powers began to lapse under the statutory

[18] S. Shah, 'The UK's anti-terror legislation and the House of Lords: the Battle Continues' [2006] *Human Rights Law Review* 416, 416. See also S. Shah, 'The UK's anti-terror legislation and the House of Lords: the First Skirmish' [2005] *EHRLR* 403; and N. Hayes, 'Liberty v Security – Anti-Terrorism Legislation, the ECHR and the House of Lords' (2005) 8 *Trinity C. L. Rev* 106.

[19] A. Tomkins, 'Readings of A v Secretary of State for the Home Department' [2005] *Public Law* 259. See also A. Tomkins, 'The Rule of Law in Blair's Britain' (2008) *University of Queensland Law Journal* 1, 28, 30, 33; C. Gearty, '11 September 2001' (2005) 32 *JLS* 18, 28; C. Gearty, 'Human Rights in an Age of Counter-terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *CLP* 25, 37; K. Ewing, 'The Futility of the Human Rights Act – A Long Footnote' (2005) 37 *Bracton Law Journal* 41, 42; and Lord Lester, 'The Utility of the Human Rights Act: A Reply to Keith Ewing' [2005] *Public Law* 249, 253.

[20] *A v Secretary of State for the Home Department* [2005] AC 68, para 42.

[21] Anti-Terrorism Crime and Security Act 2001, s.23.

[22] See Lady Arden, 'Human Rights in the Age of Terrorism' (2006) 121 *LQR* 604; and D. Bonner, 'Checking the Executive? Detention without Trial, Control Orders, Due Process and Human Rights' (2006) 12 *EPL* 45.

[23] Prevention of Terrorism Act 2005, ss.1-9. Under a control order, which were subject to judicial supervision, individual terrorist suspects whether British or non-British national s could be subject to restrictive curfews and residency conditions, as also their assets frozen pursuant to UN Security Council Resolutions.

[24] L. Lustgarten and I. Leigh, 'Making Rights Real: the Courts, Remedies and the Human Rights Act' (1999) *Cambridge Law Journal* 509, 542.

sunset clause, and the court had begun releasing the detainees itself, that the executive detention powers were replaced with the control order regime.[25] In terms of its rights-upholding effect, therefore, the decision in *A* had a limited direct impact.[26] This conclusion is made even clearer when *A* is viewed in conjunction with subsequent court decisions, in particular, those concerning the control order regime that replaced executive detention.[27]

Another case indicating the nature of the judiciary's approach to balancing the safeguarding of individual rights with the needs of counter-terror policing is that of *Secretary of State for the Home Department v JJ and Others.*[28] *JJ* brought together a number of claims concerning the use of control orders against terrorist suspects, on the grounds that they constituted an unlawful deprivation of liberty of the controlees subject to the orders.[29] The Court held that while an 18-hour daily curfew constituted a deprivation of liberty shorter periods did not.[30] The Court's approach was highly accommodating of the government's use of control orders holding them out to be permissible, despite being 'not very far short of house arrest'.[31] Following *JJ*, the Court upheld both a 14-hour curfew[32] and a 12-hour curfew,[33] apparently using the 18-hour limit stated in *JJ* as the sole determinant of whether or not the orders infringed individual rights. The government's interpretation of the control order judgments further limited their rights-protecting effect, because the Home Secretary used the opinion to support curfews of 16 hours, despite the tentative nature of Lord Brown's acceptance that curfews of this length may be permissible, with him suggesting that determination of this ultimately resided with Strasbourg.[34] The interpretation of Lord Brown's explicitly uncertain opinion as an uncaveated endorsement of 16-hour curfews led to the

[25] Prevention of Terrorism Act 2005, ss.1-9.
[26] See D. Moeckli, 'The Selective 'War on Terror': Executive Detention of Foreign National and the Principle of Non-Discrimination' (2006) 31 *Brook J. of Int. Law* 495.
[27] See *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45.
[28] *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45.
[29] *ibid*.
[30] *ibid*, paras 24 (Lord Bingham), 63 (Baroness Hale) and 105 (Lord Brown). Lord Hoffmann and Lord Carswell dissenting.
[31] *JJ*, para 3. See also House of Lords and House of Commons Joint Committee on Human Rights in their Twelfth Report of Session 2005-2006 (HL Paper 122, HC 915), para 38.
[32] *Secretary of State for the Home Department v AF and another* [2009] UKHL 28.
[33] *Secretary of State for the Home Department v E and another* [2007] EWCA Civ 459.
[34] *JJ*, Lord Brown: 'It may be, indeed, that 16 hours is too long. I would, however, leave it to the Strasbourg Court to decide upon that', para 106.

government increasing the curfews in question, which had been reduced ahead of the Court's decision. [35]

Deference is also an established characteristic of some aspects of US judicial decision-making, particularly in its acceptance of police claims as to the necessity and efficacy of targeting particular individuals with police powers. In the case of *Ornleas v United States*,[36] for example, the police justified searching behind a loose panel in the suspect's car, based on the fact that the panel was loose and contained a rusty screw. The officer said that these factors suggested that it have been removed and drugs placed behind it. The Court accepted the officer's assertion, that loose panels often hide drugs and, on that basis, deemed the search to have been reasonable. This line of reasoning is indicative of a more widespread tendency of the US judiciary, to unquestioningly accept police officer testimony in cases considering police deployment of their powers and cases claiming discrimination as a result of their use.[37]

The US judiciary has explicitly recognised that the existence of war or other exigent circumstances do not in themselves abrogate the court's role in assuring constitutional guarantees.[38] Indeed, the judiciary's own statement of its function has maintained that it 'is the historic role of the judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the US remains the supreme law of our land'.[39] Despite such a description of its operational function the US judiciary has shown a strong trend of wartime deference,[40] through which real or imagined threats to public welfare have been used as an excuse for compromising individual rights.[41] The political nature of the making, execution and evaluation of foreign and national security policies has been used as the justification for confining such matters to the jurisdiction of

[35] JCHR, *Court Policy and Human Rights*, para 41.
[36] *Ornelas v United States* 517 US 690 (1996).
[37] D. Sklansky, 'Traffic Stops, Minority Motorists and the Future of the 4th Amendment' (1997) *Sup. Ct. Rev.* 271, 300-01.
[38] *Youngstown* at 649-50, per Jackson J (concurring); *Milligan*, 71 US at 8. See also W.J. Brennan, 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Crisis (1988) 18 *Isr. Y.B. Human Rights* 11.
[39] *United States v United States District Court*, 441 F.2d 651, 664 (6th Cir, 1971).
[40] See *Korematsu* 323 US at 224-25; *Rosker v Goldberg*, 453 US 57, 64-65 (1981); *Green v Spock*, 249 US 47 (1976); *Haig v Agee*, 453 US 280 (1981); *United States v Robel*, 389 US 258 (1967); and *New York Times v United States*, 403 US 713 (1971). For academic comment relating to this trend see, e.g., S.R. McAllister, V. Dinh, E. Chemerinsky, C. Stone and J. Rosen, 'Life after 9/11: Issues affecting the Courts and the Nation' (2002-03) 51 *U. Kan. L. Rev*. 219, 225-231; A. Gruber, 'Raising the Red Flag: The Continuing Relevance of the Japanese Internment in the Post-Hamdi World' (2006) 54 *U. Kan L. Rev* 307, 310; and S. Sherry, 'Judges of Character' (2003) 38 *Wake Forest L. Rev*793, 808.
[41] *Duncan v Kahanamoku*, 327 US 304 (1946), per Justice Murphy.

Congress and the President, by virtue of their democratic authority and institutional competence.[42] Such 'special needs' deference represents an enduring tradition through which the courts have recurrently yielded to the executive's expectation that the judiciary should legitimise its actions and engage in a minimal standard of judicial review,[43] when considering matters related to national security.[44]

An infamous example of wartime judicial deference and one central to CRT claims of constructed minority status,[45] are the Japanese-American cases during the Second World War,[46] in which the Court upheld the constitutionality of Executive Orders subjecting Japanese Americans to curfews[47] and internment.[48] In the case of *Korematsu v United States*, despite the Court noting the need to subject the Executive Order to a strict standard of review, it nevertheless acquiesced to the executive's conclusions regarding the efficacy and necessity of the race-based measures, due to the risk of espionage and sabotage by Japanese Americans, and upheld the Order.[49] In reaching its decision the Court relied on the earlier judgment in *Hirabayashi v United States* which upheld the constitutionality of curfews for Japanese-Americans,[50] despite the Court in that case having expressly stated that its decision should be interpreted and applied narrowly.[51] The level of judicial subservience to the Executive's arguments in the Japanese American cases was quickly and repeatedly criticised.[52] These criticisms ultimately resulted in the *Korematsu* and

[42] See *Prize Cases* 67 US (2 Black) 635, 670 (1862) in which the Court deferred to the President's determination that the Confederate State's cessation had marked the outbreak of the Civil War. This tendency was also recognised in: The Federalist, No. 23. (Alexander Hamilton) at 147 and The Federalist, No. 41 (James Madison) at 270.

[43] See e.g., *Lidster*, 540 US at 427 citing *Brown v Texas*, 443 US 47, 51, 99 S. Ct 2637, 61, 61 L. Ed. 2d 357 (1979). See also C.N. May, *In the Name of War. Judicial Review and the War Powers Since 1918* (Harvard University Press, 1989); and T. Cruz, 'Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties when 'Fears and Prejudices are Aroused'' (2003-04) 2 *Seattle Journal of Social Justice* 129.

[44] Although the courts have been reluctant to extend the special needs exception to additional forms of criminal investigation such as drugs searches (*City of Indianapolis v Edmond*); and drug abuse testing of pregnant women (*Fergusson*).

[45] See section 2.1.2 of this thesis.

[46] See E. Rostow, 'The Japanese American Cases – A Disaster' (1954) 54 *Yale Law Journal* 489.

[47] See *Hirabayashi v United States*, 320 US 81 (1943) in which the court upheld the conviction of Japanese America, Gordon Hirabayashi, for refusing to obey a racial curfew order.

[48] See *Korematsu v United States*, 323 US 214 (1944), in which the Supreme Court deferred to military claims of necessity as justification for Japanese internment.

[49] See US Commission on the Wartime Relocation and Internment of Civilians, Personal Justice Denied, GPO (1982). See also K.D. Ringle, 'Report on Japanese Question' (26 January 1942) section I(h), stating that: 'the "Japanese Problem" has been magnified out of its true proportion … [and] should be handled on the basis of the individual regardless of citizenship and not on a racial basis', http://home.comcast.net/~eo9066/1942/42-01/Ringle.html, accessed 28.07.2011.

[50] *Korematsu v United States*, 323 US 214 (1944) at 218.

[51] *Hirabayashi v United States*, 320 US 81 (1943).

[52] See, e.g., R.N. Dembitz, 'Racial Discrimination and Military Judgement: The Supreme Court's

Hirabayashi judgments being overturned.[53] The Japanese-American cases provide an example of how, through the level of its scrutiny; acceptance of executive 'facts'; and shaping its judgments in accordance with political aims, the judicial subsystem has restricted its own rights-protecting capabilities, especially in the context of national security threats or in adjudicating claims brought against the police. Where national security considerations represent an immediate concern, therefore, courts, through judicial deference, have made clear efforts to accommodate the government's compelling interest in safeguarding the populace and country from attack.[54] Consequently, mere invocation of the word 'war' has, in effect, been able to strip individuals of the right to full due process, and judicial protection of individual rights, and increased the political incentive to characterise its activities as conducted pursuant to a 'war'.[55]

The approaches of the US and UK judiciaries to national security deference eschew recognition of the different, but complementary sources of operational legitimacy of the judicial and law-making subsystems.[56] Judicial legitimacy derives from a range of sources, including the requirements that: the court justifies its decisions publicly, by means of rational arguments; judicial decisions must been formulated with reference to objective, publicly accessible standards and supported by legal authority derived from a source other than the opinion of a single judge; and the independence of the judiciary from the political branch of government guarantees an unbiased and objective assessment of the case before it.[57] None of these constitutes direct democratic accountability, but

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Korematsu and Endo Decisions' (1945) 45 *Colum. L. Rev*. 175; M. Weglyn, *Years of Infamy: The Untold Story of American's Concentration Camps* (1976); E. Y. Yamamoto, 'Korematsu Revisited – Correcting the Injustice of Extraordinary Government Excesses and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties' (1986) 26 *Santa Clara L. Rev* 1; and E. K.. Yamamoto *et al*, *Race Rights and Reparations – Law and the Japanese American Internment* (2001).

[53] The overturning of the decision was based on a determination that the War and Justice Department had altered, suppressed and destroyed key evidence that demonstrated the absence of military necessity for mass racial internment and curfews. See *Korematsu*, 584 F. Supp. (1983) at 1417 and *Hirabayashi v United States*, 828 F.2d 591, 604-08 (9th Cir., 1987). See generally P. Irons, *Justice at War* (OUP, 1983).

[54] J.C. Yoo, 'Judicial Review and the War on Terrorism' (2003) 72 *George Washington Law Review* 427.

[55] D.M. Filler, 'Values we Can Afford – Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson' (1998) 21 *Oklahoma City University Law Rev*. 409, 420. Compare with Crona and Richardson who argue that in relation to terrorism the US could not afford to use civilian courts and that the war-footing of this threat was appropriate and justified, S.J. Crona and N.A. Richardson, 'Justice for War Criminals of Invisible Armies: A New Legal Approach to Terrorism' (1996) 21 *Oklahoma City University L. Rev* 349.

