Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues

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Draft for Discussion Only

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To date, scholarship on sentencing guidelines has understandably focused on the experiences across the United States where guidelines have been evolving since the 1970s. Unlike other American innovations, the US guideline schemes have failed to find a market overseas or across its border. Thus Canada rejected the use of presumptive guidelines in the 1980s, Western Australia in 2000, while England and Wales declined their adoption in 2008. Having rejected the US model, a number of other jurisdictions have been developing guideline schemes of different kinds. Among these countries, England and Wales has made the greatest progress; definitive guidelines have now been issued for most offences. In fact this is the only jurisdiction outside the US to have developed and implemented a comprehensive system of guidance for sentencers, consisting of offence-specific guidelines as well as generic guidelines. This essay describes and explores recent developments in England.

The theme of the seminar giving rise to this special issue was “The Effects of Different Sentencing Reforms”. Although the effects of various reforms and specific guidelines have been studied for decades, in the context of the English sentencing guidelines, it is too early to draw definitive conclusions about their impact on sentencing practices. This observation will surprise scholars who have been aware of the evolving English guidelines since 1999. Why, one may reasonably ask, are we only now beginning to understand the effects of these guidelines? The explanation lies in fact that until relatively recently, the

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1 The writing of this essay was supported by a Major Research Fellowship from the Leverhulme Trust. I would also like to thank the following individuals for comments on an earlier draft:


3 The Law Commission of New Zealand has developed a comprehensive and thoughtful set of guidelines, but these have yet to be implemented; see Warren Young and Claire Browning, New Zealand’s Sentencing Council, CRIM. L.R. 287 (2008).

4 Hereafter, for the sake of brevity I will refer to this jurisdiction simply as England, but with no disrespect to my Welsh forefathers intended.
guidelines authority in this jurisdiction lacked the mandate and the resources to monitor the application of its own guidelines. Happily, this state of affairs is now changing.

Overview of Essay

Developments in this country carry important lessons for other jurisdictions, particularly those interested in structuring sentencers’ discretion without adopting a US-style sentencing grid. Part I offers some brief commentary on the historical origins of the guidelines. This is followed by a concise chronology of recent events, including passage of the Coroners and Justice Act 2009. This Act amended the compliance requirement on courts and created a new statutory guidelines authority which commenced its work in April 2010. This body – the Sentencing Council of England and Wales – has significantly broader powers and responsibilities than its predecessors, and correspondingly greater research resources. The Council has revamped the guideline structure and the new format is described, using a common offence to illustrate the English sentencing methodology. The final section of the paper addresses some important challenges confronting the English guidelines and the Sentencing Council. To the extent possible, the discussion is situated within the context of the guideline schemes found in the US and proposed in New Zealand.

The Context

Like judges in almost all other common law jurisdictions, sentencers in England and Wales have long enjoyed wide discretion at sentencing, restricted only by appellate review and a limited number of statutory mandatory sentences. All this changed in 1998 with the creation of an advisory body, the Sentencing Advisory Panel (SAP), a development which marked the inception of more structured sentencing. The SAP was responsible for advising the Court of Appeal Criminal Division which then considered this advice in developing its guideline judgments.\(^5\) In 2003, the guidelines movement moved up a gear when the Criminal Justice Act 2003 created a second statutory body, the Sentencing Guidelines Council (SGC). Henceforth the SAP provided its advice to the SGC which then devised and ultimately issued guidelines following extensive consultation.

The reforms introduced by the Coroners and Justice Act 2009 may be traced to two developments. First, the high and rising prison population in England and Wales prompted the government to commission a review of the use of imprisonment and of sentencing guidelines.\(^6\) The second development was a Working Group which recommended a revamp of the current arrangements rather than adoption of a completely new system of guidelines.\(^7\) U.S.-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive for sentencing in this country and contrary to the traditions of English sentencing. The rather unwieldy bicameral structure (SAP and SGC) was reviewed


in 2008 by the Sentencing Commission Working Group (SCWG) which recommended a series of modifications to the guidelines environment in this jurisdiction.\(^8\) Sentencing in England and Wales entered another era in 2010 as a result of reforms introduced by the Coroners and Justice Act 2009. A new statutory body (the Sentencing Council for England and Wales), replaced the SAP and the SGC, both of which were abolished. The creation of a single guidelines authority was intended to promote more effective development and dissemination of guidelines. A great deal has changed as a result of the latest legislation – for example, the Sentencing Council has a significantly wider range of duties than its predecessors (see below).

Statutory Duties of the Sentencing Council

The Coroners and Justice Act 2009 imposes a wide range of duties on the new Council in addition to the primary function of producing guidelines.\(^9\) The Council also has to monitor the operation and effects of its guidelines. In addition it must draw conclusions about the factors which influence sentences imposed by the courts, the effect of the guidelines on consistency in sentencing and the effect of the guidelines on public confidence in the criminal justice system. Promoting public confidence is also a priority for the new Council. A number of commentators\(^10\) have argued that this is a central function of a sentencing guidelines authority. It has been suggested that sentencing councils and commissions need to do more than simply devise and distribute guidelines --- they have to be promoted to stakeholders in the field of sentencing as well as to the general public. The Coroner’s Act also states that the Council “may promote awareness of matters relating to the sentencing of offender…in particular the costs of different sentences, and their relative effectiveness in preventing re-offending”.\(^11\)

The Sentencing Council is further required to publish a report about “non-sentencing factors” which are likely to have an impact on the resources needed for sentencing. These non-sentencing factors include (but are not limited to): recalls of prisoners released to the community; breaches of community orders; patterns of re-offending; decisions taken by the Parole Board of England and Wales, and considerations relating to the remand prison population. Finally, the Council is also charged with a duty to assess the impact of all government policy proposals (or proposals for legislation) which may affect the provision for prison places, probation and youth justice services. Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organizations responsible


\(^9\) Sections 127-130 of the Coroners and Justice Act 2009 (c.25) specify a list of “other functions” of the Council.

