

The 2011 English ‘Riots’: Prosecutorial Zeal and Judicial Abandon.¹

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Introduction

The disorder which occurred in England in 2011 was quickly dubbed ‘the consumer riots’. As explanations were sought for the disturbances, ‘the same predictable debate sprang up in politics, popular culture and academia’ (Hall 2012:146) as to whether the riots were a political reaction against social exclusion, poverty and discriminatory policing; the actions of ‘defective and disqualified consumers’ (Bauman 2011; Akram 2014; Treadwell et al 2013:1); or a product of broken homes, moral decline and gang culture - what the Prime Minister condemned as ‘criminality, pure and simple’ (Cameron 2011: Col. 1051).

Much less attention has been given to the responses of the criminal justice system. The judiciary not only increased the penalties imposed on rioters but also abandoned the sentencing guidelines that should have acted as a restraint on its punitive impulses (Roberts 2012; Ashworth 2012). Whilst these exemplary sentences attracted concern, this article offers an empirically-grounded analysis of how the uplift in sentencing was a feature of *every* stage of the process for riot-related offending; a factor that does not appear to have been considered in determining the greater quantum in sentencing or in analyses of the sentences. As Stenning has argued, ‘the sentencing process may be more realistically conceived as beginning with the decision to lay charges and ending with the completion of any sentence imposed, rather than simply as a stage in the trial process that follows the verdict or guilty plea’ (2008:197). Thus the sentences imposed need to be considered in the context of police decision making and, in particular, the increasingly proactive and adversarial involvement of the Crown Prosecution Service (CPS). Finally the article demonstrates the lacuna in guidance following the Court of Appeal judgment in *Blackshaw* (2011) and the Sentencing Council’s *Guideline on Burglary* (2011) to argue for a more carefully calibrated approach to future sentencing involving offences occurring during periods of social disorder.

The Background

On Thursday 4 August 2011, armed Metropolitan Police officers shot dead a suspect named Mark Duggan. Following peaceful protests about this event, disturbances broke out in Tottenham, north London, on the evening of Saturday 6 August. The disorder spread across 22 boroughs in the capital and to 20 police force areas in other English cities, ending in the early hours of Wednesday 10 August. Five people died, more than 300 police officers were injured, 2,584 commercial premises were attacked, and at least 231 crimes against domestic properties were recorded (HMIC 2011:13). The total costs including policing, clean-up operations, damage to property, losses to business and lost

¹ Authors are arranged alphabetically. We would like to thank Professor Julian Roberts, Professor Kieran McEvoy, Dr Elaine Dewhurst and the BJC reviewers for their helpful comments. We are grateful to the *Manchester Evening News* for sharing its data; the views expressed are our own.

tourism revenue, are estimated to be in the region of half a billion pounds (Riots Communities and Victims Panel 2012).

In the year following the riots, 3,103 prosecutions were brought in relation to these events. By 31 August 2012, of the 2,158 convicted, all but twenty had been sentenced (Ministry of Justice 2012b). The vast majority of offending took place in London, followed by the West Midlands and Greater Manchester (MoJ 2012b). Although the overall offending profiles were similar in the three main areas (see Figure 1), this obscures the much more serious crimes that also took place in London and Birmingham.²

FIGURE 1 HERE

Although shocking, the events were not unprecedented. There were riots across several English cities in 1981 and 1985 (Scarman 1981; Silverman 1986); in Bradford in 1995 and again, along with several mill towns, in 2001 (Amin 2003; King and Waddington 2004); and Birmingham in 2005 (King 2013). There had also been demonstrations in London in the previous year against both student tuition fees and public sector cuts that had ended in violence (Lewis et al 2010; BBC 27 March 2011). Whilst some of the disorder and the responses to it appeared familiar, 'the days following the initial disturbances in Tottenham saw evidence of a type of systematic looting that did not appear to fit with previous experience' (Lewis et al 2011:8). Although the disturbances in London were initially associated with the Duggan shooting and the police handling of the situation, in comparison with previous riots, in *most* places, the *majority* of those involved seemed not to want to engage with the police, and the focus of the disturbances was primarily acquisitive.³ The disorder of August 2011 was 'unparalleled in terms of the speed, scale and geographical spread of disorder' (HMIC 2011:16). The media coverage was also unmatched, with continuous reporting and commentary from traditional news outlets and the increased use of social media (Hohl et al 2013:13). 'The endurance of the judiciary, prosecutors and defence lawyers; the capacity of cells and the prisoner escort service; the resourcefulness of court staff; even knowledge of the law: all were tested as never before' (Bawdon and Bowcott 2012). In response, the courts introduced all-night and weekend sittings to deal with the numbers in custody that were praised by some, but others criticised 'the unprecedented night sittings describ[ing] them as kangaroo courts, dispensing "conveyor-belt justice"' (Bawdon and Bowcott 2012). This in turn put pressure on defence representatives and the probation service at a time of year when

² The riots came to be defined by the horrifying images from London, such as a woman leaping from an upstairs window of her burning home. Examples of these images of the disorder can be found at <http://www.stylist.co.uk/life/london-riots-the-events-in-pictures>. See also the newspaper front pages for 9 August 2011 at <http://www.thepaperboy.com/uk/2011/08/09/front-pages-archive.cfm> (last accessed 1 March 2014). The disturbances in Birmingham raised particular concerns following the deaths of three men run over by a car outside a mosque and an attempt to shoot down a police helicopter (BBC 10 August 2011; Lewis and others 2014).

³ The much smaller disorders that took place in Nottingham and Merseyside appeared to have a different offending profile, involving more disorder and less looting. The Chief Constable of Greater Manchester, Sir Peter Fahy said that 'Certainly most of it in Manchester was about getting goods, breaking into places and stealing things. Salford I think was slightly different. It was more about attacking us and the fire services' (Clifton and Allison 2011).

most agencies are short-staffed due to summer holidays. A significant strain was also put on the prison estate (HM Chief Inspector of Prisons for England and Wales 2012).