[56] A. Barak, 'The Role of a Supreme Court in a Democracy and the Fight against Terrorism' (2003-04) 58 *U. Miami L. Rev.* 125, 127. Making this point more generally see K. Roach, 'The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-terrorism Law' (2008) 24 *Windsor Rev. Legal and Social Issues* 5, 55.

[57] See, e.g, R. Masterman, *The Separation of Powers in the Contemporary Constitution. Judicial*

each nevertheless contributed to the court's institutional legitimacy.[58] Both US and UK judiciaries have demonstrated the tension between the judiciary's reluctance to overstep what it perceives as the boundaries of its institutional and constitutional authority and its obligation to act as both a guarantor of individual rights and a check on the political branches.[59] In the absence of external scrutiny from the courts there is no incentive for popularly elected decision-makers to justify their decisions openly, so the courts have a specific role in eliciting an explanation from the legislature as to the rationale behind their decisions.[60] Such deference has contributed to a situation by which the permissibility of profiling in police deployment of their powers has been shaped less by how the judicial subsystem oversees police exercise of its discretion, and more by how the policing subsystems allocated that discretion themselves.[61]

As well as subsystem approaches to deference affecting its safeguarding role for individual rights, the protective capabilities of the courts were also influenced by the manner in which the government pursued counter-terrorism cases. For example, the government used delays within the court system to achieve its aims, whilst avoiding the judicial making its final judgment on a matter.[62] Delays were achieved by government consolidation of cases,[63] and the pursuit of all possible routes of appeal, to enable the continuation of the condemned practice while a new approach is devised, before abandoning the appeal prior to their final determination.[64] This approach had the effect of avoiding an adverse ruling, while allowing the government to claim that by the time the

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Competence and Independence in the United Kingdom (CUP, 2010), ch. 8.

[58] D. Feldman, 'Human Rights, Terrorism and Risk: the Rules of Politicians and Judges' (2006) *Public Law* 364, 375. See also A. Barak, 'A Judge on Judging: the Role of a Supreme Court in a Democracy' (2002) 116 *Harv. L. Rev* 16, 150.

[59] R.M. Chesney, 'National Security Fact Deference' (2009) 95(6) *Virginia Law Rev*. 1361, 1434.

[60] M. Hunt, 'Why Public Law Needs Due Deference' in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 340; D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997).

[61] M-F. Cuellar, 'Choosing anti-terror targets by national origin and race' (2003) 6 *Harvard Latino Law Review* 9, 31.

[62] In relation to the strategic use of delays in environmental litigation see L.M. Wenner, *The Environmental Decade in Court* (Indiana University Press, 1982); and S.P. Hays, 'Environmental Litigation in Historical Perspective' (1986) 19 *University of Michigan J.L. Rev* 969.

[63] The US government, e.g., consolidated a number of warrantless surveillance cases, see Trans. Order 1-3, In *re NSA Telecomms. Record Litigation*, No. 06-1791, 2007 WL3306579 (ND Cal. Nov. 6, 2007). See also ACLU, 'ACLU Fights Government Legal Manoeuvres to Delay Challenges to Datamining' (25 January 2007).

[64] For example, in January 2010, just before the Court of Appeal heard the government's appeal from a judicial ruling that the NSA programme was illegal, the executive abandoned its use of these powers. See, ACLU, 'ACLU Asks Secret Intelligence Court to Release Orders that Led to "Emergency" Wiretapping Legislation' (8 August 2007).

matter came to trial, any unconstitutional effect of the powers had been remedied through the replacement of the original measures.[65]

In the US, one example of the way in which structural features of the judicial subsystem can limit the impact of rights-protecting judgments is illustrated by the ability of the Supreme Court has refused to hear appeals from lower courts.[66] Since 9/11 the Supreme Court has refused to hear a number of appeals relating to the balance between national security and civil liberties interests,[67] on occasion not even offering any reasons behind this decision.[68] In terms of its impact on the protective role of the courts, it does not matter that this discretion is not solely limited to national security or rights-related cases, or that there may be any number of legitimate reasons for the Supreme Court's refusal to hear the cases. Instead, it is the fact that this refusal, on whatever grounds, restricts the ability of the judicial to have the rights-protecting function it is described as having by other subsystems and that despite the existence and potential effect of this power being known about this was not reflected in stated expectations regarding the strength of the judiciary's power to protect individuals from suffering from racial discrimination or the introduction of other safeguarding measures to prevent misuse of the statutory powers.[69]

The overall picture of the post 9/11 national security-related case law also demonstrates that while there are a number of cases in which district courts have ruled in favour of civil liberties these have regularly been overturned on appeal.[70] One such example is *Center for National Security Studies v United States Department of Justice*,[71] in which a coalition of public interest groups sought the release of information concerning individuals detained in relation to counter-terrorism investigations.[72] The District Court ruled in favour of the disclosure, largely on the basis of the Freedom of Information Act, holding

[65] See ACLU, 'ACLU Calls for Repeal of Expanded Patriot Act Powers in Response to Government Report on Abuses Says AG and FBI Are Part of the Problem and Can Not be Trusted to Curb Abuses of Power' (9 March 2007).
[66] See ACLU, 'ACLU Urges Supreme Court to Review NSA Warrantless Wiretapping Case' (3 October 2007); and ACLU, 'Supreme Court Refuses to Review Warrantless Wiretapping Laws' (1 February 2008).
[67] These include: *Center for National Studies v US Department of Justice*, F. Supp 2d 94 (DDC 2002); *United States v Awadallah*, 125 S. Ct 861 (2005).
[68] See, e.g., *ACLU v NSA* 493 F.3d 644 (6th Cir., 2007).
[69] I.F. Haney Lopez, 'Race and Erasure: The Salience of Race to Latinos/as' in R. Delgado, *Critical Race Theory: The Cutting Edge* (2nd ed., Temple University Press, 1999) 370.
[70] ACLU, 'ACLU Sues over Unconstitutional Dragnet Wiretapping Laws' (10 July 2008).
[71] See, e.g., *Center for National Security Studies v United States Department of Justice*, 215 F. Supp 2d 94, 96 (DDC, 2002)
[72] Including the Center for National Security Studies; the American Civil Liberties Union, People for the American Way and the American-Arab Anti-Discrimination Committee.

that 'the public interest in learning the identities of those arrested and detained is essential to verifying whether the government is operating within the bounds of the law'.[73] However, the Court of Appeal reversed this in a 2-1 decision, citing the need for deference to the executive's judgement as to the needs of national security.[74] By contrast, there are almost no rulings in which district court decisions in favour of the government have been later reversed.[75]

A similar pattern, by which district court activism has been overturned on appeal, is evident in the case of *North Jersey Media Group Inc. v Ashcroft* in which the appeal court reversed the lower court's decisions and supported the Attorney General's blanket closure of immigration hearings to the media and public, in order to maintain public confidence in the government's actions.[76] Finally, in the case of *In re: All Matters Submitted to the FISC* the FISC unanimously rejected new executive-proposed guidelines allowing federal prosecutors to consult law enforcement agents conducting foreign intelligence surveillance and the permanent use of special Foreign Intelligence Surveillance wiretaps for investigating ordinary crimes.[77] The Court held that the proposals breached the 4th Amendment protection against unreasonable searches and seizures, and in so-doing ended an unbroken series of around 14,000 approvals of government applications. However, the Department of Justice appealed this decision which was then overturned.[78]

Within the US extrajudicial settlements have also limited the role of the judicial subsystem in national security.[79] In the case of *Hamdi v Rumsfeld,* for example, before the appeal granted by the Supreme Court was heard the Bush administration reached a deal with Hamdi by which he would be released from detention in return for him renouncing his citizenship and promising never to return to the US or take up arms

[73] *Center for National Security Studies v United States Department of Justice* 215 F.Supp 2d 100, 105.
[74] *Center for National Security Studies v United States Department of Justice*, 331 F.3d 918, 928 (D.C. 3d Cir 2000). See also J.J. Paust, 'After 9/11, No Neutral Ground" With Respect to Human Rights: Executive Detention Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees' (2004) 50 *Wayne L. Rev*. 79.
[75] One such case, however, was *Gherebi v Bush*, 262 F. Supp 2d 1064 (CD Cal 2003) rev'd 352 F.3d 1278 (9th Cir. 2003), granted, vacated and remanded by 124 S. Ct 2932 (2004) where the Ninth Circuit held that the federal court had jurisdiction to hear a habeas corpus petition by a detainee at Guantanamo Bay.
[76] *North Jersey Media Group Inc. v Ashcroft*, 308 F.3d 198 (3d. Cir 2002).
[77] *In re: All Matters Submitted to the FISC* No. Multiple 02429-F. Supp 2nd C. (US FISC, 17 May 2002).
[78] *In re: Sealed Case* (US FISC of Rev. No 02-001 and 02-002, 18 November 2002).
[79] E.g. in *Internet Archive et al v Muhasey et al*, No.07-6346-CW (N.D.Cal, 2008) the FBI withdrew the National Security Letter in the face of formal court proceedings. See also *United States v Lindh*, 227 F.Supp 2.d 565 (EDVa. 2002) in which the government agreed to drop all terrorism charges in exchange for a guilty plea in relation to lesser charges.

against it.[80] A further way in which judicial oversight of the surveillance has been limited is through the court's application of the 'third party rule', under which no reasonable expectation of privacy attaches to documents held by third parties. This rule has become increasingly problematic as a result of electronic communications and transactions – which pass through or are received by third party service providers. The Court has even suggested that the absence of reasonable expectation of privacy in sent and received emails extends to the contents of the emails,[81] as well as information regarding the sender and recipients of the email and volume of data transmitted.[82]

In both the US and UK, therefore, the judicial subsystem faced a range of obstacles in terms of fulfilling the extent of its rights-protecting role. These arose from notions of deference as well as the mechanics of the court system in each country. The specific obstacles differed between the US and UK, but each shared the characteristic that it restricted the judicial in safeguarding individual rights infringement. Similar restrictions also arose from the judicial interpretation of its own role in each country, as the next section shows.

8.2 Judicial Interpretation of its Adjudicatory Role

As well as obstacles to the judicial protection of individual rights arising from the structure of the subsystem and its interaction with the government, limitations to the courts protective ability also relates to the judiciary's own interpretation of its role in adjudicating counter-terrorism case law and its application of statutory human rights protections.

The appellants did not expressly raise the potential for the racially uneven use of the stop and search powers amongst their claims. Despite this a number of the UK and European judges found this issue worthy of comment.[83] The approach of the UK courts to human rights provisions illustrates a restriction within the courts rights-protecting role, which is at odds with the level of judicial oversight described by the policing and law-making

[80] *Hamdi v Rumsfeld.*
[81] *Rehberg v Poaulk*, 598 F.3d 1268, 1281 (11th Cir. 2010).
[82] *United States v Forrester*, 512 F.3d 500, 509 (9th Cir. 2008).
[83] Although Lord Bingham and Lord Walker did not see a need to address the potential for racial discrimination in the powers, *Gillan* (HL), paras 35 and 70.

subsystems.

In the House of Lords, Lords Hope, Scott and Brown addressed the question of whether deployment of the s.44 powers on the basis of ethnic profiling was compatible with the prohibitions on discrimination on grounds such as race, colour, religion, national origin or other status within domestic law,[84] or in the enjoyment of rights within the ECHR.[85] Their Lordships found police use of s.44 to be justified on several grounds.

Lord Scott accepted that deployment of the s.44 powers 'might require some degree of stereotyping in the selection of the persons to be stopped and searched and arguably, therefore, some degree of discrimination'.[86] Pursuant to the provisions of the Race Relations Act any such discrimination Lord Scott concluded that this discrimination was nor unlawful provided that it was 'done for the purpose of safeguarding national security if the doing of the act was justified by that purpose'.[87] In considering the purpose of the statutory power Lord Scott's reasoning appears to overlook the fact that s.44 was intended for the purpose of combating terrorism and that it was by no means automatically true that this would pursued by targeting a particular racial group, nor that so doing was inevitably necessary for the purpose of safeguarding national security.[88]

Lord Scott also failed to consider article 14 ECHR. By contrast, Lords Bingham and Brown acknowledged that stops and searches may engage a person's article 8 right to respect for private and family life[89] and, therefore, analysed the stop and search powers in light of the Article 14 prohibition. Lord Brown commented that '[i]t is one thing to accept that a person's ethnic origin is part (and sometimes a highly material part) of his profile; quite another (and plainly unacceptable) to profile someone solely by reference to his ethnicity'.[90] In applying the article 14 protection, however, Lord Brown prioritised the Government's rationale for the potentially infringing treatment, as opposed to evaluating the particular use and impact of the provision. By contrast the ECtHR found

[84] RRA, s.1.
[85] Art 14 ECHR
[86] *Gillan* (HL) at para 68.
[87] *ibid.*
[88] D. Moeckli, 'Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis' (2007) 70(4) *MLR* 654. See also D, Moeckli, 'Case Comment: Police Powers – Whether Authorisation given under Terrorism Legislation Lawful' [2006] *Crim LR* 751, 755.
[89] *Gillan* (HL) paras 28 and 74.
[90] *ibid* , para74, per Lord Brown.

no difficulty in concluding that 'the risk of the discriminatory use of the powers was a 'very real consideration'.[91] The ECtHR based its assessment on the fact that the statutory powers were 'neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse'.[92] The ECtHR, therefore, instinctively recognised that the lack of effective safeguards had an impact on equal protection considerations, and used statistical evidence to support its view. The UK court's interpretation of the statutory framework for protecting individual rights, reached the contrary conclusion, without considering any specific evidence of discriminatory impact.