\(^10\) See e.g. MIKE HOUGH AND JESSICA JACOBSON, CREATING A SENTENCING COMMISSION FOR ENGLAND AND WALES: AN OPPORTUNITY TO ADDRESS THE PRISONS CRISIS (2008).

\(^11\) Coroners and Justice Act 2009 (c.25) s. 129(2).
for devising and disseminating sentencing guidelines. The ensemble of duties is also more extensive than those imposed upon sentencing commissions and councils in other jurisdictions.

II. Sentencing Guidelines in England and Wales: The New Format

The Council’s first definitive guideline, covering the offences of assault, came into effect on June 13 2011. (This guideline replaces the definitive assault guideline issued by the Sentencing Guidelines Council in 2008). The guideline assumes a new structure and will serve as a model for all future guidelines issued by the Sentencing Council. Over time, the Council will re-format and re-issue the existing guidelines under the new format; however, since definitive guidelines must be preceded by an extensive public and professional consultation, it will take several years before all the guidelines issued by the previous Council are replaced. For the foreseeable future then, sentencers in England and Wales will need two sets of guidelines to hand when sentencing, with the relevant guideline being determined by the offence for which sentence is being imposed. The country has therefore moved from having two guidelines authorities administering a single set of guidelines to one guidelines body and two sets of guidelines.

General Approach to Structuring Sentencers’ Discretion

Consistency of approach at sentencing is pursued in various ways in different guidelines. Some systems -- such as those found in US jurisdictions -- achieve consistency by specifying narrow ranges of sentence and by discouraging departures from those ranges. In contrast, the guidelines in England and Wales promote uniformity by prescribing a sequence of steps for courts to follow when sentencing an offender, while also allowing a significant degree of discretion (see later sections of this essay). Since the guideline reflects a structure derived from the statute, it is important also to consider section 125 of the Coroners and Justice Act 2009 which identifies the duties of a court with respect to the guidelines. (The essay returns to the compliance requirement having examined the new guideline format.) The revised guideline structure contains a series of nine steps, of which the first two are the most critical. (Appendix A contains a summary of the steps).

Example: Domestic Burglary

12 Despite its expanded range of duties, the new Council is a smaller body than its predecessors. The SAP-SGC had a combined membership of up to 25 members while the new Council is composed of 15 individuals, seven members of the judiciary (six judges and one lay magistrate); six criminal justice professionals, one academic and is headed by its President the Lord Chief Justice of England and Wales.

13 The definitive assault guideline as well as all guidelines issued by the previous statutory authority may be found at: http://www.sentencingcouncil.org.uk (last visited November 11, 2011).

14 Coroners and Justice Act 2009 (c.25) s. 120(6)(a)-(d).

15 See chapter 6 in PRINCIPLED SENTENCING. READINGS ON THEORY AND POLICY (Andrew von Hirsch, Andrew Ashworth and Julian V. Roberts, eds., 2009)
For the purposes of illustration we examine the guideline for Domestic Burglary. As with most offences for which a definitive guideline has been issued, this offence is stratified into three levels of seriousness. The guideline provides a separate range of sentence and starting point sentence for each category. Step One, and indeed s. 125(3)(b) of the Coroners and Justice Act, requires a court to match the case at bar to one of the three categories of seriousness. The three categories reflect gradations in harm and culpability, with the most serious category (1) requiring greater harm and enhanced culpability. Category 2 is appropriate if either greater harm or higher culpability is present, while Category 3 requires a court to find both lesser harm and a lower level of culpability.

Determining the Offence Category

Step One of the guideline identifies an exhaustive list of factors to determine which of the three categories is most appropriate for the case being sentenced. These factors constitute what the guideline describes as the “principal factual elements” of the offence, and their primordial status is reflected in the fact that determination of the category range is the step which has the greatest influence on severity of sentence. This is clear from examining the respective category ranges. For example, the lowest level of seriousness (Category 3) carries a non-custodial sentence range of a fine to a high level community order, whereas the highest category sentence range runs from one to three years of imprisonment.

The Step One factors include both statutory aggravating factors (e.g., hate motivation) as well as other important circumstances affecting harm -- such as the deliberate targeting of a vulnerable victim. Factors indicating lower culpability include: a subordinate role of the offender; a greater degree of provocation, and a lack of premeditation. The exhaustive nature of the list of factors is an innovation, and means that courts are restricted to considering only factors on the guideline’s list when identifying which category is appropriate. Having determined the relevant category range a court moves to Step Two (see below). At this step a court uses the corresponding starting point to shape a sentence which will then be modified by the remaining steps in the guideline. This essentially means moving up or down from the starting point sentence to reflect relevant mitigating and aggravating factors. Since the definition of a starting point has been amended by the Coroners and Justice Act 2009, it is worth briefly discussing the concept.

Using Starting Point Sentences

16 There is an additional complication when sentencing for this offence. When sentencing an offender for a third domestic burglary, the Court must apply section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000 (c.6) and impose a custodial term of at least three years, unless it is satisfied that there are particular circumstances relating to any of the offences or to the offender which would make it unjust to do so.

17 “[W]here the offence-specific guidelines describe categories of case in accordance with section 121(2), a duty to decide which of the categories most resembles P’s case..” Coroners and Justice Act 2009 (c.25) s. 125(3)(b).