Sentencing formed an immediate and highly politicised part of the public debate about the riots. Initial claims were made that suggested many of those involved did not fear conviction as they thought they would 'only' get a police caution or community punishment (Narain 2011; Smith 2011). The disorder occurred in the context of tension in the Conservative Party over, then Justice Secretary, Kenneth Clarke's plans to create a 'rehabilitation revolution' in sentencing (Ministry of Justice 2010:1). During the disorder, senior politicians were criticised for appearing to suggest how the criminal justice system should deal with those involved,⁴ imperilling 'the sacrosanct separation of powers between the government and the judiciary' (Carlile 2011), although judges denied yielding to such pressure (House of Commons Justice Committee 2011). Media commentary seemed polarised between those calling for the courts to 'send a message' to deter rioters; and shock at the severity of some of the sentences given for minor offences (Bowcott et al. 2011; Doyle 2011). Whilst the public seemed to support an increase in sentences, they were less punitive than the courts (Hohl et al 2013; Roberts and Hough 2013).

Manchester is a useful region to study in terms of the riots. Most of the disorder occurred on 9 August, the majority of it in Manchester city centre and Salford Precinct. There were incidents of violence in which masked groups of 200-300 people threw missiles, including petrol bombs, bricks and fireworks at the emergency services, buses and motorists. Vehicles and buildings were set alight and widespread looting of shopping centres took place (HMIC 2013). Whilst only 8 per cent (249) of defendants (Ministry of Justice 2012b) had a first hearing in Greater Manchester, the area processed the early offenders through the courts most quickly.⁵ In an unprecedented step, the Recorder of Manchester issued a form of guidelines for sentencing these cases (*Carter & others* 2011) that was followed in other courts; a practice that the Court of Appeal criticised but has not improved upon (*Blackshaw* 2011).

This article draws upon two data sets: a national and a local one, to explore how the cases were dealt with throughout the entire criminal justice process, rather than merely focusing on the sentencing outcome. The Ministry of Justice published regular statistical bulletins about the riot sentencing (Ministry of Justice 2011, 2011a, 2012a, 2012b, 2012c). These offer a wealth of demographic detail about offenders, such as age, ethnicity and previous convictions. The local data were collected by the court reporters of the regional newspaper, the *Manchester Evening News* (MEN),⁶ who attended court and recorded data on those sentenced in Manchester in relation to the riots between 11

⁴ For example, the Prime Minister stated that: 'Anyone charged with violent disorder and other serious offences should expect to be remanded in custody, not let back on the streets; and anyone convicted should expect to go to jail' (Cameron 2011: Col. 1052).

⁵ The first defendants were sentenced on 10 August (MEN 11 August 2011). It was also thought to be the first area to issue an anti-social behaviour order in relation to the disorder (BBC News 29 September 2011).

⁶ There is an interesting history of newspapers investigating public disorder. The Guardian-LSE study of the 2011 riots was inspired by the collaboration between the Detroit Free Press newspaper and Michigan's Institute for Social Research after the 1967 Detroit riots (Lewis et al. 2011:9).

August 2011 and 9 January 2012. The MEN then shared them with the first named author after collection for further analysis.⁷ We had no control over the data collection and were told that the 110 cases provided a complete census. Having compared the data with the Ministry of Justice figures, we realised that that data were incomplete. Further exploration of these missing cases established that the data relate to about 63% of the total who appeared in court in Manchester over that period.⁸ As the offending detail is in line with the Ministry of Justice data,⁹ we are broadly satisfied that rest of the data missing is due to the difficulties in managing the overwhelming¹⁰ number of defendants, rather than excluding any particular type of case, other than juveniles. The MEN data, whilst incomplete, offers finer detail and further insight into the processing of these cases by the criminal justice system than can be gleaned from the MoJ data alone, so we have included it for exploratory and illustrative purposes.

Decisions relating to Arrest and Charge

There has been much discussion of the police response to the riots, including their arrest decisions (HMIC 2011; Riots, Communities and Victims Panel 2012).¹¹ It is 'an operational decision at the discretion of the individual constable' whether to arrest a suspect (PACE Code G, para 2.4) and there was a very public dispute between the President of the Association of Chief Police Officers and the Home Secretary about this during the riots (Newburn 2011). Myriad factors may affect decisions about arrest (see, for example, Sanders and Young 2012). On the first night of the disorder, the Metropolitan Police adopted a policy of not arresting suspects at the scene due to insufficient staffing levels; this changed as more officers were drafted in (Home Affairs Committee 2011: para 41-47).

Prosecutorial decisions are also discretionary. The former Attorney General, Sir Hartley Shawcross (1951) famously said 'It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution'. Instead the CPS applies a two-stage test: first, the evidential stage (if there

⁷ See also **XXXX** (forthcoming).

⁸ 240 of the 249 cases that were dealt with in Manchester had had first hearings by 1 February 2012 (MoJ 2012a; MoJ 2012b) and we identified press reports of four cases that concluded between the end dates of the MEN and MoJ data collection (9 January and 1 February). Three cases were heard at other local magistrates' courts, and the location was not recorded in two cases (MoJ FOI request 5 November 2013, email on file with the authors). The main group missing is the 65 juvenile defendants (MoJ 2012a) as the press is usually excluded from the youth courts (although the reporters managed to get details of nine youth court cases, discussed below). We thus have data for 110 out of a possible 175 cases (63%): 66% of adult cases (110 of 166) and an additional 14% of juvenile cases (n=9).

⁹ In both data sets the majority of offences comprised burglary or attempted burglary (56% in the MoJ 2012 data and 60% in the MEN data). Theft or handling stolen goods accounted for 13% of the MoJ cases compared to 16% classified as theft offences in the MEN. Violent and public order offences comprised 21% of the MoJ data and 16% of the MEN data.

¹⁰ Sixty seven per cent of cases of the Manchester cases were dealt with in the first week (MoJ 2011) and about eighty per cent in the first month (MoJ 2011). One night sitting at Manchester Magistrates' Court saw three district judges process defendants in batches of three as they aimed to deal with the 117 defendants in custody (BBC 11 August 2011).

¹¹ Newburn (2013) noted that this was the first time that senior politicians (including the Prime Minister, Home Secretary and the Mayor of London) had criticised police performance whilst riots were on-going.

is a realistic prospect of conviction); and second whether a prosecution is in the public interest. As Stenning (2008) argues, these decisions about arrest and charge affect the sentence ultimately passed. In ordinary circumstances, it is unlikely that any of those sentenced in relation to the disorder would have been arrested, never mind charged, for example for the theft of doughnuts, or accepting a stolen pair of shorts (MEN data).