In *Gillan*, therefore, the UK courts failed to challenge or explore the policing link between race and the suspect-terrorist profile. This perceived link, through which race acted as a proxy for religion, and in turn for terrorist suspect, meant that it was deemed to be automatically justifiable that individuals could be stopped and searched on the basis of their actual or perceived racial origins.[93] For the UK judicial subsystem this perception was more influential than any calls to evaluate the justifiability of the proxy employed. Lord Hope's consideration of the possibility that the powers could infringe article 14 provides a good example of the, at best, limited consideration within the UK's judicial subsystem to the statutory protection. In justifying his conclusion regarding the hypothetical impact of the power on racial equality Lord Hope applied the test set out in the *Roma Rights Centre* case, which condemned the de-individualised treatment of Roma passengers on the basis of their ethnic origins.[94] Interpreting this judgment strictly Lord Hope distinguished it from *Gillan* because the decision to stop and search the claimants in *Gillan* had been on 'other, further, good reasons … even if, in the end it is based more on a hunch than on something that case be precisely articulated or identified'.[95] Lord Hope did not, however, explore the necessary qualities of the supplementary considerations or the weight that should be attached to them. In addition, Lord Hope's reliance upon the role of the 'further factors' does not seem to have been based on any concrete statute or judicial precedent.[96] Lord Hope also offered no basis for his conclusion that these

[91] *ibid*, para 85.
[92] *ibid*, para 87.
[93] See A. Baker, 'Proportional Not Strict: Against a US "Suspect Classifications" Model under Article 14 ECHR in the UK' (2008) 56 *The American Journal of Comparative Law* 847, 866.
[94] *Gillan*, paras 45-46, per Lord Hope. See also *ibid* para 90, per Lord Brown.
[95] *ibid*, para 45, per Lord Hope.
[96] D. Moeckli, 'Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis' (2007) 70(4) *MLR* 654, 665-666.

additional factors would meaningfully narrow the class of suspects beyond simply considering racial and ethnic origins. Lord Hope's opinion does indicate some awareness of the judiciary's role to oversee executive behaviour in that he noted that a national security-related purpose is not sufficient to render discriminatory use of the power lawful; and that an individual's racial origin is insufficient to justify deployment of s.44.[97] Despite these strong statements, however, Lord Hope held that, on the balance of probabilities, it was not inevitable that stopping persons who are of Asian origin would be found to be discriminatory and, therefore, concluded that the power was lawful.[98]

A similar judicial hesitancy in challenging legislative choices is demonstrated in *A*, in which the Court stated that those 'conducting the business of democratic government have to make legislative choices which … are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole'.[99] In his dissenting opinion, Lord Hoffmann rejected governmental claims of public emergency, maintaining that the 'real threat to the life of the nation … comes not from terrorist but from laws such as these'.[100] The majority, however, afforded the government a broad and relatively unchallenged area of deference regarding whether there was a relevant national security need for the measures, despite the government's concession that there was no evidence of a specific threat to national security.[101] Whilst such an approach does not entirely exclude judicial oversight it limits its protective potential, by rendering a wider range of operations a proportionate incursion into rights protections, in response to contextual pressures against which it was nevertheless still intended to provide adjudicatory oversight.

A further example of the difference between the EU and UK judiciaries approach to individual rights protections in the context of counter-terror legislation, is the case of *Liberty v United Kingdom*,[102] which was referred to in *Gillan*.[103] In *Liberty* the ECtHR

[97] *Gillan*, paras 44-45, per Lord Hope.
[98] *ibid*, paras 46-48, per Lord Hope.
[99] *A*, para 38.
[100] *ibid*, para 97, per Lord Hoffmann.
[101] *ibid*, para 21. See also C. Gearty, '11 September 2001. Courts and the Human Rights Act' (2005) 32(1) *JLS* 18, 29.
[102] *Liberty v United Kingdom*, EctHR App. No. 58243/00 (2008).
[103] *Gillan*, para 65.

held that the legislation, which permitted the secret monitoring of communications,[104] 'strikes at the freedom of communication'.[105] Consequently, the ECtHR found that the powers interfered with the applicants' rights under article 8 ECHR, irrespective of any measures actually taken against them, because the legislative provisions themselves constituted a breach.[106] This case demonstrates the expansive European Court approach to rights infringements, which is unswayed by considerations of institutional or constitutional competency, or even the need for standing on the part of the claimants. By contrast, the UK courts appear to have based their adjudication on the presumptive validity of the domestic legislation, readily accepting the government's rationale behind its implementation and use.

As in the UK, in the US the judiciary's rights-protecting function is also affected by its understanding of its adjudicatory role in overseeing national security powers, which has meant that the Supreme Court 'as a matter of policy, does not enforce the rule of law with respect to large sections of people'.[107] This effect has arisen both from judicial action and inaction; in particular, because the Supreme Court has not specifically addressed the issue of whether racial profiling by law enforcement necessarily invokes equal protection analysis.[108] One of the reasons cited for the judicial subsystem's failure to make an expressed declaration on the permissibility of profiling is the lack of congressional guidance regarding this mode of police behaviour,[109] which has meant that the courts have persisted in applying the intent requirement to determine whether the police have engaged in discriminatory differential treatment.[110] This approach has exacerbated the disconnection between civil liberties enshrined in the constitution and applied by the courts and post-9/11 law enforcement operations, as demonstrated by cases such as *Hamdi v Rumsfeld*, in which the Executive claimed that the separation of powers doctrine should preclude the courts from interfering in the detention and trying of enemy

[104] Interception of Communications Act 1985 and the Regulation of Investigatory Powers Act 2000.
[105] *Liberty v United Kingdom*, para 56.
[106] *ibid.*
[107] N.T. Saito, 'Will Force Trump Legality after September 11th?' (2002-03) 17 *Georg. Immigration Law Journal* 1, 6.
[108] J.I. Winn, 'Time for Clarity in Federal Guidance: Suspect Profiling as Legitimate Counter-terrorism Policy' (2006-07) 1 *Homeland Security Review* 53, 58.
[109] A.C. Conveny, 'When Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism' (2007-08) 37 *Am J. Trial Advocacy* 329, 352.
[110] See section 7.2.1 of this thesis.

combatants.[111]

One area of case law which indicates the nature of the US judiciary's understanding of its adjudicatory function relating to police powers is its approach to governmental claims of secrecy surrounding the use of counter-terrorism powers. In *MacWade*, the majority opinion stated that while '[c]ounter-terrorism experts and politically accountable officials have undertaken the delicate and esoteric task … [w]e will not – and may not – second guess' them.[112] In its decision, therefore the Court was quick, almost eager, to accept that no empirical proof of the effectiveness of the powers in protecting national security was necessary to evaluate the balance struck between individual rights and countering terrorism.[113] As well as relying upon a somewhat tendentious distinction between fact and law,[114] however, the existence of such a recognised area into which the court will not enquire enabled the executive to present what were really moral or legal conclusions as factual findings.[115] Such judicial reasoning ignores the propensity, which is particularly acute in relation to national security measures, for the law-making and law enforcement subsystems to take action to create a sense of security, as opposed to the reality of security.[116] In failing to evaluate claims relating to the utility of the powers, therefore, the Court helped to facilitate the demonstrative and symbolic use of the counter-terrorism powers.[117] The judicial subsystem's tendency to acquiesce to governmental claims of security need, irrespective of the lack of a factual basis for this assessment was also demonstrated in the case of *Detroit Free Press v Ashcroft.*[118] In *Detroit Free Press* the Court upheld the Government's claim of necessity on the basis of a conclusory affidavit from a single law enforcement officer and unsupported assertions in the oral arguments

[111] *Hamdi v Rumsfeld*, para 535, per Justice O'Connor. See also N.J. Finkel, 'Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times' (2006) 12 *Psychology, Public Policy and Law* 242, 262-64.
[112] *ibid*, para 274.
[113] A.C. Coveny, 'When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism' (2007-08) 31 *Am. J. Trial Advocacy* 329, 370.
[114] C.E. Borgmann, 'Rethinking Judicial Deference to Legislative Fact-finding' (2009) 84 *Ind. L.J.* 1, 9. See also C.E. Borgmann, 'Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy' (2008-09) 17 *JL and Policy* 16.
[115] See N. Devins, 'Congressional Factfinding and the Scope of Judicial Review: Preliminary Analysis' (2001) 50 *Duke LJ* 1169, 1177-78; S.M. Pilchen, 'Politics v The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding under the Post-Civil War Amendments' (1984) 59 *Notre Dame L Rev* 337, 340.
[116] See section 6.2.2 of this thesis.
[117] C.J. Keeley, 'Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism' (2006) 74 *Fordham L. Rev* 3321, 3363-64.
[118] *Detroit Free Press v Ashcroft*, 303 F.3d 681 (6th Cir, 2002).

heard. In his dissenting opinion Justice Tatel criticised the 'government's vague [and] poorly explained allegations' and accused the majority judgment of 'filling in the gaps in the government's case with its own assumptions about the facts absent from the records'. Tatel further considered the Court to have 'converted deference into acquiescence'.[119]

In a further case, that of *El-Masri,* although the Court stated that it was 'the court, and not the Executive, that determines whether the state secrets privilege has been properly invoked'[120] it nevertheless accorded the 'utmost deference to the responsibilities of the executive branch' on the grounds that the executive was in a better position than the courts to evaluate the negative effect of releasing the information against which privilege was claimed.[121] The Court concluded that 'virtually any response to El-Masri's allegations would disclose privileged information', so no response was made.[122] The Court's refusal to challenge executive assessment of the impact of releasing information effectively eliminated any meaningful evaluation of whether the doctrine was properly invoked confirming the decision to invoke the doctrine, and evaluation of the justification behind it, to a single governmental branch.[123] Whilst it is not claimed that the Executive invoked the State Secrets Doctrine specifically to avoid judicial scrutiny, in doing so it would have known that the courts have traditionally shown it a high level of deference to this doctrine.[124] However, the court's previous approach had primarily resulted in the exclusion of particular pieces of evidence and issues,[125] and had still enabled it to adjudicate in relation to warrantless surveillance in national security cases.[126] Under this previous approach the court only struck out entire cases where the very subject matter of the case was itself a state secret, which only applied to circumstances in which the plaintiff could not present the prima-facie case, or the government raise a valid defence, without recourse to privileged evidence,[127] and there was no alternative way of enabling

[119] *El Masri*, para 938, Tatel, J (dissenting).
[120] *ibid*.
[121] *ibid*, para 305.
[122] *ibid*, para 310.
[123] P. Marguiles, 'Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity and Procedure after September 11' (2004) 84 *B.U. L. Rev* 383, 401.
[124] See, e.g., *United States v Nixon*, 418 US 683, 710 (1974).
[125] See, e.g., *In re United States*, 872 F.2d, para 478.
[126] See, e.g., *United States v Clay*, 430 F.2d 165 (5th Cir 1970), rev'd 403 US 698 (1971); *United States v Brown*, 484 F.2d 418 (5th Cir., 1973); *United States v Butenko*, 494 F.2d 593 (3rd Cir., 1974); and *United States v Truong Dinh Hung*, 667 F.2d 1105 (4th Cir., 1981).
[127] See, e.g., *Tenet v Doe*, 544 US 1, 9 (2005); *United States v Reynolds*, 345 US 1, 11, n.26 (1953); *DTM Research, LCC v AT&T*, 245 F.3d 327, 333-34 (4th Cir., 2001), quoting *Fitzgerald v Penthouse Int'l Ltd*, 776 F.2d 1236, 1241-42 (4th Cir., 1985); *Moleno v FBI*, 749 F.2d 815, 822, 826 (DC Cir., 1984); and *Ellsberg v*

the case to progress.[128] The *El-Masri* judgment, by contrast, suggests an increased deferential turn in the court's approach to the state secrets doctrine and effectively confirmed that the Government's action, in the present case and in any future judicial challenge, was insulated from judicial review.[129]

As well as deference regarding the level of the emergency faced the US and UK courts have also adopted executive irritants pertaining to the efficacy of challenged police powers in countering the terrorist threat, citing the latter's greater expertise in determining such questions.[130] Long-standing arguments supporting fact-finding deference have cited both constitutional and institutional rationales for this mode of judicial behaviour.[131] These include the claim that matters of fact are essentially political questions, whereas the jurisdiction of the courts exists solely in resolving legal questions, and that the judiciary is structurally and institutionally less adept at discovering and analysing complex facts than Congress.[132] The role of law-making subsystem fact-finding in informing judicial decisions was expressly acknowledged by the US courts in the case of *Metro Broadcasting*, where the Supreme Court held that courts 'must pay close attention to the fact-finding of Congress… [and] give great weight to decisions of Congress'.[133] Adhering to this approach in post-9/11 adjudication, judicial fact-finding deference is apparent in the case of *MacWade v Kelly*, in which the Court upheld a programme of container searches in the New York subway, on the basis of the special needs doctrine.[134] In *MacWade v Kelly* the Court opined that the search programme 'address[ed] the broad

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Mitchell, 709 F.2d 51, 64 n.55 (D.C. Cir., 1983). See also ACLU, 'ACLU Urges Court to Reject State Secrets Claim in NSA Case' (21 June 2006); ACLU, 'Government Abusing State Secrets Claim in NSA Case' ACLU Tells Court' (10 July 2006); and ACLU, 'ACLU Seeks Information on Extent of Bush Administration Spying' (19 July 2006).

[128] *Fitzgerald v Penthouse*, para 1238, n.3.

[129] M. Avery, 'The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to National Security of the United States' (2007-08) 62 *Univ. Miami L. Rev*., 541.

[130] This approach supported by, eg., E. Posner and A. Vermeule, *Terror in the Balance* (OUP, 2007) 5; and E. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (OUP, 2006) 37.