18 Factors identified at Step One are not necessarily primordial, and some factors assigned to Step Two (see next section of essay) are by no means secondary in nature. For example, targeting a vulnerable victim may be not always be more important than committing an offence which results in the victim having to leave her home. However, the first circumstance is found in Step One, the latter in Step Two (see discussion in Julian V. Roberts, Structured Sentencing: Exploring Recent Developments in England and Wales, 13 PUNISHMENT AND SOCIETY (forthcoming 2011).
Starting point sentences are a feature unique to the guidelines in England and Wales. Under the US grid-based guidelines crime seriousness and criminal history comprise the two dimensions and each cell of the two-dimensional matrix contains a range of sentence length. For example, in Minnesota, robbery carries a presumptive sentence length of between 50 and 69 months for an offender with a single criminal history point. With such narrow ranges of sentence length, starting points are presumably unnecessary and none are provided. The only other jurisdiction to develop numerical guidelines is New Zealand. The Law Commission of New Zealand created a comprehensive and thoughtful set of guidelines for that jurisdiction, although these have never been implemented. When devising its guidelines, the New Zealand Law Commission studied both the England and Wales and the US schemes, and ultimately declined to incorporate starting points. Whence the desire, and wherefore the necessity for such a feature in the English guidelines?

Three justifications may be offered for starting point sentences. First, the concept of a starting point derives from guideline judgments of the Court of Appeal which have been an element of appellate jurisprudence in England and Wales for decades. Incorporating starting points links the guidelines to the traditional source of guidance for courts of first instance and this, in turn, may enhance the appeal of the guidelines for sentencers. The second justification reflects the psychology of human decision-making. Confronted with a range of options, or sentence lengths, sentencers may well “enter the range” at different points, with consequences for the sentences ultimately imposed, which could then be less consistent. Finally, if the new format abandoned starting points entirely, sentencers would be required to use two very different sets of guidelines -- one with and one without this defining feature.

**Definition of Starting Point**

The new guidelines format changes the definition of the “starting point” sentence. The SGC guidelines defined the Starting Point in terms of a first offender who is convicted following a trial. Practitioners and scholars have often observed that this definition relies on a highly atypical offender profile, as few offenders appear for sentencing following a contested trial and without any criminal antecedents. The Starting Point for the new Assault

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19 The Minnesota guidelines consider many aspects of an offender’s record and accord points for issues such as the recency of prior convictions, their relationship to the current conviction and custody status at the time of the latest conviction; MINN. SENTENCING GUIDELINES COM’N, MINN. SENTENCING GUIDELINES (2004) available at http://www.msgc.state.mn.us/ (last visited November 11, 2011).

20 See Warren Young and Andrea King, Sentencing Practice and Guidance in New Zealand 22 FEDERAL SENTENCING REPORTER 254 (2010); Young and Browning supra note 3.


23 Exact statistics are not available, but in 2009, only approximately one in ten (12%) of defendants pleaded not guilty, and only 10% of offenders appeared for sentencing without any prior convictions. The overlapping population is therefore likely to be much smaller than 10%; see Ministry of Justice, Sentencing Statistics: England and Wales 2009, London: Ministry of Justice (2010) available at https://www.justice.gov.uk/publications/docs/sentencing-stats2009.pdf (last visited Nov. 11, 2011).
guideline – and all subsequent guidelines -- applies to all offenders, irrespective of plea or previous convictions. This change in the definition of the starting point found favour with respondents to the professional consultation24, and has been welcomed by practitioners.

Step Two: Shaping the Provisional Sentence

Step Two of the guideline requires a court to “fine tune” its provisional sentence (based on the category starting point) by reference to a list of aggravating or mitigating factors which relate to crime seriousness, culpability, or personal mitigation. In the words of the guideline, these circumstances provide “the context of the offence and the offender”. This second step also involves a change from the previous guideline which required a court to consider aggravating factors – and to revise the sentence upward if appropriate – and then to consider mitigating factors and personal mitigation in a separate step. Considering both kinds of factors simultaneously represents a more holistic approach to the determination of seriousness.

The aggravating factors include committing the offence while on bail or licence, at night when a child was at home, while under the influence of alcohol or drugs, or whilst the offender was on licence for a previous offence. The guideline specifies factors which reduce seriousness, including an absence of prior convictions and the fact that the offender was a subordinate member of a gang. Consistent with the relatively expansive perspective on mitigation characteristic of sentencing in this jurisdiction25, a diverse collection of factors is cited as personal mitigation, including remorse, the fact that the offender was a sole or primary carer for dependent relatives and, controversially, “good character and/ or exemplary conduct”26. Most importantly, the guideline makes it clear that the list of factors at Step Two is, unlike Step One, non-exhaustive. This creates significant room for counsels’ submissions on personal mitigation to reflect the highly variable circumstances of individual offenders.

Revisiting the Category Range

One last element of the guidelines at this stage in the methodology illustrates the flexibility of the English guidelines.27 Under the guidelines proposed for New Zealand, once a court has selected a particular category, the court’s sentence must remain within the sentence range associated with that specific category. In contrast, the new format English guidelines allow a court to move out of the category range. Under what circumstances might this occur? If a court is confronted at Step Two with a case in which multiple aggravating or


25 Ashworth for example notes that “in practice the range of factors advanced in mitigation is enormously wide”; ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE, 170 (2010).

26 For discussion of the role of mitigation and the effect of guidelines see exchange in CRIM. L.R. issue 7 (2011); for mitigation and aggravation more generally see JULIAN V. ROBERTS, MITIGATION AND AGGRAVATION AT SENTENCING (2011).