There has been remarkably little research undertaken into the practices and cultures of the CPS (Kirk 2014, McConville et al 1991; Quirk 2006). The decision in recent years of governments to 'rebalance the system in favour of victims, witnesses and communities' (Home Office 2002) has led to the CPS adopting a higher public profile and putting the 'needs of victims and witnesses at the heart of the criminal justice system' – an approach that arguably conflicts with its role as a disinterested prosecutor (Harris 2013). CPS decision-making in relation to the riots has largely escaped scrutiny but, in an example of 'zealous advocacy' (Smith 2012) unusual in an English prosecutor, the Chief Crown Prosecutor for the north west said:

Justice, when it's swift, is most effective; it's about ensuring that they see the shock and awe of the criminal justice system. Because we represent society, we want to ensure that society is reflected in our courtrooms and we want them to experience what they made us experience (Afzal 2011).

The Chief Crown Prosecutor for London made the remarkable admission that there had been no contingency planning for an event such as the disorder (Bawdon and Bowcott 2012) but the CPS was swiftly involved in meetings of Cobra, the government's emergency committee; the Attorney General; and the senior presiding judge responsible for liaising between the judiciary, courts and government departments. In the first week, a special CPS unit was set up to deal exclusively with riot cases (Bawden and Bowcott 2012).

Decisions relating to charge were taken very quickly during the disorder. The police were given a draft form of words to include in the incomplete files they sent to the CPS for decisions about charge. They were told to explain that the on-going nature of the disorder and the strain on police resources meant that enquiries could not be completed within the time limits and to recommend that charging decisions should be based on the lower standard of the 'threshold test'¹² (Operation Withern 2011). In guidance issued on 15 August 2011, the CPS stated that 'The serious overall impact of the disorder in August 2011 has been such that prosecution will be in the public interest in all but the most exceptional of circumstances' (2011a). In effect, this statement suggested that a substantial policy decision had been made at speed, without consultation that resulted in these cases being treated differently to all other types of offending.

This prosecutorial zeal had a particular effect on young suspects. When deciding whether a prosecution is in the public interest, prosecutors (who should be Youth Offender

¹² This is used to charge a suspect where the prosecutor has reasonable suspicion that the suspect has committed the offence but has insufficient evidence to apply the evidential stage of the Full Code Test. The prosecutor must have reasonable grounds for believing that further evidence will become available within a reasonable period; the seriousness or the circumstances of the case justifies the making of an immediate charging decision, and that there are continuing substantial grounds to object to bail (CPS 2013:11).

Specialists) must take into account the interests of youngsters and should generally divert those eligible from prosecution (CPS n.d.). This appears to have been over-ridden in relation to the disorder, an approach which is potentially unlawful.¹³ Of all those prosecuted in relation to the disorder, 27 per cent were aged 11-17, with a further 26 per cent aged 18-20 (MoJ 2012b:3). No data are given regarding the numbers diverted from prosecution but we are aware of cases from the MEN data of very young suspects and trivial offences that were pursued. These include an 11 year old who was convicted of burglary having stolen a cap from a sports shop, and a 17 year old who, somewhat ironically, was convicted of burglary having stolen an 'I Love Mcr' [Manchester] hooded top.

The offence with which a suspect is charged can make a significant difference to sentence. Following the riots, most of the property offences related to stealing from commercial premises. This could be charged either as theft, which carries a maximum sentence of seven years, or as burglary of a non-dwelling, which can attract up to ten years imprisonment. The national figures showed that offences were charged as burglary rather than theft at a ratio of 3:1 (MoJ 2012c). The CPS issued guidance stating that those who take part in public disorder which involves breaking into property intending to cause criminal damage or steal, should be charged with burglary in addition to any public order offence. The CPS also stated that even those who cannot be shown to have taken part in the disorder should be charged with burglary rather than theft, 'to reflect the unwarranted invasion of another's property and the serious context of the offence' (CPS 2011a). Such an approach represents a classic example of what Cohen (1985) referred to as both 'net widening' and 'mesh thinning'. This labelling does not necessarily accord with the everyday understanding of burglary. For example, an offender in Manchester walked into a patisserie after finding the door open, disliked the taste of an ice cream he had made, so handed it to a passer-by. He was convicted of burglary and sentenced to 16 months imprisonment (Osuh 2011).

Nobles and Schiff have examined the 'impossibility of making the same communications in different systems' (2000:1), in particular the media and the criminal justice system, which can use the same terminology but understand it in very different ways. During the 2011 disorder, the criminal justice system dealt with events in the face of intense media interest but in dissimilar terms. The Oxford English Dictionary defines a riot as 'an outbreak of active lawlessness or disorder among the populace' and this was the preferred term in the media discourse.¹⁴ Section 1 of the Public Order Act 1986 defines riot as:

Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such

¹³ A decision whether to prosecute a youth offender is open to judicial review if it can be demonstrated that the decision was made regardless of, or clearly contrary to, a settled policy of the Director of Public Prosecutions (*R v Chief Constable of Kent and another ex parte L, R v DPP ex parte B* [1991] 93 Cr App R 416).

¹⁴ The British Insurance Brokers Association noted that the Government did not use the term 'riot' in any public conversation, suggesting that this may have been to avoid liability under the Riot (Damages) Act 1886 (Home Affairs Committee 2011, para 63) – although the government agreed shortly after the disorder ended that compensation would be paid (Cameron 2011 col. 1053).

as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.

It is immaterial whether or not the twelve or more people use or threaten unlawful violence simultaneously (s2); the common purpose may be inferred from their conduct (s3). This definition includes violent conduct towards property (s8(a)). No person (of reasonable firmness or otherwise) needs to be present (s4) and it is not necessary for injury or damage to occur (s8(b)).

CPS Guidance affirmed that, although generally riot should be prosecuted only in the most exceptional circumstances, 'the extreme nature and effect of the outbreaks of violence and lawlessness that have characterised the August 2011 events are such that the offence of Riot merits serious consideration' (CPS 2011a). Despite the apparent appropriateness of the charge, we have found only sixteen reported convictions for riot – all but one relating to two specific incidents.¹⁵ This differed from the Bradford riots, when the majority of over 100 defendants were sentenced for riot (*Najeeb and others* 2003: para 10). This provides a curious situation in which the labelling of offending is down played in relation to the associated punishment. To a lay person, the public order offences may sound more serious than property offences but the actual punishment is greater, as riot carries a maximum sentence of ten years imprisonment and violent disorder five years; both lesser sentences than for burglary.