[131] C.K. Iijima, 'Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and Mccarthy' (2004) 54 *Syracuse L. Rev* 109, 128.

[132] *Oregon v Mitchell*, 400 US 112 (1970) per Justice Brennan (dissenting) at paras 247-48. See also N. Devins, 'Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis' (2001) 50 *Duke L.J.* 1169, 1179. In addition Mark Tushnet has suggested that because legislators are less insulated from the public they may have a more immediate connection to, and awareness of, the social circumstances that call for legislative solutions, M. Tushnet, *Taking the Constitution Away from the Courts* (1999); and M. Tushnet, 'Non-judicial Review' (2003) 40 *Harvard J. on Legis.* 453.

[133] *Metro Broadcasting* 497 US 547, 569, 579-81 (1990), quoting *Columbia Broad Systems Inc. v Democratic National Comm.*, 412 US 94, 103 (1973), overruled on other grounds by *Adarand Constructors Inc. v Pena* 515 US 200 (1995).

[134] *MacWade v Kelly* SDNY, Index No.05-cv-6921, US Court of Appeals, 2nd Circuit, Index No.05-6757-cv..

range of concerns related to terrorist activity' and 'created an environment in NYC that has made it more difficult for terrorist to operate',[135] despite the Court not having been shown, nor sought, any specific evidence as to this effect of the New York Transport Authority. Invocation of the doctrine meant that the presumption that a stop and search in the absence of the normal warrant and probable cause requirements was unreasonable did not apply, and the programme was upheld.[136]

This section has provided examples of how the US and UK judicial subsystems have interpreted and applied the legislative frameworks through which human rights obligations of the political subsystem are protected, in a way which has contributed to the inherent limitations of these provisions. Consequently, whilst the rights regimes represent a self-imposed restriction on legislative freedom the effect of the restriction is limited. A key reason for this was that because the legislative frameworks originated from the legislatures, but are interpreted by the judicial subsystem in its rights-related judgments[137]. Through this process the legal frameworks had a different effect to that claimed by the originating subsystem. The absence of a straightforward constitutionally-focused solution to the limitations of the 14th Amendment EPC and Article 14 in protecting rights hints at the complexity of the problems faced by the judicial subsystem in safeguarding individual rights against infringement as a result of national security concerns. As well as the role of judicial interpretation of constitutional rights protections, in curtailing their protective value, judicial subsystem programmes of operation were also affected by the manner in which each judiciary responded to political irritants, relating to the national security threat, arising from terrorism, as the next section shows.

8.3 The Influence of Political Irritants on the Judicial Subsystem

The rights-safeguarding function of the judiciary is strongly tied to its institutional independence.[138] While the relatively insulated nature of the judicial subsystem and the doctrine of precedent are designed to promote judicial independence and neutrality they do not hermetically seal off the judicial subsystem from environmental irritants.

[135] *MacWade v Kelly*, para 267.
[136] See *Skinner v Railway Labor Executive's Association*, 489 US 602, 619; *Payton v New York*, 445 US 573, 586 (1980); *Mincey v Arizona*, 437 US 385, 390 (1978).
[137] J. Black, 'Proceduralizing Regulation' (2001) 20(1) *OJLS* 33.
[138] A. Sarat, 'Going to Court: Access, Autonomy and the Contradictions of Liberal Legality' in D. Kairys (ed.), *The Politics of Law. A Progressive Critique* (Basic Books, 1998) 97, 97; and J. Jowell, 'Judicial Deference: Servility, civility or institutional capacity?' [2003] *PL* 592.

Consequently, court judgments at all levels are informed by a range of sources from the general public, interest groups and the federal government.[139] This has led to suggestions that we can rely on judges no more than on legislators to exercise the dispassionate application of reason. Consequently, normal subsystem operations are responsive to political irritants, which play a role in standard subsystem communicative redundancies, such as the doctrine of deference. This section shows that in the context of the threat from international terrorism the judicial subsystem interpreted changes in the nature of these irritants as necessitating a change in its own operational responses to them.[140] Such changes suggest a judicial willingness, if not to be 'stampeded by the Executive', then at least to reflect political communications in its own programme of operations relating to national security threats.[141] This nexus affected the judicial subsystems' protection of individual rights against their infringement by the police.

8.3.1 Political Irritants and Judicial Decision-Making

The impact of political irritants on judicial decision-making is suggested by several features of counter-terrorism jurisprudence. A number of judgments, for example, show evidence of the judiciary adopting governmental exceptionalism regarding the nature of the security threat faced, against which judicial condemnation of executive measures would represent an unacceptable concession to the terrorists.

In the UK, the *Gillan* judgments suggest a number of ways in which politically-motivated communications were incorporated into the judicial subsystem's programme of operation and affected its decision-making. One such influence is evident in the judiciary's adoption of the exceptionalism of the terrorist threat, upon which the law-making subsystem premised the enactment and deployment of the stop and search powers.[142] In the Court of Appeal judgment, for example, the court's role in applying the HRA was described as being to 'place in the scales the authorities' evaluation of the action needed

[139] Lawrence Baum argues this through an analysis of empirical evidence of judicial reasoning and decisions, L. Baum, *The Puzzle of Judicial Behavior* (The University of Michigan Press, 2000).
[140] Making this observation regarding the US see M. Kammen, *A Machine that Would Go of Itself. The Constitution in American Culture* (rev. ed., Transaction Publishers, 2006) 67.
[141] Predicted by Prof Keene, as quoted in M. Dolain and H. Weinstein, 'America Attacked: Preservation of Principles' *LA Times* (14 September 2001) A1. See also W. Glaberson, 'Arab Americans See Hazards in the Courtrooms' *NY Times* (3 October 2001).
[142] See section 4.1 of this thesis.

to avoid the terrorist incident as against the courts' assessment of the effect on the member of public'.[143] This approach to the HRA's proportionality test enabled governmental claims of the nature of the threat faced to dominate the court's adjudication without any scrutiny of their basis. The judgment of the Court of Appeal also demonstrates a strong link between the mode of judicial reasoning and the politically inspired communications arising from the law-making subsystem with the Court describing the scale of the terrorist threat being 'so well-known [that] it hardly requires evidence'.[144] Thus the exceptionalism pervading the parliamentary debate was an important factor in shaping judicial decision-making.

A further example of the openness of the judiciary to political communications exists specifically in relation to the deployment of stop and search in a racially targeted manner. Judicial comments labelled the race-based deployment of s.44 as 'common sense' and 'inevitable', because terrorists 'are likely to be linked to sectors of the community that, because of their racial, ethnic or geographical origins are readily identifiable'.[145] In rejecting the possibility that the powers had been used in a racially discriminatory manner the Court distinguished *Gillan* from the decision in the *Roma Rights Case*, because of the existence, in *Gillan*, of 'other, further, good reasons' for using the power, beyond race.[146] These factors meant that race-based stops and searches were not inevitably discriminatory and, indeed, performed an important function in reassuring the public that they were effectively protected against terrorist attack.[147] The lack of evidence of, or comment regarding, the necessary quality of these other reasons, however, casts doubt as to their ability to effectively target the powers, beyond their arbitrary deployment against individuals satisfying a particular race-based suspect profile. The judiciary's acceptance of both the exceptionalism of the terrorist threat and the utility of a race-based terrorist profile automatically meant that, from the perspective of the Court, the level and nature of use of the powers was sufficiently selective as to be neither arbitrary nor discriminatory.[148] Indeed, Lord Brown concluded that the racially targeted use of the powers was the only means of avoiding their arbitrary deployment, and was therefore an

[143] *Gillan* (CA), para 35.
[144] *Gillan* (CA), para 50.
[145] *Gillan* (HL), paras 39 and 42 per Lord Hope of Craighead and para 80 per Lord Brown of Eaton-under-Heywood.
[146] *Gillan* (HL), para 45, per Lord Hope of Craighead.
[147] *ibid*, paras 47 and 48.
[148] *ibid*, para 92 per Lord Brown of Eaton-under-Heywood.

essential means of avoiding the abuse of the power.[149]

A final feature of the *Gillan* judgment which suggests the interconnection between the politically-driven law-making subsystem communications and the substance of judicial decision-making is the Court's adoption of the legislature's expectations of police professionalism and discretion in deploying the powers. To the extent that the Court accepted that the powers may have been deployed on a racial basis, therefore, this was attributed to the police exercising their professional judgement, even where the power was used against a person who 'conforms to some extent in the mind of the police officer to a stereotype of a person' who may be involved in terrorism.[150] This confidence was reflected in the fact that whilst the powers themselves were wide-ranging this was described as merely enabling the powers to be used sparingly but flexibly, as operationally required.[151] Thus, despite having acknowledged that the evidence surrounding the operational guidance upon which the police based their deployment of the power was 'lamentable' the court nevertheless adhered to the same levels of confidence as expressed within Parliament, that use of the power was appropriate and proportionate given the scale of the threat faced.[152] Such judicial expectations of professional judgement are also suggested by the wholesale rejection of the claim that s.44 had become part of day-to-day police operations.[153] The centrality of the police's own ability to protect against misuse of the power within the judicial decision-making is further suggested by Lord Hope's comment that the best means of preventing any misuse of the powers 'is likely to be found in the training, supervision and discipline of the constables who are to be entrusted with its exercise'.[154]

In the US several of the enemy combatant cases provide a good insight into the way in which judicial considerations were affected by political irritants and expectations regarding the role of the courts in reviewing counter-terrorism powers. One such decision was the judgment in *Hamdi*, which actually received a positive reception, in terms of its rights-affirming nature, when it was initially handed down.[155] In rejecting the President's

[149] *ibid*, para 92, per Lord Brown of Eaton-under-Heywood.
[150] *Gillan* (HL), para 67 per Lord Scott of Foscoe. See also para 68 per Lord Scott.
[151] *Gillan* (CA), para 50.
[152] *Gillan* (CA), para 53; *Gillan* (HL), para 35.
[153] See, e.g., *Gillan* (divisional court decision), para 25;
[154] *Gillan* (HL), para 57.
[155] For discussion of this see K.A. Bergin, 'Authenticating American Democracy' (2006) 26 *PACE L. Rev*

argument that courts may not inquire into the factual basis for the detention of a US citizen as an enemy combatant,[156] the Court was described as having found 'ways to honour the Constitution without compromising vital national security interests'.[157] However, the impact of the case on counter-terrorism policy and practice did not correspond with its apparent promise.[158] A number of characteristics of the judgment indicate a judicial adoption of executive-originating political value judgements and assumptions,[159] so that the policing measures were rationalised on the basis of military necessity and their objective nature.[160] The Court, for example, quickly accepted the utility and necessity of the detention, describing it as a 'fundamental and accepted incident to war',[161] and as constituting 'necessary and appropriate force'.[162]

In adopting this approach the Court failed to evaluate the measures in accordance with prescribed levels of judicial scrutiny. Further, while the Court recognised that detention was only permissible for the duration of the relevant conflict it did not distinguish the context it was assessing, with its potentially on-going and unending nature, from that of conventional military engagement.[163] This practical, but not judicially recognised difference negated the protective value of the temporal limitations to the detention provisions. The Court also wholly deferred to the Executive's designation of the individuals as 'enemy combatants'.[164] More generally the Court failed to resolve broader questions concerning the role of the judiciary in the separation of powers and the nature of due process available to citizen-detainees.[165] Claims regarding the impact of political irritants on the *Hamdi* judgment also came from within the judiciary itself. In a dissenting opinion, for example, Justice Motz criticised the majority for simply rubber-

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397; and J. Margiles, *Guantanamo and the Abuse of Presidential Power* (Simon and Schuster, 2006) 115-56.
[156] *Hamdi v Rumsfeld*, para 533.
[157] O. Fiss, 'The War against Terror and the Rule of Law' (2006) 26 *OJLS* 235, 265.
[158] See L.R. Katz, 'Detention in the US after 9/11 without Judicial Oversight' (2003) 1 *IDFLR* 181.
[159] C.K. Iijma, 'Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and Mccarthy' (2004) 54 *Syracuse L. Rev* 109, 115.
[160] As recognised before 9/11 see, e.g., G. Gott, 'A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law' (1998) 40 *BCL Rev*. 179, 211.
[161] *Hamdi*, para10.
[162] *ibid*.
[163] *ibid*, para 13, per Justice O'Connor. See also T. Cruz, 'Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties when "Fears and Prejudices are Aroused"' (2003-04) 2 *Seattle Journal of Social Science* 129, 145-46.
[164] See Editorial, 'Why Mr. Hamdi Matters?' *Washington Post* (11 August 2002); and Editorial, 'Detaining Enemy Combatants' *NY Times* (10 January 2003).
[165] See L. Parrott, 'Restoring the Delicate Balance: Judicial Review of Executive Detention in a Time of Terror' (2007) 3 *High Ct. Rev.* 1, 8.

stamping the Executive's practically unsupported designation of Hamdi.[166] Further limitations of the *Hamdi* judgment were expressed in the dissenting opinions of Scalia and Stevens who considered the majority to have effectively provided the government with a process by which to render illegal detention legal.[167]

Even where the court did take a more executive-challenging approach to the enemy combatant cases, such as in *Boumediene v Bush*, again there are indications that the judiciary was acting in accordance with the expectations of the wider political context, as opposed to demonstrating any independent activism.[168] The *Boumediene* judgment was published less than six months before the US would elect a new President, and in a context in which the candidates from both political parties had pledged to review the Bush administration's treatment of detainees, including the possibility of closing Guantanamo Bay. As well as being near the end of the presidential tenure Bush and Congress were faced with very low approval ratings.[169] Realising that the court was unlikely to face political backlash it is hard to see the judgment as one of determined activism.[170] As such, the behaviour of the US court in the *Boumediene* judgment in a sense supports Gerald Rosenberg's thesis of the fallacy of the 'dynamic court', by which external considerations are frequently able to explain judicial protection of minority interests.[171]

As well as the effect of political irritants in shaping judicial decision-making the impact

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[166] *Hamdi*, para 373 per Justice Motz (dissenting).