27 To some scholars the flexibility is a positive characteristic, as it facilitates individualisation; others see the discretion allowed by the guidelines – and the compliance requirement (discussed later in this article) to constitute a weakness; see discussion in Ashworth supra note 6.
mitigating factors exist, it has the discretion to move away from the Starting Point to reflect this multiplicity of aggravators or mitigators. This movement may result in a provisional sentence associated with a higher or lower category range than the one established by applying the step one factors. The consequence is that sentencers are effectively permitted a “second look” at the category decision they have previously taken. As noted, this revisiting of the category range decision is impermissible under the New Zealand format. Presumably the number of cases in which this takes place will be small; otherwise the integrity of the guidelines is threatened.

**Primary and Secondary Factors**

The two-step format may be described as employing primary and secondary factors to determine crime seriousness and culpability. Thus Step One considers elements which have the most important influence on sentence severity – for example the presence of a knife or other weapon where this is not the cause of a separate criminal charge. Step Two on the other hand identifies those circumstances which are relevant to seriousness or culpability, but which should carry less weight. The guideline does not actually make this primary/secondary distinction explicit, although it may be implied by the phrase “principal factual elements of the offence” to describe Step One and “additional factual elements” to describe Step Two.

The two stages are not completely airtight: Factors identified at Step One are not necessarily primordial, and some factors assigned to Step Two are by no means secondary in nature. For example, vandalism of the property may be not always be more important than committing an offence which results in the victim having to leave her home. However, the first circumstance is found in Step One, the latter in Step Two. Previous convictions provide another illustration of the complexities of assigning sentencing factors to one of the two stages. Despite the fact that criminal history is generally considered to an important sentencing factor – after all it is one of the statutory sentencing factors – it is consigned to Step Two, where it will, for better or worse, have less impact on the quantum of punishment.

**Incorporating Thresholds for a community order and custody**

At Step Two the guideline incorporates consideration of the statutory thresholds for custody as opposed to community-based disposals. The Criminal Justice Act 2003 articulates the sentencing principle of restraint with respect to both the imposition of a term of custody and the duration of any custodial term. Section 152(2) specifies that:

> The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

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28 The exact language of the guideline is the following text from Step Two: “Identify whether any combination of these [step two] factors or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the category range.” (emphasis added); SENTENCING COUNCIL, ASSAULT: DEFINITIVE GUIDELINE, 5 (2011) available at: http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf

29 Ss. 152(2), 148(1) Criminal Justice Act 2003 (c.44); see Ashworth *supra* note 5 for discussion of this issue.
S. 153(2) of the same statute states that:

..the custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.

The custodial threshold is now embedded in the guideline. Thus the guideline advises that when sentencing Category 2 or 3 offences, the court should also consider (i) whether the custodial threshold has been passed, (ii) if it has been met, whether a custodial sentence is unavoidable, and finally (iii) whether the sentence of imprisonment should be suspended. These directions constitute a salutary reminder to sentencers of the need to consider the hierarchy of sanctions and the statutory criteria which must be fulfilled before specific disposals are imposed. Under the previous guideline, the statutory thresholds were cited only by cross-reference to the guideline on Overarching seriousness.

**Remaining Steps Towards Final Disposition**

After Step Two, a court proceeds through the remaining seven steps of the guidelines methodology, which may be briefly summarised. Step Three directs courts to take into account provisions in the *Serious Organized Crime and Police Act 2005*30 which permit a court to reduce sentence in cases where the offender has provided (or offered to provide) assistance to the prosecution or police. Any potential reduction here is independent of the reduction for the guilty plea although the utilitarian justification is the same in both cases.

Step Four invokes the factor much discussed in this jurisdiction: the sentence reduction for a guilty plea. Section 144 of the *Criminal Justice Act 2003* permits a court to reduce a sentence in cases where the accused entered a guilty plea. The magnitude of the discount is not specified in the statute, but guidance is provided in the definitive guideline issued by the former Sentencing Guidelines Council.31 This guideline creates a sliding scale of discounts according to which an offender is entitled to a reduction of up to one third if the plea is entered at first reasonable opportunity, with the reduction declining to one tenth for pleas entered only on the day of the trial. This guidance is still in effect, although the Sentencing Council has a statutory duty to issue a definitive guideline, and will do so in 2012.

Step Five requires courts to consider whether, having regard to the criteria contained in Chapter 5 of the *Criminal Justice Act 2003*, it would be appropriate to impose an extended sentence. The totality principle32 is invoked at Step Six for cases in which the court is sentencing an offender for more than a single offence, or where the offender is currently serving a sentence. This principle requires sentencers to adjust the sentence to ensure that the total sentence is just and proportionate to the offending behaviour.

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30 *Serious Organized Crime and Police Act 2005* (c.15) ss. 73, 74.


32 In September the Council issued a consultation on a draft guideline dealing with the application of the totality principle, see www.sentencingcouncil.org.uk.
Step Seven reminds sentencers that in all cases they should consider whether to make a compensation order and or any other ancillary orders. Section 174 of the *Criminal Justice Act 2003* imposes a duty on courts to give reasons and to explain, for the benefit of the offender and others, the effect of the sentence, and this duty is encapsulated in Step Eight. The final step (Nine) directs courts to consider whether to give credit for time spent on remand or on bail, in accordance with sections 240 and 240A of the *Criminal Justice Act 2003*.