Bail

Most defendants awaiting trial or sentence are presumptively entitled to release on bail unless there are substantial reasons to believe that they pose a risk to the public by committing further offences, interfering with witnesses or absconding (Bail Act 1976). The public disorder, of itself, was not a ground for refusing bail. Wells and Quick observed previously that 'The use of bail conditions as a form of 'informal' punishment by the courts is thus now well established' (2010:222). Although remanded in accordance with the terms of the Bail Act 1976, as one magistrate cautioned, 'it can be tempting to treat a remand in custody as a first bite at punishing an offender. That is not just wrong, but also illegal' (Bystander 2011). Many of those remanded in custody were young and/or of previous good character (21.9% of all suspects and 36.3% of juveniles had no previous convictions; MoJ 2012c) and were charged with only minor offences. Neither the MoJ nor the MEN data gives detailed information about remand status. Leaked Metropolitan Police guidance revealed that 'a strategic decision has been made... that in all cases an application will be made for remand in custody both at the police station, and later at court' (Operation Withern 2011). The Prison Governors Association President claimed that magistrates were choosing custody rather than bail at a 'much greater rate' but this was disputed by the Magistrates' Association Chairman (BBC 29 August 2011). One Manchester-based lawyer thought that 'there was a blanket decision made in court before the first case was ever heard' to refuse bail (Bawden and Bowcott 2012). There were understandable concerns in the context of the on-going disorder that, if bail were granted,

¹⁵ The Ministry of Justice statistics do not distinguish the different public order offences. We found sixteen convictions for riot following a search of the major online news websites. Seven were convicted in Nottingham for an attack on a police station (BBC 1 June 2012); eight for the incident involving the shooting at a police helicopter in Birmingham (*Lewis and others* 2014).

those released would commit further offences. Prosecutors noted that, once it was clear the danger of more riots had passed, objections to bail were dropped in many cases and defendants were released pending trial or sentence (Bawden and Bowcott 2012).

We have no way of telling whether bail was refused for preventative or punitive reasons – or a combination of both - but prisoners, many of whom who were ultimately acquitted or given a community punishment, spent time remanded in custody, which again, under normal circumstances, they would not have done. This additional ‘punishment’ is not considered part of the sentencing tariff and has the greatest impact on those who committed the least serious offences. If a defendant is given a custodial punishment, time served on remand is deducted but, in a case in which the sentence is a community punishment or fine, no such allowance can be made. Even one night in custody, for someone who has not experienced it before is likely to be a frightening experience (Gentleman 2011), even more so given the overcrowding following the riots.

Venue

Where a case is dealt with also affects the sentence that can be passed. Summary-only offences must be disposed of in a magistrates’ court, with a maximum sentence of six months imprisonment (or up to one year for two consecutive sentences) and a £5,000 fine. Indictable-only cases must be heard before a judge and jury in the Crown Court, with sentences of up to life imprisonment in some cases. A category of intermediate offences are known as triable either way: defendants can elect to be tried at the Crown Court, or can be sent there if the sentencers think their powers are inadequate. During the riots, the Magistrates’ Association called for its members’ sentencing powers to be increased to one year’s imprisonment so that they could dispose of more cases. Looking at the MEN data (Table 1), assuming the same sentences would have been passed by the magistrates as were actually imposed at the Crown Court, this would have increased by forty per cent the number of cases that could have been dealt with summarily in Manchester, with associated savings in both time and money in processing these cases. (the Ministry of Justice figures do not give this level of detail).

INSERT TABLE 1 HERE

Most of the offences charged during the disorder were triable either way including violent disorder,¹⁶ theft and burglary. Existing guidance states that burglary of non-dwellings should usually be tried summarily unless there are particular aggravating features, which did not apply in most of these cases (Ministry of Justice 2013: part V.51.6). In its riots guidance, the CPS altered this, stating that ‘Given the wider context and the likely sentence, offences of burglary involving the stealing of property from shops or stores, even of a seemingly opportunistic nature, are unlikely to be regarded as suitable for summary trial’ (CPS 2011a). Again, this is a remarkable ratcheting up of the stakes. Magistrates were also told to consider committing cases to the Crown Court if they felt their sentencing powers were insufficient (Bowcott and Bates 2011). Nearly two-thirds (65 per cent) of riot-related cases were sent to the Crown Court (MoJ 2012b).

¹⁶ Although the Charging Standards state that this would rarely be suitable for summary disposition (CPS 2011a).

Another factor to be considered is the allocation of cases at the magistrates' court. Since the riot offences usually involved individuals offending in their own communities, the claim for involving local representatives —lay magistrates—would appear to be compelling (Roberts 2013:236). Anecdotal evidence suggests instead that almost all riot-related cases dealt with summarily were assigned to district judges (Roberts and Hough 2013:236). These legally qualified professionals are thought to hear cases more expeditiously than lay magistrates do; however, they are also more likely to impose custodial sentences (Ipsos MORI 2011).

All youths should be tried summarily, usually in the youth court, other than those charged with grave crimes, specified offences or those charged jointly with an adult. Riot, violent disorder and non-residential burglary are not grave crimes. According to the MEN data, 17 young people were tried by magistrates and two by the Crown Court, without the expertise and protections of the youth courts. The two 17 year olds were each sentenced at Crown Court to eight months detention for burglary. It is not clear on what basis their cases were transferred to Crown Court, as the offences would seem to be at the lower end of the spectrum and their sentences fell within the capacity of the youth court.¹⁷ Moving these cases from the youth courts has additional consequences for young defendants. The automatic reporting restrictions that apply in the youth courts to prevent the naming of young offenders unless it is thought to be in the public interest (s. 39 Children and Young Persons Act 1933) are merely discretionary in the magistrates' and Crown Court. On 18 August 2011, the CPS issued guidance advising prosecutors to ask that young defendants should be named if it is required in the public interest (CPS 2011). Almost thirty per cent of juveniles in the MEN data were named. Once again, usual procedures were departed from with no debate, no explanation of why this was being done and no analysis of the potential consequences for the young people involved.