[167] *ibid*, para 24 per Scalia and Stevens (dissenting). For a similarly critical view of the majority onion see E. Halsam, 'Human Rights and Hegemony in the Way against Terror' in P. Eden and T. O'Donnell, *September 11, 2001. A Turning Point in International and Domestic Law?* (Transnational Publishers Inc., 2005) 363, 374.

[168] A. Shinar, 'Constitutions in Crisis: A Comparative Approach to Judicial Reasoning and Separation of Powers' [2008] 20 *Florida Journal of Int. Law* 115, 145.

[169] In the second half of 2008 both the President and Congress received record low approval ratings of 25% and 14% respectively. See Gallup Polls, 'Bush Approval Rating at 25%, His Lowest Yet' (6 October 2008) http://www.gallup.com/poll/110980/Bush-Job-Approval-25-Lowest-Yet.aspx, accessed 28.07.2011; and 'Congressional Approval Hits Record-Low 14%' (16 July 2008), http://www.gallup.com/poll/108856/Congressional-Approval-Hits-RecordLow-14.aspx, accessed 28.07.2011.

[170] See N. Devins, 'Congress, the Supreme Court and Enemy Combatants: How Lawmakers Buoyed Judicial Support by Placing Limits on Federal Court Jurisdiction' (2007) 91 *Minn. L. Rev* 1562.

[171] G. Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change?* (2nd ed., University of Chicago Press, 2008) 2-3. See also G. Rosenberg, 'The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs about Equality (or Anything Else)' in N. Devins and D.M. Douglas, *Redefining Equality* (OUP, 1998) 172; M.J. Klarman, *From Jim Crow to Civil Rights. The Supreme Court and the Struggle for Racial Equality* (OUP, 2004) 449, 468; and E.N. Gates (ed.), *The Judicial Isolation of the "Racially" Oppressed* (Garland Publishing Inc., 1997).

of such factors on the judicial subsystem is also apparent in the aftermath of judicial decisions where courts did not support executive behaviour and legislative provisions, as the next section considers.

8.3.2 Political Irritants Following Judgments

Executive and legislative criticism of judicial decision-making have been described as bordering on the irrational, 'since the judges have merely applied orthodox doctrine that the Government was well aware of before introducing counter-terrorism measures'.[172] In such circumstances, in both the US and UK courts have been subject to some express criticism from the political subsystem, as this section shows.

In the UK Tony Blair described the decision of Justice Sullivan in the case of *R(S) v Secretary of State for the Home Department*[173] as 'an abuse of common sense'.[174] Further, David Blunkett suggested that '[i]f public policy can always be overridden by individual challenge through the courts then democracy itself is under threat'.[175] In making his comment Blunkett elided the ability to challenge public policy with the court's scrutiny of the justification of the rights incursion. The comments, therefore, failed to recognise that the legitimate and legislatively prescribed role that the court is afforded in balancing rights and security is regulated through the test of proportionality. Consequently, it is always possible for the courts to scrutinise public policy, by applying an established test of justification which specifically envisages that some individual rights may be sacrificed for more broadly applicable aims. Parliamentary debate has also been a forum for negative comments regarding the role of the courts in enforcing necessary legal measures to counter terrorism. Following the judgment in *Chahal*, for example, the then Home Secretary John Reid, criticised the Court for frustrating the Government's wish to deport foreign terrorist suspects through its interpretation of Article 3 ECHR, and described the decision as an 'outrageously disproportionate judgment'.[176]

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[172] I. Leigh and R. Masterman, *Making Rights Real. The Human Rights Act in its First Decade* (Hart Publishing, 2008) 232.
[173] *R(S) v Secretary of State for the Home Department* [2002] EWHC 1111.
[174] R. Austin, 'The New Constitutionalism, Terrorism and Torture' (2007) 60 *Current Legal Problems* 79
[175] R. Sylvester, 'Blunkett accuses judges of undermining democracy', *The Daily Telegraph* (21 February 2003).
[176] John Reid, Hansard HC Debs (25 May 2007) c.1433. In *Chahal v United Kingdom* the ECtHR confirmed that national security concerns could not be used to trump the extraterritorial effect of Article 3 where a non-citizen individual had been accused of terrorist and threatened with removal to his home nation,

In the US, the potentially detrimental influence of external politics on the judicial subsystem was recognised before 9/11.[177] Following 9/11 political criticism of judicial decision-making is evident, for example, in comments regarding the Supreme Court's decision in *Boumediene v Bush*, which was described by Senator John McCain as being 'one of the worst decisions in the history of the country'.[178] Similarly, in relation to *United States v Moussaoui*[179] the Government was reported as having suggested that it could, and would, resort to exigent procedures if the court dismissed the case, including using a military tribunal to hear the case.[180] Such public castigation from members of the executive and the law-making subsystems increased the pressure on the courts to avoid reaching any decisions which challenged the government's approach.[181] These influences on judicial behaviour, arising both from politics and popular opinion, have been seen as particularly concerning because of their potential to discourage the courts from protecting individual rights in the face of over-zealous, but possibly ineffective government efforts to protect national security.[182] The courts, therefore, are unlikely to act against majority opinion.[183] Where such rights protect minority group interests they are even less likely, by definition, to attract popular support.[184] Commentators such as

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notwithstanding the 'real risk' that he would face treatment prohibited by Article 3, (1996) EHRR 413.

[177] E. Lazarus, *Closed Chambers. The Rise, Fall and Failure of the Modern Supreme Court* (Penguin Books, 1999) 11.

[178] See S. Davis, 'McCain Condemns Supreme Court Guantanamo Ruling' *The Wall Street Journal* (13 June 2008), http://blogs.wsj.com/washwire/2008/06/13/mccain-condemns-supreme-court-guantanamo-ruling/, accessed 28.07.2011.

[179] *United States v Moussaoui*, 282 F. Supp 2d 480 (E.D. Va. 2003).

[180] See P. Shenon, 'White House Called Target of Plane Plot' *NY Times* (8 August 2003) at A7. See also N.K. Katyal and L.H. Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) *Yale LJ* 1259, 1308-10.

[181] See A. Travis, 'Judge Misunderstood Anti-Terrorism Legislation' *The Guardian* (4 July 2006); 'Don't try to Push us around, Lord Chief Justice tells Labour' *The Guardian* (12 October 2005). See also A. Bradley, 'Judicial Independence under Attack' [2003] *Public Law* 397; and A. LeSoeur, 'The Judicial Review Debate: From Partnership to Friction' (1996) 31 *Government and Opposition* 8.

[182] S. Fredman, 'From deference to democracy' 76; J.H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (University of Chicago Press, Chcago, 1980) 68; C.E. Borgmann, 'Legislative Arrogance and Constitutional Accountability' (2006) 79 *S. Cal. L. Rev* 753, 801; R.H. Fallon, Jr., 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harv. L. Rev* 1693, 1706-08; R.B. Ginsberg, 'Judicial Independence: The Situation of the US Federal Judiciary' (2006) 85 *Neb. L. Rev* 1, 13; and D. Laycock, 'A Syllabus of Errors' (2005) 105 *Mich. L. Rev.* 1169, 1174.

[183] B. Friedman, 'Dialogue and Judicial Review' (1993) 91 *Mich. L. Rev* 577. See also M.J. Klarman, 'Rethinking the Civil Rights and Civil Liberties Review' (1996) 82 *Va. L. Rev* 1, 16; M.J. Klarman, 'Majoritarian Judicial Review: The Entrenchment Problem' (1997) 85 *Geo. L.J.* 491, 495; and C.J. Peters, 'Adjudication as Representation' (1997) 97 *Colum L. Rev* 312, 314.

[184] See G. Loury, *The Anatomy of Racial Inequality (The W.E.B. Du Bois Lectures)* (Harvard University Press, 2002) 812 discussing the indifference to harms that disproportionately affect minorities. See also D. Garland, *The Culture of Control: Crime and Social Order in the US* (University of Chicago Press, 2001) 132, 137 regarding the lack of political incentive to address the issues of minority groups, seen as

Mark Tushnet have claimed that in such situations minority interests are only likely to come to the fore where it is in the direct interests of the majority group, such as where it needs to form political coalitions.[185]

The interaction between judicial decisions and political irritants may further be used to explain the factors encouraging a number of the US and UK's more activist decisions – because they have predominantly been reached in circumstances where they did not significantly challenge the government's position. In making its judgment in the case of *A*, for example, the court would have known in practical terms that it was not significantly challenging government policy suggesting that the apparent activism within the decision may be connected to the effect of wider contextual considerations, as opposed to a judicial determination to uphold individual rights.[186] Claims of the limited judicial activism of *A* are bolstered by the wider context of the judgment which shows that by the time the appeal reached the House of Lords there had been extensive criticism of the detention power, including from parliamentary committees,[187] the independent reviewer of counter-terrorism legislation,[188] from both the European Union and the United Nations,[189] and in terms of general public opinion.[190] The notion that *A* marked a radical change in the court's approach to national security cases is not, therefore, as persuasive as it initially appears to be.[191] Indeed, it may stand more as a testament to the rights-protecting power of public and political opinion than that of the courts. A further example of delay leading to the practical irrelevance of the judgment, in terms of it challenging governmental priorities, is *Gillan* in which, by the time it had been finally

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undeserving and potentially dangerous.

[185] Mark Tushnet has suggested that in countries whose electoral systems utilise proportional representation minority groups are able to protect themselves and their interests to a better degree than elsewhere, through the use of vote bargaining, see *Taking the Constitution away from the Courts* (Princeton University Press, 1999) 159.

[186] M. Cohn, 'Judicial Activism in the House of Lords: A Composite Constitutionalist Approach' [2007] *Public Law* 95, 104-05.

[187] See The Newton Report, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (2003-04) HC 100 (18 December 2003).

[188] See Lord Carlile of Berriew, Review of Part IV Section 28 of the Anti-Terrorism Crime and Security Act 2001 (2 December 2003); and Lord Carlile of Berriew, Review of Part IV Section 28 of the Anti-Terrorism Crime and Security Act 2001 (2 November 2004).

[189] See Opinion 1/2002 on certain aspects of the United Kingdom 2001 Derogation from article 5 paragraph 1 of the ECHR (CommDH (2002) 8, 28 August 2002); and UN Comm against Torture, Conclusions and Recommendations (CAT/C/CR/33/3) (10 December 2004) para 4.

[190] See BBC Opinion Poll (23-24 April 2004), http://www.icmresearch.com/pdfs/2004_may_bbc_terrorism_poll.pdf, accessed 27.07.2011.

[191] Supporting this conclusion see T. Hickman, 'The Courts and Politics after the Human Rights Act: A Comment' [2008] *Public Law* 84; and A. Tomkins, 'The Rule of Law in Blair's Britain' (2997) 26 *U. Queensland L.J.* 225, 287.

determined by the Strasbourg court, s.44 had been widely condemned and the government showed little reluctance to suspend the power, especially following the election of a new government, four months after the judgment.[192] Seen in this light, the decisions in *A* and *Gillan*, are not only wholly in accordance with popular opinions, but also reflective of the Government's own changing programme for counter-terrorism law enforcement.

In considering the way that the judicial subsystems have been influenced by political irritants it is not claimed that the limited judicial protection of minority interests is a conscious decision on the part of either country's law-making subsystem. Instead, it simply reflects the limited ability of the judiciary to articulate the minority viewpoint within existing institutional structures,[193] and the effect of popular opinion on judicial operations.[194] An important factor suggested as contributing to this has been the dual role of the media in reporting on, and cultivating, popular sentiment and expectations surrounding the response to threats to national security.[195] The courts cannot stand above and wholly separate from their environment, but instead are likely to identify with governmental interests in such circumstances.[196] Therefore, despite the idealised operational standards in accordance with which US and UK are expected to reach their decisions these are far from being a panacea for rights-infringing legislative powers or law enforcement behaviour. In *Gillan*, for example, both the Divisional Court and the Court of Appeal held that the level of discretion implicit in s.44 limited judicial scrutiny because such decisions were the constitutional responsibility of the policing subsystem.[197] The Court of Appeal held that it only needed to be conceivable that an arms fair could be a potential terrorist target for such discretion to have been appropriately exercised.[198] As Clive Walker has noted, however, given the UK's exposure to IRA attacks since 1918 and the size of the country's arms industry this standard permitted the powers to be

[192] The decision was handed down in January 2010. In May 2010 a new Coalition Government replaced the Labour Government.
[193] H. Spector, 'Judicial Review, Rights and Democracy' (2003) *Law and Philosophy* 285, 303. See also section 8.1 of this thesis.
[194] L. Epstein and J. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (University of North Carolina Press, 1992) 273.
[195] E.B. Hindman, *Rights vs. Responsibilities. The Supreme Court and the Media* (Greenwood Press, 1997).
[196] D. Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in times of Crisis' [2003] 101 *Mich L. Rev*. 2565. See also W.J. Brennan, 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis' (1988) 18 *Isr. Y.B. Hum Rts*. 11.
[197] *Gillan*, Div Ct para 17; CA paras 33-35.
[198] *ibid*, Div Ct para 17; CA para 31.

effortlessly invoked.[199] This meant that the police did not need any specific reason to stop and search a person – a decision that could not be effectively challenged through any legal procedure because of the suspicion-less nature of the power.[200] In its determination of facts regarding use of s.44 both the divisional and appeal courts in *Gillan* deferred to the testimony of the police, without seeking or analysing other contemporary evidence relating to these assertions.[201] The judgments, therefore, demonstrated a judicial perception that the court lacked institutional and constitutional legitimacy ensuring that it deferred to police descriptions justifying their operational behaviour.