**III: Compliance Requirement: How binding are the English sentencing guidelines?**

Having described the structure of the guidelines it is time to turn to the most critical element of any guidelines scheme: the extent to which courts are required to comply with the guidelines. In other jurisdictions the duty of a court to follow guidelines is usually quite strict. The most recent model for a compliance provision is contained in the proposed New Zealand sentencing guidelines. The statute regulating these guidelines states that “A court must impose a sentence that is consistent with any sentencing guidelines that are relevant to the offender’s case, unless the court is satisfied that it would be contrary to the interests of justice to do so.” Since the New Zealand guidelines have not been implemented, compliance data are unavailable. The jurisdiction with the most experience with presumptive sentencing guidelines is of course the US, where guidelines exist in most states and also at the federal level. Across the United States, most guideline systems employ numerical, presumptively binding guidelines and with a more rigorous compliance requirement than the New Zealand model. The Minnesota guidelines are representative of these systems. The compliance requirement in that state is that “The sentencing judge must find, and record, substantial and compelling reasons why the presumptive guidelines sentence would be too high or too low in a given case.”

The phrase “substantial and compelling reasons” implies that only a small minority of sentences should fall outside the guidelines. This interpretation is supported by the guidelines manual in that state which notes that “there will be a small number of cases where substantial and compelling aggravating or mitigating factors are present” (Minnesota Sentencing Guidelines Commission (2010a), p. 29, emphasis added). Indeed, the Minnesota guidelines manual warns users that: “The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if judges depart from the guidelines frequently…. certainty in sentencing cannot be attained if departure rates are high.”

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33 See Young and Browning *supra* note 3.

34 **MINN. SENTENCING GUIDELINES COMM’N, MINN. SENTENCING GUIDELINES** (2010), 24 (emphasis added).

35 *Id.* 24 (emphasis added) Similarly, in the state of Oregon, the administrative rules relating to the guidelines state that “the sentencing judge shall impose the presumptive sentence provided by the guidelines unless the judge finds substantial and compelling reasons to impose a departure,” **OREGON CRIMINAL JUSTICE COMM’N, SENTENCING GUIDELINES** (2010), *available at* http://www.oregon.gov/CJC/SG.shtml
The Coroners and Justice Act 2009 amended the requirement for courts with respect to sentencing guidelines. According to the Criminal Justice Act 2003 – the statute in force until passage of the Coroners and Justice Act in 2009 -- courts were directed that in sentencing an offender, they “must have regard to any guidelines which are relevant to the offender’s case” (s. 172(1)). Section 174(2) of the same Act provided that: “Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court’s reasons for deciding on a sentence of a different kind or outside that range”. Thus a court simply had to consider (“have regard to”) the Council’s guidelines and to give reasons in the event that a “departure” sentence was imposed.

**The Current Compliance Requirement in England and Wales**

The Coroners and Justice Act 2009 creates the following duty on a court with respect to the guidelines: S. 125 reads:

(1) Every court--

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function,

unless the court is satisfied that it would be contrary to the interests of justice to do so. …

(3) the duty imposed on a court by subsection (1)(a) to follow any sentencing guidelines which are relevant to the offender’s case includes –

(a) in all cases, a duty to impose on P, in accordance with the offence-specific guidelines, a sentence which is within the offence range, and

(b) where the offence-specific guidelines describe categories of case in accordance with section 121(2), a duty to decide which of the categories most resembles P’s case in order to identify the sentencing starting point in the offence range;

but nothing in this section imposes on the court a separate duty, in a case within paragraph (b), to impose a sentence which is within the category range. (emphasis added).

The relatively robust language “must… follow” is therefore qualified by the words creating the discretion to impose a different sentence if following the guidelines would not be in the interests of justice. In addition the statute clarifies what is meant by the duty to sentence within a range.

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36 The relevant provision in the Criminal Justice Act 2003 (c.44) did not specify whether compliance entailed sentencing within the category range or the wider offence range, although a number of appellate decisions endorsed the former interpretation; see discussion in Julian V. Roberts, Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales, 51 BRITISH JOURNAL OF CRIMINOLOGY 997 (2011)
seriousness, each with its own range of sentence. The duty on courts is to sentence within the *total offence range*, rather than the narrower range associated with any particular category of seriousness.\(^{37}\) The total offence range is relatively wide and naturally increases to reflect the seriousness of the offence. For example, inflicting grievous bodily harm, carries a total sentence range of a low level community order to 4 years in custody; a court may sentence anywhere in this range and still be compliant with the guidelines.

More serious offences carry a much wider range of sentence within which a court may impose a sentence and remain compliant with the guidelines. For robbery, a court may impose a custodial sentence of up to 12 years in length and remain compliant with the guidelines -- a degree of discretion which has been criticized by some commentators for being too permissive.\(^{38}\) In the event that the court imposes a sentence outside the overall range -- in the interests of justice -- it must give reasons for its decision. The provisions in the Coroners and Justice Act focus a court’s attention on the relevance of the guidelines, yet permit considerable judicial discretion to impose a fit sentence.\(^{39}\)

**Sentencing outside the Total Offence Range**

The total *offence* range for domestic burglary (encompassing the bottom of the lowest level range to the ceiling of the highest level range) runs from a low level community order up to six years’ custody, yet the maximum penalty for this offence is 14 years imprisonment (when tried on indictment). A custodial ‘zone’ therefore exists between the guideline range ceiling of six years and the statutory limit of 14 years imprisonment. For the most serious offences, this zone between the ceiling of the total offence range and the statutory maximum will be greater than the eight year range for domestic burglary. A natural question to pose is therefore the relationship between a definitive guideline and the statutory maximum. Answering the question requires a brief reflection on the role of a guideline.