Sentence

The courts have to consider certain factors when determining sentence. Section 142 of the Criminal Justice Act 2003 requires those passing sentence to take into account: [deserved] punishment, deterrence, incapacitation, rehabilitation, and reparation to victims. The problem with this is that there is no hierarchy or means of deciding which of these, often contradictory, factors to apply. Following the riots, judges and magistrates were faced with sentencing under intense media and political scrutiny. In the earliest cases, especially in Manchester, they were having to pass sentence whilst the disorder was ongoing which meant that incapacitation was perhaps more of an issue. Committing an offence at a time of social disorder has long been regarded by the courts as deserving of greater punishment (Caird 1970). Following the 2001 Bradford riots, the Court of Appeal set a descending tariff, starting at ten years imprisonment for ringleaders (Najeeb 2003). Sentencers in 2011 had to decide by how much they should increase the punishment to reflect the context of the disorder. Two factors meant that they could not just follow *Najeeb*. The different nature of most of the offending in 2011 meant that the

¹⁷ One admitted burgling a city centre newsagents, which had already been attacked, having been caught with cigarettes and jewellery. The other had handed herself in to police after her picture was publicised. She had 'gone into [a pawnbrokers] but left empty handed because she didn't see anything she wanted' (MEN data).

scale was not directly applicable in most cases.¹⁸ In addition, since *Najeeb*, the sentencing guidelines had come into effect, but these made no mention of sentencing in relation to public disorder.¹⁹

The definitive guidelines issued by the Sentencing Council are supposed to ensure a consistent approach to sentencing, whilst allowing flexibility to reflect individual cases. Most offences are divided into three categories of severity, with starting points and sentence ranges for each level. In determining the offence category, an exhaustive list of factors is provided relating to harm and culpability. Sentencers are required to locate the appropriate starting point for the offence, and then adjust for any general and individual, aggravating and mitigating circumstances (sentencers have discretion as to which factors to consider at this stage). In addition, they should make a reduction for a guilty plea; consider whether ancillary orders are appropriate or necessary; ensure that the total sentence is proportionate to the offending behaviour and that it is properly balanced. Sentencers must also follow any relevant sentencing guidelines, 'unless the court is satisfied that it would be contrary to the interests of justice to do so' (s 125(1) Coroners and Justice Act 2009). When a court imposes a sentence of a different type or outside the range provided, it must explain its reasons for so doing.

The riots created 'an unexpected and unwelcome challenge for the guidelines' (Roberts 2013:16). Her Majesty's Courts and Tribunals Service (the agency responsible for courts administration) instructed magistrates' court clerks to advise magistrates to consider disregarding normal sentencing guidelines. This had the, apparently counterintuitive, justification of ensuring consistency in sentencing across the country (Bowcott 2011). Crown Court judges decided to depart from the guidelines as well. Because public disorder was not on the list for determining the offence category, the courts decided that the guidelines were not applicable. The courts appeared to disregard, without discussion, the overarching *Guideline on Seriousness*²⁰ that:

The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type (Sentencing Guidelines Council 2004: F 1.38).

Without the guidelines, there was no indication as to how sentences should be calculated. The Sentencing Council declined to publish emergency guidelines (s123 Coroners and Justice Act 2009) because some offences would be sentenced before any guidelines could be published and others afterwards, which could lead to inconsistency and complicate subsequent appeals (Sentencing Council 2012:9).

¹⁸ Other than *Lewis and others* (2014).

¹⁹ According to Gilmore (2010) when sentencing those convicted following violent protests outside the Israeli Embassy in 2009, the courts followed *Najeeb* in imposing deterrent sentences. We are not aware of any discussion of these cases in relation to the 2011 disorder.

²⁰ This guideline deals with the general concept of seriousness in the light of the relevant statutory provisions and considers how sentencers should determine when sentencing thresholds have been crossed when applying the provisions of the Criminal Justice Act 2003.

In the absence of guidance, the Recorder of Manchester, Judge Gilbert QC, undertook ‘an important and interesting initiative’ (Thomas 2011). Having concluded that the disorder took the offences ‘completely outside the usual context of criminality,’ he set out the higher starting points and ranges of sentences which would be applied in the Crown Court at Manchester for riot-related offending, including offences not yet before him (*Carter and others* 2011). Judge Gilbert set as his starting point that ‘any adult offender... must expect to lose his or [her] liberty for a significant period’. The sentences were intended to ‘send a clear and unambiguous message ... which I trust will deter others from engaging in this type of behaviour in the future’ (para 11). Although not binding, Judge Gilbert’s comments were regarded as ‘persuasive authority’ by judges in the Crown Court at other locations (*Alagago and others* 2011; *Twemlow and others* 2011).

Of those tried in relation to the riots, 508 defendants (16%) were acquitted or had their cases dismissed (Ministry of Justice 2012b). Of the 2,138 individuals sentenced, 66 per cent (n=1405) received an immediate custodial sentence with an average 17.1 months (compared to a figure of 3.7 months for similar cases in 2010; MoJ, 2012b). There were stark differences in the proportions receiving an immediate custodial sentence and the average length of sentences passed the previous year (see Figure 2). The uplift was replicated at both magistrates’ courts and Crown Court. At the magistrates’ courts, 36 per cent were sentenced to immediate custody compared to 12 per cent for similar offences in 2010 and the average custodial sentence rose from 2.5 to 6.6 months. At the Crown Court, 85 per cent were sentenced to immediate custody (compared to 33 per cent in for similar offences in 2010) and average sentences rose from 11.3 to 19.6 months; a 73 per cent increase (MOJ 2012b).

FIGURE 2 HERE

Not only is the public disorder context seen as an aggravating feature in sentencing, but also factors that would normally be considered mitigation, such as previous good character are given less weight in such circumstances (*Najeeb* 2003; *Blackshaw* 2011, para 20). Ordinarily the level of culpability would be reduced if the offending was spontaneous, or the offender had played only a minor role (Sentencing Guidelines Council 2004 D 1.17 and D 1.25). Whilst the definitive guidelines issued by the Sentencing Council cite ‘age and/or lack of maturity’ as a mitigating factor (Sentencing Council 2011), this had little influence on the punishments issued to youngsters. Thirty-eight per cent of those sentenced in relation to the riots were juveniles (aged 11-17; MoJ 2012b). Those convicted of riot-related offences in the youth courts were six times more likely to be given custody than those convicted by the same courts for similar offences in 2010 (MoJ 2012c). One youth court magistrate interviewed for *Reading the Riots* claimed the usual ‘sentencing rulebook’ for children with no previous convictions had been ‘torn up and thrown away’ (Bawdon and Bowcott 2012a). In *Lewis and others* it was held that ‘the particular circumstances of this case require the strong message to go out that those, of whatever age, who are tempted to become involved in this sort of group offending must expect significant deterrent sentences despite their youth’ (2014: para 181).