When *Gillan* reached the House of Lords, instead of evaluating the proportionality of the powers the Court accepted the national security threat as fully justifying the statutory powers and the use made of them. As well as limited judicial scrutiny of the evidence and arguments regarding utility of the powers the UK courts also failed to inhabit the victim-focused approach envisaged by the HRA or ECHR, under which judicial evaluation of alleged rights infringements would have been focused on the basis of the impact on the claimant(s).[202] Under both ECHR and the HRA the reason behind the rights infringement is irrelevant to making the prima facie case of discrimination,[203] with the expected judicial focus being instead wholly on the detrimental impact caused by the measure under consideration.[204] However, the Lords maintained the pre-HRA adjudicatory focus on the governmental justification for enacting and using the powers, which the Court accepted as fact irrespective of the weakness of the evidence presented

[199] C. Walker, 'Neighbor Terrorism and all-risks policing' (2009) 3 *Journal of National Security Law and Policy* 121, 146.
[200] Evidence of Mr. Levidow, commenting on UK Court decision in *Gillan*, in Home Affairs Committee, Terrorism and Community Relations, Sixth Report of Session 2004-05, Vol II, Oral and Additional Written Evidence, HC165-III (2005), Oral evidence taken before the Home Affairs Committee, 9 November 2004, Ev. 12.
[201] *Gillan*, Div Ct para 17; CA paras 51, 53, 55-56. This is comparable to the court's behaviour in *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA CIV 606 [2002] QB 1391. In this case Louis Farrakhan, the African American spiritual leader of the Nation of Islam was prevented permission to enter the UK because the Home Secretary feared that his presence may threaten relations between Muslims and Jews and lead to disorder. The Court of Appeal overturned the lower court decision, which had quashed the Home Secretary's decision. The Court of Appeal upheld the Home Secretary's decision because it considered the minister to be in a far better position to assess the likelihood of unrest than the court, at paras 1418-19. For criticism of this failure see K. Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829; and Edwards, 'Judicial Deference under the Human Rights Act'; and T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 *Cambridge Law Journal* 671.
[202] *R v Secretary of State ex p. Daly* [2001] UKHL 26.
[203] Under ECHR/HRA approach government justification is relevant in determining whether the infringement is justified – but not in establishing the infringement itself.
[204] This was also acknowledged by Lord Hope, *Gillan* at para 44. See also *R (Roma Rights Centre) v Immigration Officer*, at 46; and *Nagarajan v London Regional Transport* [2000] 1 AC 50, at 511.

on this. The UK courts in *Gillan* were unwilling to scrutinise the content of the statutory provisions, which meant that they were fundamentally unable to assess the rights-infringing nature of the scope and use of the powers.[205] In his consideration of racial discrimination, for example, Lord Scott suggested that whilst use of the power might require a degree of stereotyping in the selection of individuals to be stopped and searched, any such treatment was validated by the statutory authority of the Terrorism Act.[206]

In reaching this conclusion, Lord Scott refused to question the lawfulness of the legislation itself or its use, despite the fact that while race-based profiling targets a particular racial group the legislation was intended to target terrorists necessitating a link between the racial group and effective counter-terror policing. Instead, Lord Scott endorsed the use of s.44 because the Act was for the purpose of safeguarding national security,[207] without considering whether the power had any utility in achieving that objective, or whether any such link made the power a proportionate means of balancing the aim and outcome. The failure to enquire as to the utility of the powers by the UK justices indicates how the opinions were premised on the value of ethnic appearance in identifying terrorist suspects.[208] Explicit confirmation of this link was provided by Lord Hope who stated that terrorists are 'likely to be linked to sectors or the community that, because of the racial, ethnic or geographical origins are readily identifiable'.[209] Further, Lord Brown concluded that it was 'inevitable' that in the context of the current terrorist threat a disproportionate number of individuals stopped and searched would be of Asian appearance.[210] The link between race and suspicion was, therefore, presented as being one of 'common sense'.[211] By contrast, the ECtHR rejected any such nexus. Instead, it analysed the empirical evidence of the racial effect of the powers and their lack of utility in safeguarding against terrorist attacks.[212] For the ECtHR there was no question that the suspicion-less nature of the powers led to the risk that they could have a racially uneven

[205] As Connor Gearty and J Kimbell wrote in 1995 'it is obvious that the rule of law would not be particularly helpful if all that was meant by it was that the officials of state were required to follow the letter of the law', C.A. Gearty and J.A. Kimbell, *Terrorism and the Rule of Law. A Report on the Laws Relating to Political Violence in Great Britain and Northern Ireland* (CLRU, 1995) 11-12.
[206] *Gillan*, para 68, per Lord Scott.
[207] *ibid*, para 66.
[208] D. Moeckli, 'Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis' (2007) 70(4) *MLR* 654, 667.
[209] *Gillan*, para 42, per Lord Hope.
[210] *ibid*, para 80, per Lord Brown. See also C. Walker, 'Know thine enemy as thyself: Discerning Friend from Foe under Anti-terrorism Law' [2008] 32 *Melbourne Univ. Law Rev*. 275, 290.
[211] *Gillan*, paras 42 and 88.
[212] *ibid* paras 84-85.

impact. Following on from this, the European Court rejected the claims as to the utility of the powers in safeguarding national security. There was no doubt expressed in the court's reasoning that policing predominantly based on an individual's racial background was discriminatory. In so doing the court rejected the claimed legitimacy of such race-based policing. In consistently yielding to the government claims of state secrets doctrine and in employing a functionalist approach to standing, and other process-based considerations, the courts have taken a generally deferential approach to counter-terror related adjudication.[213]

The US judiciary has also been particularly susceptible to responding to political irritants, regarding the national security threat and intent on avoiding political censure arising from its making governmentally unpopular decisions. Judges, like the rest of the population, the legislature and the government are socialised by the dominant culture and are thus liable to having 'internalized the basic values and assumptions of that culture, including the benefits and predispositions that can cause the majority to discount minority interests'.[214] Such attitudes and personal judicial philosophies are, therefore, likely to play an important part in shaping the subsystem's programme of operation.[215] Individual judicial attitudes can, therefore, include negative notions about minority groups, such as are evident in the observation of Chief Justice Rehnquist in 1990 that non-Americans are not part of 'we the people' because 'they are not part of our national community' and have not 'otherwise developed sufficient connection with this country to be considered part of that community'.[216] Like other subsystems, therefore, while the judiciary constitutes a social system, it is also a body of individuals whose personal beliefs and adjudicatory approaches affect the manner in which the subsystem adheres to its system-specific operational rules.[217] Commentators, such as Mark Tushnet, have described one effect of

[213] See E.A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (OUP, 2007) 205; B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006) 170-71. See also J.C. Yoo, 'Treaty Interpretation and the False Sirens of Delegation' (2002) 90 *Cal. L. Rev* 1305, 1305.
[214] G.A. Spann, 'Pure Politics' (1990) 88 *Mich L. Rev* 1971. See also C.R. Lawrence III, *Rethinking Unconscious Racism* 380.
[215] See H.J. Spaeth and J.A. Segal, *Majority Rule of Minority Will: Adherence to Precedent on the US Supreme Court* (Cambridge University Press, 1999); and T.J. Peretti, *In Defense of a Political Court* (Princeton University Press, 1999) 54.
[216] *United States v Verdugo-Urquidez*, 494 US 259 [1990] at para 265.
[217] J.E. Semonche, *Keeping the Faith: A Cultural History of the US Supreme Court* (Rowman and Littlefield, 1998).

this as being that judges are likely to succumb to the security hysteria of the day.[218] Therefore, any constitutional review, to which the courts subject the government's wartime policies, risks being motivated by public misperceptions of risk and vulnerability.[219] These views are highly susceptible to 'risk amplification' through the reporting of the media.[220] Against such sentiments, and policing designed to appease popular fears, the courts are 'the crucial forum in which this galloping exceptionalism, fear-mongering and rights-trammelling should encounter forensic challenges'.[221] Despite this aspiration, judicial review has frequently amounted to a mere rubber-stamping of those policies, creating bad precedent, if not encouragement, for future exercises of such executive power.[222]

Judicial discretion and behaviour are also affected by the norms and expectations of legal culture.[223] Consequently, judicial unwillingness to support socially protective claims has long been apparent in its adjudications, which have included infamous judgments holding: that at common law trade unions could be liable in damages for trade disruptions arising from strike action;[224] that paying women the same wages as men breached local authority fiduciary duty to spend money wisely;[225] that discounted fares for the elderly were not in accordance with normal business principles;[226] or finding against the argument that caring for the sick is a 'function of a public nature'.[227] The US courts have a similar category of judicial decisions ruling against efforts to promote social equality, with decisions ruling against affirmative action efforts to decrease racial inequality;[228] election financing;[229]

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[218] M. Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) *Wis. L. Rev*. 273.
[219] V. Ramja, 'Terrorism, Risk Perception and judicial review' in K. Roach, M. Hor and V. Ramja (eds.), *Global Anti-terrorism Law and Policy* (CUP, 2005) 107.
[220] R. Kaperson *et al*, 'The Social Amplification of Risk: A Conceptual Framework' in P. Slovic (ed.), *The Perception of Risk* (2000) 232-45.
[221] A. Baker and G. Phillipson, 'Policing, Profiling and Discrimination Law: US and European Approaches Compared' 10.
[222] R. Kaperson *et al*, 'The Social Amplification of Risk' 282-83.
[223] See Note, 'Implementation Problems in institutional Reform Litigation' (1977) 91 *Harv. L. Rev* 428, 436; and R.W. Gordon, 'Critical Legal Histories' (1984) 36 *Stan. L. Rev*. 57.
[224] *Taff Vale Ltd v Amalgamated Society of Railway Servants* [1901] AC 4226 (HL).
[225] *Roberts v Hopwood* [1925] AC 578 (HL).
[226] *Prescott v Birmingham Corporation* [1055] Ch 210 (CA), approved in *Bromley v Greater London Council* [1983] 1 AC 768 (HL) 815, per Lord Wilberforce.
[227] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.
[228] *Regents of the University of California v Bakke; Wygant v Jackson Board of Education; City of Richmond v Croson; Adarand v Pena; Hopwood v University of Texas Law School; Grutter v Bollinger; Parents v Seattle Schools District; Meredith v Jefferson; and Ricci v DeStefano.*
[229] *Citizens United v Federal Election Commission* 558 US 08-205 (2010).

and gun control providing good examples.[230] Consequently, expectations of judicial intervention to protect the interests of minority groups overlook the extent to which law remains a powerful expression of ruling interests: a 'microcosm and model for the nation as a whole'.[231] That these inclinations are likely to be in line with government priorities is increased further as a result of the appointments process for some US justices, which has been described as itself a political process.[232] In particular federal courts of appeal judges and members of the Supreme Court are selected by the government.[233] Such appointments are, therefore, likely to be from amongst judges whose political sympathies are known to lie with the current administration.[234] The process, by which the subsystem is renewed, therefore, fuels the potential for its politicization,[235] as well as that the judiciary is tantamount to an extension of the executive branch, bending with whatever political view is ascendant.[236]

8.4 Conclusion

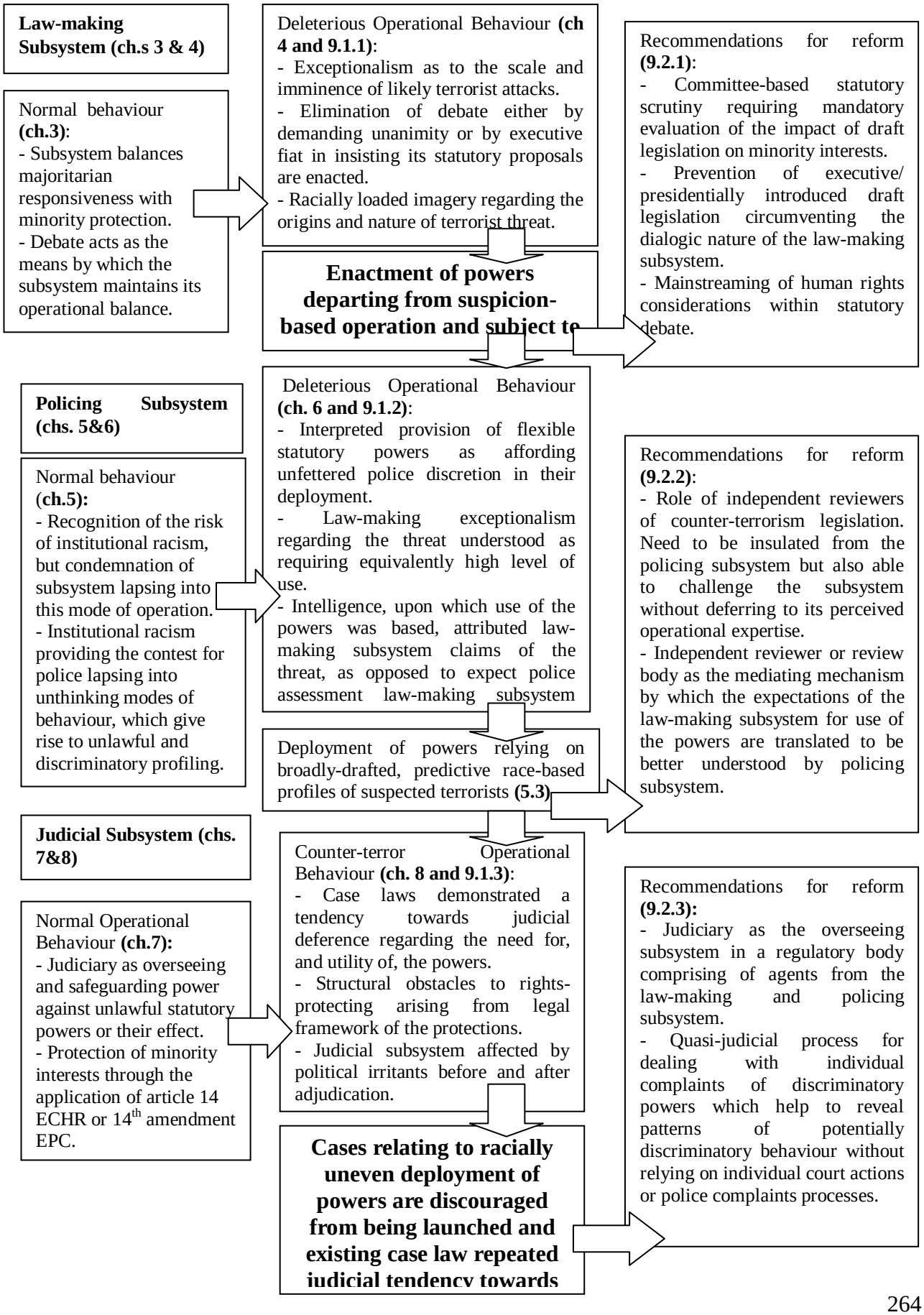
The judiciary's role in scrutinising post-9/11 counter-terrorism powers cannot be simply described as adhering to either one of the two polar opposites of the debate surrounding judicial deference, in either the US or UK. Instead, it demonstrates a variable ability to perform the rights-protecting role expected of it by the law-making and policing subsystems. However, the level of judicial activism should not be overstated as, upon analysis, such judicial behaviour can often either be attributed to particular contextual circumstances; or failed to have any significant or lasting impact on governmental policy. Consequently, whilst the role of the judicial subsystem is not wholly given to a monolithic