Sentencing guidelines provide courts with guidance as to the appropriate disposals for most cases; they do not encompass cases falling at the extremes of mitigation or aggravation. It is to be anticipated that most cases will be accommodated within the total offence range specified by the guideline; however, there will be a small number of cases which fall into the most serious category (one) yet for whom a term of custody in excess of six years is proportionate. Equally, some cases conforming to the lowest level of seriousness category may warrant a disposal less punitive than a fine. Imposition of a sentence beneath a low level community order (the floor of the total offence range) would require some justification. A court sentencing in such a case would be required to provide justification for a higher sentence. Using the language of the statute this would entail an explanation of why it would be “contrary to the interests of justice” to impose a sentence within the guideline total offence range.\(^{40}\)

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\(^{37}\) For further discussion, see Roberts *supra* note x


\(^{39}\) See Roberts *supra* note x.

\(^{40}\) *Coroners and Justice Act 2009*, (c.25) s. 125(1)(b).
IV. Emerging issues and Challenges to the Guidelines

1. Compliance Rates

One of the curiosities of the English guidelines is that comprehensive compliance statistics have never been published. The explanation for this is that the previous guidelines authorities had neither the mandate nor the resources to take the appropriate steps to collect such data. That changed with the new Council which has a statutory duty to monitor the “operation and effect of its sentencing guidelines”\(^{41}\). More specifically, the Council must “discharge its duty.. with a view to drawing conclusions about- the frequency with which, and the extent to which, courts depart from sentencing guidelines”.\(^{42}\)

Compliance statistics are routinely collected and published by the US sentencing commissions. However, neither the Sentencing Advisory Panel nor the Sentencing Guidelines Council ever published statistics on the proportion of sentences falling within the guidelines. This exercise may not have been feasible in the early years. As the first statutory body created to promote guidelines (in 1998), the Panel was preoccupied with promoting the guidelines -- a necessary first step before compliance could be measured. The SGC co-sponsored a large data collection exercise in 2006\(^{43}\), but this research was terminated before data became available.

The first insight into sentencers’ response to the guidelines derives from data collected by the Sentencing Commission Working Group which conducted a very limited survey of Crown courts. Over a trial one-month period, judges were asked to complete a pro forma every time they sentenced one of four high-frequency offences or offence categories: assault and other offences against the person; sexual assault and sexual assault of a child under 13; robbery, and burglary. Judges identified the seriousness category appropriate to the case appearing for sentencing as well as the sentence imposed and these sentences were then compared to the guideline ranges. Since the data collection exercise was restricted to a small number of courts (and offences) and was conducted in a limited period of time, the trends must be treated with caution. Nevertheless, some conclusions may be drawn.

First, the “departure rate” was higher here than in the US jurisdictions cited above: approximately half the sentences imposed were outside the guidelines range.\(^{44}\) It is tempting to assume that this suggests a lower level of compliance with the guidelines in this country, but this would be wrong. Most US guidelines are two dimensional in nature, crime seriousness and criminal history comprising the two dimensions. This means that the effect of criminal history is taken into account in determining which offence-specific range is appropriate; thereafter prior convictions should play no further role -- or the court would effectively be double counting this factor.

\(^{41}\) Coroners and Justice Act 2009 (c.25) s. 128(1)(a).

\(^{42}\) Coroners and Justice Act 2009 (c.25) s. 128(2)(a).

\(^{43}\) See discussion in MANDEEP DHAMI AND KAREN SOUZA, SENTENCING AND ITS OUTCOMES PROJECT: PART ONE PILOT STUDY REPORT (2009)

\(^{44}\) SENTENCING COMMISSION WORKING GROUP, CROWN COURT SENTENCING SURVEY, 16 (2008)
The English guidelines however do not take into account criminal history in the determination of the category range (a step two factor). When a court in Minnesota imposes a sentence outside the guideline range it is clearly a departure and is subject to appellate review; a sentencer handing down a sentence in England that is above or below the category (bracket) range is not necessarily demonstrating non-compliance since the guidelines make it clear “Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the provisional sentence beyond the range given”.

Prior convictions in England and Wales assumed an enhanced role as a function of the Criminal Justice Act 2003. S. 143(2) of that act which directs courts that in considering the seriousness of an offence they “must treat each previous conviction as an aggravating factor….”. Considering this provision in conjunction with the structure of the guidelines leads to the inescapable conclusion that sentences will be more likely to fall outside the range, but in a way that is not legitimately considered a departure. The survey sheds important light on this issue. In fully one third of the total sample there was upward movement from the category range to reflect the offender’s prior convictions. It is impossible to derive a specific statistic from these imperfect data, but the inescapable conclusion is that the true departure rate – the percentage of cases outside the category range for reasons unrelated to factors accepted by the guidelines – is significantly lower than 48%.

Two other interesting findings emerge from the early compliance data. First, when courts imposed a sentence outside the category range, they were significantly more likely to go above rather than below the range. Averaged across the offences, sentence lengths above the range were more than twice as frequent as sentences below the range (34% versus 14%). This finding is in clear contrast to the US guideline systems, where “downward” departures – more lenient sentences than would be prescribed by the guidelines – are more frequent than “upward” departures. For example, statistics from Minnesota reveal that one quarter of all sentences of custody were downward departures, while only 3% were above the prescribed range; mitigated sentences were eight times as likely as enhanced sentences. The second trend worth noting is that the asymmetry varies greatly. Thus for robbery, upward and downward departures were roughly in equipoise, whereas for burglary cases falling above the range were four times more frequent than sentences below the range.

Why were upward or aggravated “departures” so much more frequent than mitigated or downward deviations from the English guidelines? There are two possible explanations for this asymmetry. First, the Council’s guidelines contain a much higher number of aggravating than mitigating factors. For example, the foundational guideline for determining offence seriousness identifies 31 factors which enhance culpability while only four which reduce the level of culpability or harm. Similarly the offence specific guidelines all cite more aggravating than mitigating factors.