The practical implications of this uplift should not be underestimated. Concerns have been expressed about the brutalising effects of contact with the criminal justice system and incarceration and (especially for those who were previously of good character),

which may in turn diminish their chances of reintegration into society on release (see e.g., Haney 2013; McAra and McVie 2007). Prosecuting these cases has had additional social and familial consequences for defendants, particularly those whose offending would not normally have been pursued so vigorously. For example, the man sentenced for stealing an ice cream, described above, was recommended for deportation following his sentence, along with about 100 others nationwide (Wheatstone 2012). The Leader of Manchester City Council said that it would use its powers to evict those living in social housing who had been involved or allowed their children to be involved in the disturbances (Leese 2011). It is not clear to what extent ancillary orders were sought (such as curfews, non-entry to certain locations), but the CPS guidance emphasised seeking compensation orders (CPS 2011a; Section 130 Powers of Criminal Courts (Sentencing) Act 2000).

As of 10 August 2012, there had been 24 successful appeals against sentence from the magistrates' courts and 13 from the Crown Courts (one had his sentence increased on appeal by the Attorney General; MoJ 2012c). The Court of Appeal will not vary a sentence merely because it is harsh. It will only alter a sentence if it is 'manifestly excessive' (that is the sentence was too high given the facts of the offence or in light of any available personal mitigation) and/or 'wrong in principle' (if the judge made some mistake when imposing the sentence). Its judgments, however, allow guidance to be given for sentencing future cases, an opportunity that was not fully utilised in these cases. Packer argued that appellate decisions are significant 'because the appellate level of the criminal process is where the governing norms are made explicit' (1963:232) and, in that respect, the decisions were more revealing.

In *Blackshaw* (2011), the Lord Chief Justice delivered the judgment on ten joined appeals relating to the riots (including six appeals from Manchester Crown Court). In upholding eight of the sentences, the Court held that those who deliberately participated in these disturbances had committed aggravated crimes. Severe sentences, intended to punishment and deter, must follow as any participation in an unlawful or riotous assembly derives its gravity from the common and unlawful purpose, which is an essential feature in the assessment of culpability and harm. The Court confirmed that, as none of the guidelines envisaged the public disorder, sentences beyond the usual range were 'not only appropriate, but... inevitable' (*Blackshaw* 2011, para 16).²¹ It held that these are long established principles and 'Nothing in any sentencing guideline undermines them or reduces their application.' Whilst sentencers should consider any relevant guidelines, 'the aphorism that sentencing guidelines were guidelines not tramlines, continued to be fully reflected in the present legislative framework' (para 14).

The Court upheld all of the burglary sentences but reduced those for handling stolen goods. The distinction appeared to be whether the defendant had played a direct part in the disorder (*Blackshaw* 2011: para 132) or if 'The defendant's crime stemmed from this public disturbance, but it was not intrinsic to it' (para 140). Whilst deprecating the trial judge's attempts to set 'ersatz guidelines' (Roberts 2013:19-20), the Court gave no

²¹ The Court has rebuked judges for disregarding inadequate sentencing guidelines in other cases, noting the judge's statutory obligation to take account of the guidelines and holding that 'their reconsideration is a matter for the Sentencing Guidelines Council and not for a trial judge' (*Heathcote-Smith and Melton* 2011: para 10).

explanation of how cases should be sentenced once they were outside the sentencing guidelines. In reasoning that Ashworth describes as 'strange and unconvincing' (2012:82), the Court made no mention of the 'interests of justice' exception, merely holding that the requirement to follow the sentencing guidelines does not require 'slavish adherence' (*Blackshaw* 2011: para 13). It did not try to explain the quantum of punishment ('a deterrent sentence... was not manifestly excessive' (para 86); the overall sentence was...'within the appropriate range (para 99); 'Making due allowances for his age and his personal disadvantages, the sentence was within the appropriate range' (para 107)). It did not seek to explain how or why these sentences were appropriate, for example by examining what the offence would have attracted under normal circumstances, then setting an additional penalty for the disorder. The Court did not attempt to justify its conclusions with reference to the relevant guidelines or the overarching principles, even as a point of departure (Ashworth 2012: 95). No reference was made as to why the cases crossed the threshold for custody (s152(2) Criminal Justice Act 2003), or how the sentence was of the shortest term commensurate with the seriousness of the offences (s153(2) Criminal Justice Act 2003). The criminal justice system should be able to justify its decisions on a principled and proportionate basis. Whilst the sentences fell within the statutory maxima, they were far in excess of what anyone could have forecast- including defence lawyers when advising their clients as to their plea. In future riots, it would be difficult to predict a likely sentence based on these cases.

Several other appeals have followed,²² all of which have endorsed *Blackshaw* (2011). The only case in which the Court gave lengthy consideration to appropriate sentences was for the considerably more serious conduct in *Lewis and others* (2014).²³ It upheld the *Blackshaw* principle of departing from the guidance, but gave a reasoned explanation as to why the sentences were appropriate, including comparisons with previous cases, the defendants' character, involvement, youth and future dangerousness. This was of limited utility however as the seriousness of the offending means that it is a 'case is probably unique in the annals of public disorder in this country in recent times' (para 1).

Conclusion

The disorder of August 2011 was commonly described as the worst in living memory due to the speed with which it spread over such a wide geographical area. Extensive damage was done, primarily to property rather than people, but the riots caused widespread fear and a clear desire for 'something to be done'. Unlike previous riots, there has been no systematic public inquiry (Scarman 1981; Gifford 1986) but there are important lessons to be learned from the official responses to the situation. Thus far, attention has focused on the police handling of the disorder and the views of those affected. This enquiry needs to be broadened in particular to include an appraisal of how each part of the criminal justice system contributed to the sentencing 'escalator'.