[230] *District of Columbia v. Heller*, 554 US 570 (2008).
[231] E. Lazarus, *Closed Chambers* 11.
[232] M. Tushnet, *The Constitution of the United States of America. A Contextual Analysis* (Hart Publishing, 2009) 130. See also M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981); and R.G. McCloskey, *The American Supreme Court* (University of Chicago Press, 1960) 223-24.
[233] By contrast federal district court judges are chosen by Senators. This difference has been cited as explaining why the federal district courts have in fact shown more right-protecting behaviour than the courts of appeal in cases relating to the 'war on terrorism', see E. Chemerinsky, 'The Lower Federal Courts and the War on Terrorism' (2004-05) 39 *Val. U.L. Rev* 607, 623. See also H.W. Chase, *Federal Judges: The Appointing Process* (University of Minnesota Press, 1972).
[234] One of the most overt examples of this is FDR's 1937 'court-packing' policy through which Roosevelt planned to appoint up to six new Supreme Court justices. Although Roosevelt's plan to expand the court failed by 1941 he had nevertheless appointed eight of the nine serving justices. See J. Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (W.W. Norton, 2011).
[235] M. Kammen, *A Machine that Would Go of Itself. The Constitution in American Culture* (Transaction Publishers, rev. ed., 2006) 386.
[236] D. Nicol, 'Law and Politics after the Human Rights Act' (2006) *Public Law* 722, 739.

characterisation it has broadly repeated the previously established pattern by which in times of war and threats to national security the courts subscribe to a relatively deferential role in overseeing the law-making and law enforcement subsystems. In post-9/11 counter-terrorism jurisprudence these limitations combined with the inherent weaknesses within the statutory protection of equality, meant that the unflinching rights safeguarding role that is the idealised purview of the judicial subsystem was not matched by the reality of its protective power.[237] Such idealised expectations of the role of the courts may 'forget their history and ignore their constraints' whilst they also 'cloud[ing] our vision with a naïve and romantic belief in the triumph of rights over politics'.[238] This failure of the law-making and policing subsystems to shape their own programmes of operation in response to the reality of how the judiciary has tended to respond to cases invoking national security and minority rights issues turns self-generating modes of judicial subsystem behaviour into a means of perpetuating racially uneven and discriminatory legal provisions – as opposed to a means of criticising them and their prejudicial nature.

[237] A. Kavanagh, 'Judging the Judges under the Human Rights Act: Deference, Disillusionment and the 'War on Terror' [2009] *Public Law* 287, 292-94.
[238] G. Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change?* (2nd ed. University of Chicago Press, 2008) 429.

Fig. nine: Racial effect of suspicion-less counter-terrorism stop, search and surveillance powers



9.1 Conclusions[1]

This thesis has proposed a critical systems explanation for the racial effect of the US and UK counter-terrorism stop, search and surveillance provisions. This explanation has identified how each subsystem departed from its normal modes of operationally closed behaviour in response to external irritants arising from the terrorist threat. In addition, the case studies of s.44 and ss.214-215, have highlighted some of the communicative barriers between the law-making, policing and judicial subsystems resulting from each subsystem's interpretation of externally arising communications through its own specific frame of understanding. This autopoietic behaviour meant that despite having identified difficulties in previous efforts at inter-subsystem communications, these obstacles remained. Consequently, the operations of each subsystem were misunderstood by other subsystems resulting in differences between the intended effect and actual effect of the statutory powers. The key ways in which the subsystems departed from their normal modes of behaviour and the barriers to understanding that arose within and between each of the three subsystems, together with their contribution to the racial effect of the powers, are summarised in the following paragraphs.

9.1.1 Law-making Subsystem

The analysis provided in chapters three and four demonstrated that in both the US and UK the law-making subsystems were cognisant of the risk of departing from normal operational behaviours in general, as well as the particular subsystem susceptibility to doing-so in times of acute threat to national security. Communications arising from the law-making subsystems in both countries showed an awareness that in such circumstances environmental irritants, in particular arising from popular opinion and the media, are liable to affect the legislature's approach to balancing majoritarian considerations with minority protection. In both the US and the UK the subsystems recognised that their directly accountable nature encouraged a tendency towards over-reacting to national security pressures, and as seeing its law-making function as being best fulfilled by drafting heightened statutory powers, affording the police extensive operational discretion and independence. In the UK previous examples of such behaviour

[1] See fig. nine.

relating to Irish terrorism were used by MPs to demonstrate how counter-terrorism powers were rushed through Parliament without consideration of their utility or impact. In the US members of Congress criticised their predecessors for enacting police powers which infringed constitutionally protected rights, without contributing to law enforcement effectiveness. The law-making subsystems in both countries combined their critique of previous subsystem behaviour with an avowed intention to avoid any similar occurrences in their then present actions.

Despite the expressed desire to maintain normal subsystem operations, in the aftermath of 9/11 several trends in law-making subsystem behaviour helped to accommodate its tendency to enact and support ill-considered legislation in response to popular irritants pertaining to the threat faced. Firstly, both the US and UK law-making subsystems demonstrated their openness to environmental irritants arising from popular and media representations of the threat faced through their use of exceptionalism in the law-making debates. Indeed, to characterise the legislative process as consisting of debates is itself something of a misnomer, because the law-making subsystems' behaviour in both countries eliminated, or at least severely curtailed, partisan debate regarding the draft powers. The lack of debate meant that executive proposals as to the scope of the provisions were largely ascendant in the enacted legislation. To the extent that the US law-making subsystem was better able to retain a degree of partisan debate concerning the draft statutory provisions, any beneficial impact of the revisions and compromise secured were largely eliminated through the Executive by-passing normal law-making process to introduce its own draft Bill. A final way in which the law-making subsystems' tendency to shape its behaviour in accordance with popular expectations was apparent was in its use of imagery relating to the racial minority character of the terrorist threat. This imagery not only linked the threat with a single, visibly identifiable minority group; but also appeared to accept that this link placed all individuals within this group as legitimate and justifiable targets for heightened suspicion and police attention.

The response of the US and UK law-making subsystems to the perceived need for additional counter-terrorism police powers was the enactment of suspicion-less powers which incorporated minimal requirements in terms of external oversight and safeguards against misuse. To the extent that there were safeguards incorporated into the powers these failed to live up to the subsystem's expectations regarding their protective effect,

because of the law-making subsystem's misplaced expectations regarding the manner in which the policing subsystem would deploy the powers as part of their counter-terrorism police operations.

9.1.2 Policing Subsystem

Chapters five and six showed that police use of the suspicion-less counter-terrorism stop, search and surveillance powers turned the potential that they be used in a highly discretionary and uneven manner into a reality. The particular way in which this discretion was borne out was in the deployment of the powers in a racially uneven way, so that they were disproportionately targeted at Muslims, or individuals perceived as being Muslims, belonging to Asian or Arabic ethnic minorities. The operational behaviour, which gave rise to this targeting, was the use of the powers based on broadly-drafted, predictive profiles as to who should be targeted with the policing power. In both the US and UK the policing subsystems have long been aware of the threat to their operational legitimacy in engaging in racially uneven law enforcement, whether consciously or unconsciously, as well as the institutional tendency to do so. Despite long-standing condemnation of race-based profiling, both on the basis of its lack of operational utility and its discriminatory nature, such profiles became an apparently legitimate and common-sense mode of operations in relation to the counter-terrorism stop, search and surveillance powers. The use of race-based profiles was readily accommodated within the counter-terrorism statutory provisions because of their departure from normative policing standards based on reasonable suspicion and lacked rigorous safeguards against misuse or any stringent review of use of the powers.

In identifying why racially uneven policing was once again elevated to a legitimate mode of subsystem behaviour, the analysis within chapter six demonstrated the existence of several communicative barriers between the law-making and policing subsystems, in relation to the intended nature and use of the suspicion-less stop, search and surveillance powers. These barriers help to account for the gap between the normal modes of policing and the subsystems' reversion to operating in accordance with discredited subsystem priorities. Firstly, while the law-making subsystems justified the suspicion-less nature of the powers on the grounds that the police needed to be free to deploy the powers in accordance with expertly assessed operational needs the police interpreted this change in

accordance with its own subsystem-specific understanding of the law-making subsystems' behaviour. This interpretation did not match the law-making subsystems' own legislative intentions for how the police would use the powers. Instead of interpreting the law-making subsystems intention to enact statutory powers that were flexible but still subject to significant operational limitations, therefore, the police interpreted the suspicion-less nature of the powers as demonstrating the law-making subsystem's expectation of their groundless deployment. A second communicative barrier between the law-making and policing subsystems was apparent in relation to how the law-making subsystem expected the police to use the powers. The law-making subsystems expressly justified the enactment of broad and discretionary powers on the basis of the police's circumspect deployment of them – so that they would only be used when the expert determination of the police deemed them to be necessary. However, the police interpreted the nature of the powers, coupled with the law-making subsystems communications relating to the exceptional nature and scale of the threat of terrorist attack, as indicating an expectation on the part of the law-making subsystems that the powers would be widely and frequently deployed.

A final communicative barrier between the law-making and policing subsystems considered in chapter six related to the different subsystem understandings of the role and meaning of intelligence. Intelligence regarding the threat from terrorism was at the foundation of the law-making subsystem's expectations for how the police would use the stop, search and surveillance powers. The expectations of the law-making subsystem regarding police exercise of discretion in determining when to use the powers and the frequency with which they would be deployed was premised on the assumption that deployment of the powers would be grounded in particularised intelligence concerning terrorist activity. However, the law-making subsystems in both the US and UK emphasised the importance of acting far in advance of any possible attack and were also emphatic in their own descriptions of the extreme level of threat faced. However, the pre-emptive use of the powers advocated by the law-making subsystems meant that the type of particularised intelligence upon which the law-making subsystem premised the drafting of the powers was not available. Therefore, the policing subsystem used the law-making subsystems' assessment of the threat of attack the operational justification for the deployment of the powers. The generalised nature of this intelligence added to the apparent legitimacy of race-based profiles to determine how the powers were targeted.

9.1.3 Judicial Subsystem

Despite the self-recognised fallibility of the law-making and policing subsystems in acting in the shadow of threats to national security these subsystem, in both the US and the UK, cited the judicial subsystem as able to identify and protect against any infringement of individual rights. However, as chapters seven and eight showed confidence in the rights-protecting function of the courts was not matched by reality. Instead, both through its actions and inactions, the judicial subsystems in the US and UK enabled the racially uneven use of the stop, search and surveillance powers to persist as an apparently legitimate and lawful exercise of the statutory powers. The analysis within chapter eight showed that the constitutional rights-protecting role of the courts was relegated behind the judicial tendency towards judicial deference, a tendency that it recognised as being particularly pronounced in cases arising out of national security-related contexts. The judiciary's interpretation of its adjudicatory role in evaluating national security-related police behaviour and statutory provisions, therefore, diverged from the role that the law-making and policing subsystems expected it to play.

On top of judicial subsystem understandings of the parameters of its constitutional legitimacy and institutional competence in adjudicating cases where national security and individual rights intersected, chapter eight also showed that the rights-protecting role of the courts was affected by structural obstacles arising from the nature of the statutory protections against which the police behaviour was assessed. The conditional nature of the equal protection guarantees of the 14th Amendment of the US Constitution and Article 14 of the ECHR provided one such obstacle but others existed, such as the fact that claims citing breach of article 14 must be brought alongside a claim of the infringement of another protected right. As well as demonstrating a greater degree of institutional subservience to the expertise of the law-making and policing subsystems than that expected by those subsystems, the rights-protecting function of the courts was also limited by its susceptibility to acting in accordance with political irritants. These irritants encouraged the modes of exceptionalism espoused popularly, for example, in the media, coupled with judicial desire to avoid governmental censure by reaching politically unpopular decisions, to play a role in shaping judicial behaviour. Through both its action and inaction, therefore, the judiciary's deferential programme of operation subjected police use of the counter-terrorism powers to minimal judicial oversight or scrutiny,

despite the police and the law-making subsystem expressing the contrary expectation.