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48 Sentencing Guidelines Council, 2004
If courts are more likely to be sensitized to aggravating circumstances, or if there are more aggravating factors identified, this may enhance the effect of aggravation relative to mitigation. In support of this possibility it is worth noting that the statistics show that sentences imposed above the category seriousness range had significantly more aggravating features than those associated with sentences within the range.\(^{50}\) However, this explanation can at best explain a small percentage of the asymmetry effect. A more plausible explanation concerns the architecture of the English guidelines. As noted under the English guidelines prior convictions may take the sentence outside the range. In light of the clear statutory direction regarding the use of prior convictions at sentencing upward departures will be more likely than departures below the bracket range.

**Latest Compliance Data**

In 2011 the Sentencing Council issued the first report from its relatively comprehensive survey of Crown Courts (hereafter CCSS). This survey requires for every sentencing decision all Crown court judges to complete a form summarising the key elements of the sentencing decision, including the critical question of whether the sentence imposed was within or outside the guidelines. The first and experimental statistical release does not provide “departure” statistics for all sentences imposed but only for a single offence; subsequent releases will presumably provide comprehensive statistics on this issue. With respect to the one offence for which compliance data were released (assault occasioning actual bodily harm), the statistics confirm the expectation that having defined compliance in terms of the total offence range (rather than the category specific range), very few dispositions will fall outside the compliance zone. Only 2% of all sentences imposed for this offence were outside the total offence range of a low level fine to three years custody.\(^{51}\) Of the sentences falling outside the range, “downward” departures accounted for four-fifths, the remainder falling above the ceiling of the offence range. The conclusion is clearly that the stratospheric compliance trends are a reflection of the wide ranges of sentence within which a court can sentence and remain compliant with the guidelines.

2. **Responding to Punitive Surges**

One of the functions of sentencing guidelines is to serve as a “circuit breaker” – preventing local or general bursts of punitiveness from affecting sentencing practices. One obvious source of populist punitiveness is the legislature, where politicians sometimes introduce tough mandatory sentences which distort sentencing practices and undermine principles such as proportionality and restraint.\(^{52}\)

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\(^{49}\) For further examples and discussion, see Julian V. Roberts, *Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application*, CRIM. L.R. 264 (2008).

\(^{50}\) SENTENCING COMMISSION WORKING GROUP *supra* note 44


\(^{52}\) A good example is Canada, where the federal government has been introducing mandatory sentences of imprisonment for the last few years; the latest raft of such sentences are contained in Bill C-10 *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional
A less obvious source of episodic punitiveness is the judiciary itself. This may include individual judges drawing upon their personal observations of a local rise in offending to impose exemplary sentences. A guidelines scheme would (and should) constrain such initiatives. In August 2011, the extraordinary mass riots in a number of English cities created an unexpected and unwelcome challenge for the guidelines. Over three consecutive nights, large numbers of individuals participated in mass looting in several cities, including Birmingham, Manchester, London and Bristol. Participants in the riots appear to have been oblivious to the extensive network of CCTV cameras in Britain’s streets; the police in London and elsewhere trawled through footage and were able to identify – with the assistance of news media who published their photos -- approximately 50,000 suspects in the capital alone. Charges were laid for a wide range of offences including burglary of a commercial property; receiving stolen goods; and theft.

The Empire Strikes Back

The judiciary responded expeditiously and punitively to the individuals charged with offences during this period; in doing so they also undermined the guidelines by affirming that the offending was so far removed from conventional offending to render the sentencing guidelines irrelevant. One early judgment, issued by the Manchester Recorder following consultation with fellow judges in that city, is particularly significant. After noting that the context of the offences committed takes them “completely outside the usual context of criminality”, the court assumed the view that existing sentencing guidelines “can be departed from”. The judgment then outlines new starting point sentences and sentencing ranges for a wide range of offences.

The Manchester Recorder’s “guidelines” were immediately followed by a number of judgments from other courts, all of which endorsed the Carter ranges. A typical example is found in R. v. Twemlow and others. One of these offenders (McGrath) had entered a previously looted supermarket where he was arrested by police and subsequently pleaded guilty to burglary of a business premise. The 21-year old offender, a university student, was regarded by the Court as of good character and a PSR recommended imposition of a non-custodial sanction. The definitive guideline for burglary in a building other than a dwelling in effect at the time has three levels of seriousness. The lowest level applies to burglary involving goods valued under £2,000 and carries a range of a fine to 6 months custody with a starting point sentence of a community order. This would appear to be the relevant category

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53 The vigorous response was not restricted to sentencing; the rate of persons remanded into custody jumped overnight from less than one third to over two-thirds, reflecting (presumably) the view that conventional bail criteria were also less relevant for persons accused of offences during this period.

54 R. v. Carter & Ors (Sentencing Remarks) [2011] EW Misc 12 (CrownC). The criminal justice system could not be faults for being slow to respond; many offenders were located, charged, brought to court and having entered guilty pleas were sentenced less than a week after the offences had been committed. Ten cases were then heard by the Court of Appeal within a month (see text for discussion).

55 In R. v. Twemlow & Ors (Sentencing Remarks) [2011] EW Misc 14 (CrownC) the Court noted the following: “I expressly agree with the observations of HHJ Gilbart QC. In passing sentence he set out the ranges of sentences which are to be imposed. I respectfully agree with those ranges.”
for the McGrath case. In the event, the court sentenced this offender to 24 months imprisonment, reduced to 18 months to reflect the early guilty plea. This case provides some indication of the aggravating power of the riot context, at least as manifest in this early judgment.