²² *Adam Khan* (2012), *Anderson* (2012), *Challinor* (2012), *Bretherton* (2011), *Pilgrim* (2011) and *Suleimanov* (2013).

²³ This involved a group breaking into and setting fire to a public house in Birmingham. The police were enticed to the scene then fired upon, including at least one shot at a police helicopter. 'If the offences in *Blackshaw* were serious, what happened here was in an altogether different and far more serious league' (para 167).

Punishment is analysed largely in terms of sentences handed down by courts. These determinations are announced publicly and can be debated and amended for future cases if they are seen as inappropriate. Despite its duty to monitor the operation and effectiveness of its guidance, including 'the frequency with which, and the extent to which, courts depart from the sentencing guidelines' (s128 Coroners and Justice Act 2009), the Sentencing Council has not commented on or published findings in relation to the courts having systematically disregarded its guidance.

Feinberg describes punishment as 'a conventional device for the expression of attitudes or resentment and indignation ... [it] has a *symbolic significance* largely missing from other kinds of penalties' (1994:73). There is undoubtedly a performative aspect to 'judgecraft' (Moorhead and Cowan 2007; Baum 2006) and judges' influence depends on the reactions of politicians, the legal profession, academia the media and the public react (Garoupa and Ginsberg 2009:452). A local reporter who had watched many of the trials described them to us as being akin to show trials, with the district judge addressing the press gallery as much as the defendants. Judges are influenced by the interaction between the legal subculture (their professional norms and guidelines) and the democratic subculture (shaped by public opinion; Richardson and Vines 1970). Whilst it is obviously important that judges are aware of public opinion, it is particularly important at times of widespread panic that they do not become merely ciphers for the loudest voices and disregard their professional constraints. Whilst the offending may have been impulsive, sentencing should not be. The former Chair of the Criminal Bar Association, Paul Mendelle QC cautioned that 'people get caught up and act out of character, in a similar way, there is a danger that the courts themselves may get caught up in a different kind of collective hysteria' (BBC 17 August 2011). Adhering to the guidelines can 'serve as a "circuit breaker," preventing bursts of punitiveness from affecting sentencing practices' (Roberts 2013: 15).

Rather than abandoning the guidelines, the courts could, and arguably should, have treated the public disorder as an aggravating factor rather than a reason for abandoning the guidelines, thereby threatening both consistency and proportionality in sentencing (Roberts 2012). We concur with Roberts that 'a systematic approach should be followed by courts - even when departing from a definitive sentencing guideline' (2012:440) and that this decision should be taken on an individual level rather than as a blanket decision that all disorder-related offending should fall outside the existing guidelines. The courts are required to sentence within the offence *range* rather than the *category*, so the aggravating nature of the disorder could have been addressed by sentencing each case as though it was in the sentencing category above that in which it would normally have been placed to reflect any additional punishment required. With one important distinction, this is essentially what the Sentencing Council has done in the new Burglary Offences Definitive Guideline, which makes the 'context of general public disorder' a factor indicating greater harm. This means that the courts will be able to enhance the quantum of sentencing in future cases without abandoning all structure. Because the Sentencing Council has put this factor in category one, the courts will be obliged to sentence offenders more harshly in future – thus the Sentencing Council has added to the punitive escalator. Had it been put in category two, sentencers could have used their discretion to adjust sentences to reflect individuals' culpability in the context of the disorder. Some confusion

remains however. Whilst the Burglary Guideline has been amended so that cases should be dealt with within the existing guidelines; no such provision applies to theft, public order, arson or sexual offences. It is unclear whether in future the courts would follow *Blackshaw* (2011) in disapplying the guidelines, or extend the Burglary Guideline by analogy.

Sentencing those who commit the most serious conventional riotous offences is relatively clear now (*Najeeb* 2003, *Lewis and others* 2014). The greatest lack of clarity and it appears, the most punitive sentences, may be imposed on those whose conduct, of itself, is less serious, but for the riotous context. A closer examination of these cases suggests that sentencing cannot be considered in isolation.

Discretion in the charging and prosecution process is especially significant in situations of disorder; typically involving large numbers of people, they invite a policy of selective enforcement... Yet the principles on which such a selection proceeds at successive stages – arrest, questioning, charge, final decision to prosecute – remain unarticulated and thus unaccountable. (Wells and Quick 2010:218).

All the agencies were working under great pressure to restore order and the courts made it clear that they saw their role as being to pass enhanced sentences to reinforce notions of punishment and deterrence. One factor that has been neglected is the driving impetus of the CPS in sentencing, taking decisions that are both enormously significant and largely unreviewable. Retribution and deterrence have been pursued by the CPS, a factor not analysed in this way hitherto. In their 1991 book, McConville et al described police dominance of the charging process and the CPS as confining itself to testing the sufficiency of evidence. The riots illustrated how that has changed.

Some scholars have contested whether or not the criminal justice apparatus can properly be termed a system (Feeney 1985; Pullinger 1985). Sentencing in relation to the riots exemplifies this problem. Each stage of the process considered its treatment of the offender in isolation; applying an uplift, whether for pragmatic or punitive purposes. The impact of this cumulative uplift and its impact on the individual were never considered holistically by sentencers. Under normal circumstances, individuals who stole a bottle of water or left a premises without having stolen anything would be very unlikely to be arrested; if arrested, they probably be cautioned or released; if charged they would rarely be remanded in custody; they would be dealt with at the magistrates' court (or the youth court); and if sentenced, they would receive a light sentence. The riot-related offenders received an 'uplift' at every step of the process – a factor which does not appear to have been taken into account in sentencing. As Feeley (1979) argued, 'the process is the punishment' and this should be taken into consideration in issuing and applying guidance for sentencing future riot-related conduct.

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R v Blackshaw and others [2011] EWCA Crim. 2312; [2012] 1 WLR 1126

R v Bretherton [2011] EWCA Crim 2861

R v Caird (1970) 54 Cr App R 499

R v Carter & Others (Sentencing Remarks) [2011] EW Misc. 12 (CrownC), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hhj-gilbart-qc-sentencing-remarks-r-v-carter-others.pdf>

R v Challinor [2012] EWCA Crim 963

R v Heathcote-Smith and Melton [2011] EWCA Crim 2846; [2012] 2 Cr App R (S.) 25.