This thesis has demonstrated that behind the racial effect of the counter-terrorism stop, search and surveillance powers were communicative barriers between the law-making, policing and judicial subsystems. These communicative barriers can be linked to the enactment of the statutory provisions which departed from normal suspicion-based requirements for use and which, in the febrile atmosphere following 9/11, were deployed by the police based on high levels of unchecked discretion. Faced with such use the oversight function of the judicial subsystem, upon which the law-making and policing subsystems relied to ensure that their own operations were lawful and appropriate, was largely illusory.

9.2 Recommendations for Reform

To a large extent the recommendations for reform flow naturally from the findings of the analysis of the three subsystems. The behaviour of the law-making, policing and judicial subsystems in relation to the enactment, use and review of the counter-terrorism stop, search and surveillance powers highlight a number of potential ways in which the racially uneven effect of the powers could have been avoided. Particular subsystem tendencies which were recognised as liable to give rise to negative modes of operation are evident in communications within each of the three subsystems, in responding to the national security threat. These observations and the suggestions for how the subsystems could have behaved to avoid the negative effects of the stop and search powers are, however, of limited value in trying to ensure that such behaviours are not repeated in future primarily because even where they were recognised the subsystems failed to avoid similar modes of operation in this instance. A more forward-looking approach to the difficulties observed in inter-subsystem communications is, therefore, the more potentially fruitful option, albeit that it lies in the inherently more difficult task of identifying mechanisms which may help to stop these tendencies from manifesting themselves in subsystem behaviour in future.

9.2.1 Law-making Subsystem

The analysis of the law-making subsystem within this thesis suggests that greater

parliamentary and congressional self-awareness regarding the subsystem's tendency to respond to media and popular perceptions of crises may help to limit the extent to which these factors are allowed to drive law-making operations. However, the communications arising from the law-making subsystems prior to the enactment of the statutory powers demonstrate that each was aware of its behavioural tendency to respond to popular irritants, but nevertheless remained powerless, or unwilling, to avoid its recurrence. Another potentially useful subsystem reform, therefore, is that it should be more explicit in stating its expectations for how statutory powers should be used, including those deployed by the police. If Parliament and Congress were more explicit in communicating its expectations for the grounds upon which statutory powers would be deployed this may help those subsystem responsible for implementing the powers, including the police, to enact them in accordance with the reality of parliamentary and congressional expectations, as opposed to its own erroneous expectations of those expectations.

The inherent difficulty in making suggestions for reform which rely upon subsystem's overcoming their own deleterious patterns of self-determined behaviour suggests that any recommendation for additional oversight of the subsystem as a means of guarding against its repetition of previously criticised but seemingly unavoidable patterns of behaviour must come from outside the subsystem. This suggests that an overseeing body focused on the law-making subsystem, could help to prevent some of the negative subsystem patterns of behaviour. However, because subsystems only understand externally originating communications in terms of their own internally derived patterns of operational behaviour, in order that the communications of the overseeing, external source are understood as expected by the law-making subsystem it is necessary that the overseer must be part of the law-making subsystem. Any successful safeguarding mechanism therefore seems to require the apparently impossible characteristics that it is both inside the law-making subsystem whilst at the same time sitting outside it. This apparent paradox may not, however, be as irresolvable as it may initially seem to be. What the analysis of the behaviour of the law-making subsystems in both the US and UK demonstrate is that the role of legislative committees can provide a forum within which statutory provisions and their potential impact are debated and analysed without the highly politicized and emotive discourse of the public legislative chambers.

The US law-making subsystem provides a particularly clear demonstration that the

committee-system operated both as part of the law-making subsystem as well as being a check on its proposals. Where the safeguarding role of judicial committees floundered in the enactment of the Patriot Act was the executive's ability to reject the committee's output and introduce its own Bill, which was then passed without being subjected to congressional scrutiny. A US-specific reform, therefore, could be that if the Executive rejects the draft provisions that have passed both congressional and committee scrutiny the executive provisions still have to go back through the normal statutory process. This may help to dissuade the Executive from any attempts to by-pass the normal law-making process in this way, whilst still maintaining the President's power to decide whether a law is enacted or not and to propose draft powers. In the UK, the committee process is already increasingly becoming an integral part of the law-making process, and the enactment of the s.44 powers illustrates the importance of this forum to ensure that draft statutory powers are considered more widely than parliamentary debate sometimes allows, particularly with reference to any potential impact on individual rights.

9.2.2 Policing Subsystem

Operational freedom is important for the police to be able to implement abstract statutory powers to the real life challenges of preventing and detecting crime. This need is heightened when the crimes in question are a matter of particular public concern, such as terrorism. However, in order that policing subsystems are able to interpret and implement statutory powers in the way in which they were intended by the law-making subsystem there needs to be some means of translating these communications into a vernacular which the policing subsystem can understand in terms of its own programme of operations. A potential consequence of the absence of a mediating mechanism, as has been demonstrated in relation to the suspicion-less stop, search and surveillance powers, is that the policing subsystems understand statutory powers lacking safeguards against misuse, combined with highly charged political rhetoric about the need for wide spread use of the powers as a green light for their blanket deployment. By contrast what the law-making subsystem intended was for the police to be afforded the operational flexibility to determine the most appropriate model of circumspect and intelligence-led use of the powers.

One avenue by which legislative communications may be more effectively incorporated

into policing programmes of operation could be through the development of the role of the independent reviewer of counter-terrorism legislation, which was undertaken by Lord Carlile in the UK during the time frame with which this thesis has been concerned. In the US a comparable review function was performed by the Inspector General of the Department of Justice.[2] As a safeguarding mechanism against the consequences of the police failing to understand parliamentary expectations for their use of the stop and search powers the UK's independent review and the US inspector general have been relatively unsuccessful. Instead of casting light and condemnation on the misuse of the powers their reviews repeated many of the misplaced expectations of police operational restraint maintained within the law-making subsystem. It was not until there was widespread public and political condemnation of the police's use of the powers that the reports of Lord Carlile and the US Inspector General shared this sentiment,[3] and even then both Carlile and the US Inspector General lacked the power to compel a governmental review of s.44.

Given that Carlile and the US Inspector General were lone individuals who failed to withstand the irritants of the contexts within which they were operation it is possible that their review function may have been able to act as a more effective mediating mechanism if it was the responsibility of a number of individuals, representing both the law-making and policing subsystem, as opposed to a single person. Of course, this review body would face similar communicative obstructions as between the law-making and policing subsystems as a whole but having multiple individuals from each would enable them to acquire a greater understanding, through training and experience, of the way in which the other subsystem operates and its expectations for the other's operational priorities.

Aside from these recommendations, the analysis within this thesis hints at the inherent difficulty of making any such proposals, because of the likely subsystem reactions to, and possible misunderstanding of, them. In the UK the doctrine of parliamentary supremacy poses a further difficulty in making recommendation because it is not possible to make recommendations to the law-makings subsystems along lines that would require them to

[2] Under the statutory authority within USA Patriot Act 2001, s.1001 the Inspector General of the Department of Justice was required to produce a biannual report to the Committees on the Judiciary of the House of Representative and the Senate.
[3] Lord Carlile of Berriew, *Report on the Operation in 2009 of the Terrorism Act 2000* (2010), para 268; Inspector General of the Department of Justice, *USA Patriot Act: Sunset Provisions* (April 2005) 37 and 41.

purport to bind their future behaviour so as to avoid deleterious departures from normal subsystem programmes of operation. In relation to the policing subsystem, a key conclusion arising from the analysis of this subsystems operations was that the police are systemically incapable of interpreting and responding to communications instructing them how to behave in the way that the instructing subsystem expects them to. Any recommendations for reform of the policing subsystems, therefore, would be likely to suffer the same fate as other communications, preventing the proposed reforms from avoiding the problematic behaviour at which they were targeted. Given the difficulties with proposing any concrete recommendations for reform in relation to either the law-making or policing subsystems, a perhaps greater focus for reform must be on the judiciary.

9.2.3 Judicial Subsystem

Reliance on reform of the judicial subsystem as the key for trying to avoid the types of subsystem behaviour analysed in this thesis in future is a somewhat paradoxical conclusion in light of the fact that out of the three subsystems analysed herein the judiciary was the one that was the least actively involved in creating or realising the potential racial effect within the powers. In contrast to the law-making and policing subsystems it was primarily the judiciaries' inaction, together with its actual and perceived inability to act, which marked its contribution to the racially uneven impact of the stops, searches and surveillance. Nevertheless, the judicial subsystem is perhaps the best placed to bridge the gaps in communications between the other subsystems, because of the interpretive nature of its adjudicatory function. The role of the judiciary means that if it was able to encompass a greater understanding of how other subsystems work this would help to ensure that its decisions were based on a more genuine evaluation of the context and facts before it. For example, in scrutinising parliamentary and congressional legislative intent the judicial subsystem is well-placed to respond to the fact that when the law-making subsystem says one thing it frequently means a different thing altogether. Similarly, judicial understanding of how the policing subsystem behaves when it is granted unfettered discretion by the law-making subsystem will enable the courts to see through general claims of police expertise and professionalism and evaluate the police's behaviour in each particular circumstance.

The judicial subsystem could also perform a role in the mediating mechanisms mentioned previously, in relation to the policing and law-making subsystems. The proposed review body could operate under the direction of a member of the judiciary, in an effort to facilitate the process of achieving a cross-subsystem understanding. The body could evaluate the type of concerns regarding the powers that might otherwise be directed towards the police complaints authority. As such the review body could offer a forum for an abstract analysis of the powers; an evaluation of empirical data regarding their overall use; or for hearing formal challenges concerning specific instances of their use. The outcome of this quasi-judicial process would not have the standing of a court judgment – but would send a clear message to the government that if the need for a review of the powers was not given serious consideration a legal challenge through the courts would be a serious risk. This sort of forum may offer a context in which the judicial subsystem could perform a rights safeguarding role exactly as intended – but without the difficulties which arise from perceptions of its institutional competency and constitutional legitimacy as well as the procedural rigidity of the criminal justice system.

In terms of hearing cases of individual complaint concerning the nature and/ or use of statutory powers one reform which could assist the oversight function of the courts would be the acceptance of evidence from a broader range of sources than is currently the case, particularly in UK courts. In the US judicial subsystem, in contrast to the position in the UK, the courts take a more engaged approach to the use of social science arguments or empirical background data when evaluating whether a particular legal provision has a discriminatory impact on minorities. Each case is still dependent upon the specific facts before the court but less-particularised evidence can be used to place those facts within their wider context and can help to reveal patterns in behaviour are not so identifiable in cases concerning a particular instance of use of police powers. By contrast, the UK courts are less willing to look outside the specific facts in front of them, such that the may lose the opportunity to explore other issues. Such judicial behaviour is indicated by the widespread reluctance of the Court to fully explore the contentious matter of the racially uneven use of s.44 in *Gillan*, because the two claimants in the case were white. Whilst it may seem obvious, even appropriate, that the Court did not engage in a wholly unrelated line of judicial enquiry the racially uneven use of suspicion-less stop and search is closely linked to it being an ineffective and inappropriate counter-terrorism police tool. Further, it is only through a broader approach to its evaluation that the courts can hope to uncover

racial discrimination that is neither conscious nor wholly unconscious, but an unquestioned part of the way in which the policing subsystem operates. In contrast to the UK courts the ECtHR felt no difficulty in exploring the issue of the racially uneven use of the stop and search power.

9.3 Avenues for Future Research

While the specific claims made in this thesis are focused on the racial effect of counter-terrorism police stop, search and surveillance powers these statutory provisions have been used to provide a case study through which to apply the social systems claims which provide the analytical framework for this thesis. Despite the narrow focus of this thesis, therefore, the interaction between subsystem operation and unexpected and negative effects of legal provisions identified herein may be analysed across a range of legal contexts, and offers potential avenues for future research.

Equality on grounds other than race such as, for example, gender-based equality offers one such opportunity for additional research. In particular, an analysis of the enactment, use and review of affirmative action and positive action provisions in both the US and UK may provide a means of understanding why, despite a degree of apparent political will in both countries to address inequality between men and women, it continues to be an elusive goal, with legal measures seeking to mandate this effect often being accused of worsening, as opposed to improving, the situation, and departing from 'the norm of a career open to talents'.[4] The application of a social systems framework to affirmative action would be particularly in accordance with the claims of critical theorists who consider merit to be socially constructed by the dominant group and used to maintain its social hegemony.[5] Social systems offers a means of explaining how subsystem constructions and expectations surrounding merit contribute to the rejection and limited success of positive action efforts. Other areas of the legal protection of individual rights, and the inherent need to balance this with wider societal interests, could also offer potentially fruitful avenues for future research. Indeed, conceivably any situation in which statutory provisions give rise to a different impact in their enactment and use than was anticipated by the law-making subsystem offers the opportunity to use a systems-

[4] A. Koppelman, *Anti-discrimination Law and Social Equality* (Yale University Press, 1996) 35.
[5] R. Delgado, *Critical Race Theory* (New York University Press, 2000) 105-07.

based analysis to reveal the communicative barriers giving rise to this effect.

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