R v Adam Khan [2012] EWCA Crim 964

R v Lewis and others [2014] EWCA Crim 48.

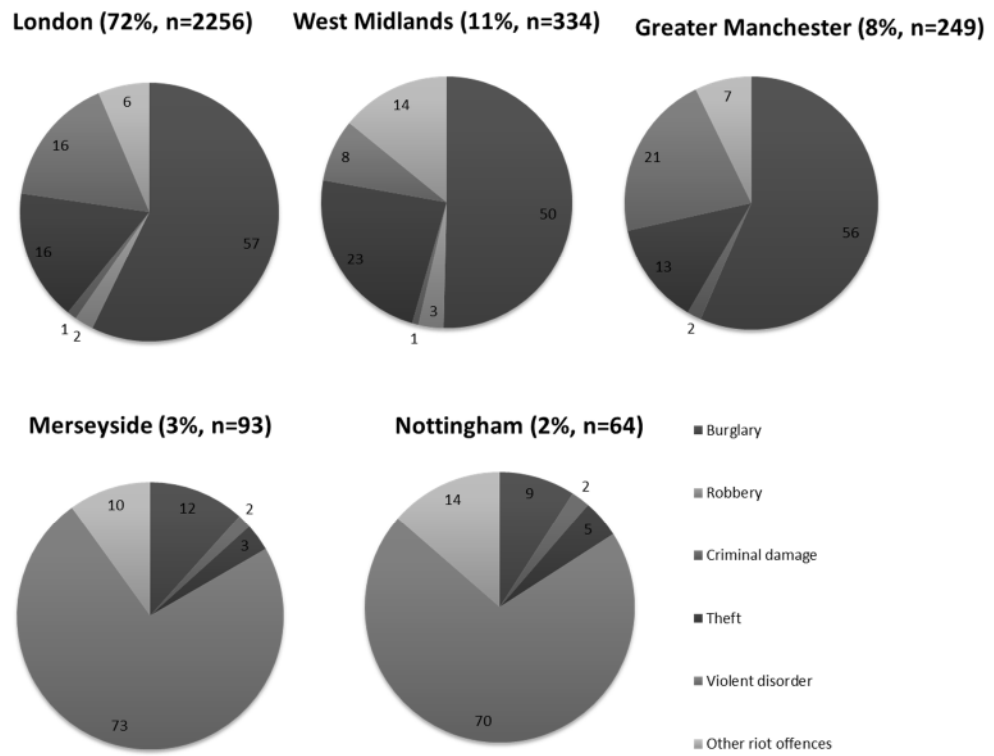
R v Najeib [2003] 2 Cr.App.R. (S) 69 CA

R v Pilgrim [2011] EWCA Crim 2941

R v Suleimanov [2013] EWCA Crim 32

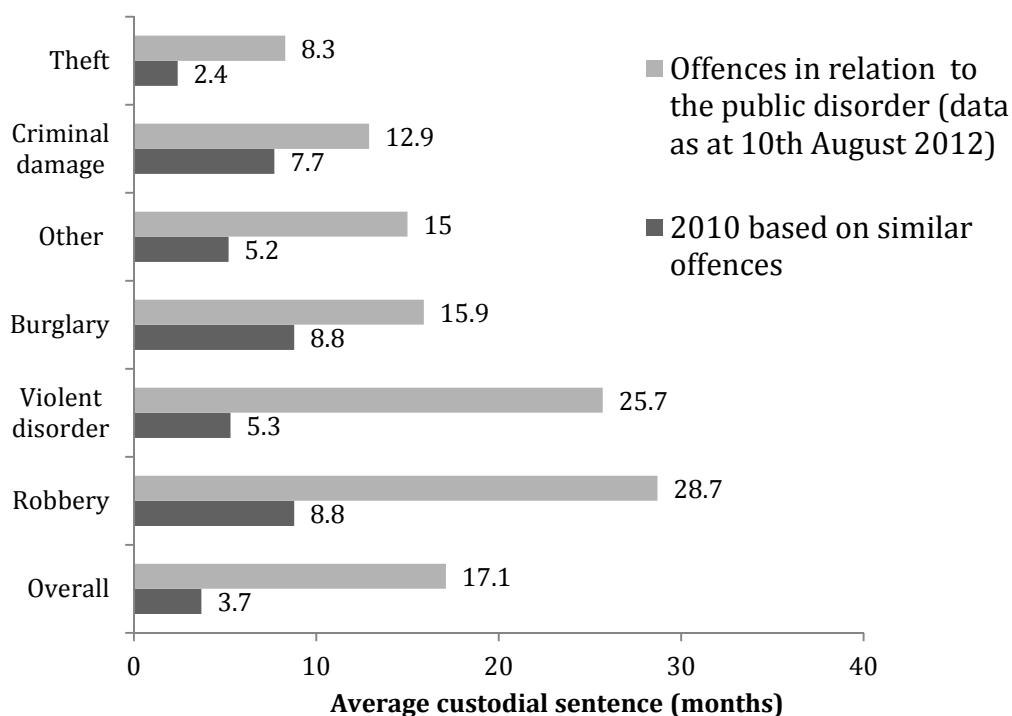
R v Twemlow, Downy, McGrath, Coudjoe, Swarbrick and Winder, (2011) Crown Court at Manchester 18 August.

Figure 1: Percentage of sentences by offence type and area



Source: figures compiled from data in MoJ 2012c

Figure 2: Average custodial sentence in months for offences related to the public disorder between 6 and 9 August in England and Wales



Source: figures compiled from MoJ data (2012b)

Table 1: Nature of sentence and length of sentence dispensed by court type in Manchester

Length of sentence	Manchester Youth Court	Manchester Magistrates'	Manchester Crown Court	Total
Unknown	0	4	0	4
Non-custodial	3	10	1	14
Under 3 months	0	2(1)	0	2
3-6 months	2	10	2 (2)	14
6-12 months	4	4	17 (5)	25
1-2 years	0	0	39(1)	39
2-3 years	0	0	9	9
3-4 years	0	0	2(1)	2
4-5 years	0	0	1	1
Total	9	30 (1)	71 (9)	110

* numbers in parentheses are suspended sentences