**Ranges in the Ersatz Guidelines**

How much higher are the sentence length ranges specified in the *Carter* decision? Although the judgment notes that the current guidelines are “of much less weight in the context of the current case”, the *Carter* guidelines must be seen in some context. Direct comparisons between the existing definitive guidelines and those in *Carter* are complicated by differences in guideline structures; nevertheless, some conclusions may reasonably be drawn. A comprehensive comparison is beyond the scope of a brief commentary; one common offence may serve as an illustration: burglary from a non-dwelling.

As noted, the Sentencing Guidelines Council definitive guideline for burglary in a building other than a dwelling was still in effect at the time of the riots; it stipulates a sentence range of a fine to 26 weeks custody for property valued under £2,000. The SGC guideline applies to a first offender, so the 26 weeks should be increased somewhat for the purposes of comparison. If we consider the upper limit for this level of the offence to be higher, say 40 weeks to reflect this consideration, the aggravating effect of RRO is nevertheless very striking. Under *Carter*, a burglar who takes part in breaking into a business premise is subject to a sentence length range with an upper limit of 364 weeks (seven years). The aggravating impact of the antecedent events at the time of the offending thus has a dramatic impact on the severity of punishments.

The challenge to the guidelines was therefore two-fold. First, the *ad hoc* sentencing ranges reflect a high degree of aggravation that undermines the integrity of the guidelines; second; by prescribing a new set of starting points and sentence ranges for a raft of offences the judgment effectively creates an additional level of guidelines authority: local courts. Let us take these two issues in turn.

**Impact of Aggravating Factors on Proportionate Sentencing**

Aggravating factors at sentencing should enhance the quantum of punishment in proportion to the elevated harm of the offence or culpability of the offender. The extent to which factor X aggravates the sentence in case Y is properly left to judicial discretion to determine. It is

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56 The Sentencing Council has just issued a definitive guideline for non-domestic burglary, SENTENCING GUIDELINES COUNCIL, NON-DOMESTIC BURGLARY: THEFT ACT 1968 available at http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_Magistrates_web.pdf). If we compare the *Carter* ranges with the appropriate range of sentence identified in the new guideline, the same conclusion emerges: the ranges contained in the *Carter* judgment are much higher. The range for the middle level of seriousness in the new guideline runs from a low level community order to 51 weeks custody, far short of the seven year maximum established by the Manchester judges.

57 Id.

58 If we consider 15 weeks as an approximate midpoint of the existing guideline and 5.5 years (286 weeks) as the midpoint of the enhanced guideline, the latter is approximately 20 times longer than the former; see *Carter supra* note 54.
impossible for Parliament\(^59\) to decide \textit{a priori} that any given circumstance should increase the quantum of punishment by say, one quarter or one half in all cases. To do so would deprive sentencing of the individualisation necessary to achieve a just and proportionate sentence. A guideline can offer some guidance on the appropriate range of sentence resulting from an aggravating circumstance.

The reduction for a guilty plea is a good example. At present\(^60\), the definitive guideline recommends that a court reduce the sentence by up to one third, in the event that the defendant entered a plea at the earliest opportunity.\(^61\) Courts retain the discretion to award a greater reduction in exceptional cases, but such cases will be rare and will entail the court invoking the interests of justice provision in the \textit{Coroners and Justice Act 2009} to step outside the guideline maximum of one third. If courts were allowed (or encouraged) to select \textit{any} magnitude of discount, consistency and indeed proportionality in sentencing would be threatened. The same may be said for aggravation; the impact of an aggravating factor should be constrained by the gravity of the predicate conduct of the offence of conviction. If the tariff for, say a common assault without injury to the victim were a community order, the sentence should not rise to several years in prison in the event that the assault was aggravated by being racially motivated – a classic case of the tail wagging the dog.

\textit{Threatening Ordinal Proportionality}

Ordinal proportionality is one of the requirements of desert based sentencing. This requires offences of differing seriousness to receive sentences of commensurate severity.\(^62\) Rank-ordering is one of the sub-requirements of ordinal proportionality: offences ranked differently in terms of their relative seriousness should receive commensurably distinguishable penalties.

There is a clear threat to ordinal proportionality when aggravating or mitigating factors have the power to increase or reduce the sentence to a great extent. Rankings of seriousness will be scrambled: an offence of relatively low seriousness will be punished at a level of severity associated with a much more serious offence. Moreover, proportionality is not restricted to comparisons \textit{within} crimes of the same offence; it permeates the entire spectrum of offending. Sentencing must be considered in this broader perspective. To take an obvious example, punishing serious frauds more harshly than theft preserves proportionality across economic offences, but if serious frauds result in the imposition of a harsher disposal than, say manslaughter, ordinal proportionality\(^63\) would be threatened.\(^64\) Do the elevated levels of sentencing for RRO have implications for other forms of offending?

\(^59\) This is why legislatures and guidelines authorities around the world have declined to provide guidance as to the quantum of aggravation or mitigation associated with sentencing factors.

\(^60\) The \textit{Coroners and Justice Act 2009} (c.25) directs the Sentencing Council to issue a guideline on the reduction for a guilty plea and a draft guideline will be issued later in 2012.

\(^61\) Sentencing Guidelines Council \textit{supra} note 31.

\(^62\) See \textsc{Andrew Von Hirsch}, \textsc{Censure and Sanctions}, 18-19 (1993).

\(^63\) See discussion in Ashworth \textit{supra} note 5, 89

\(^64\) This is why guidelines authorities generally devise guidelines for all offences simultaneously, rather than developing them \textit{seriatim} on an offence by offence basis as has been the case in England and Wales.
Should a court sentencing a serious robbery have in mind that receiving a stolen television under RRO attracted a sentence of 27 months? This sentence was imposed on one of the offenders sentenced during this period who had been convicted of receiving stolen property (a television). Several mitigating factors were noted by the court in the judgement, as was the absence of prior convictions. Despite this, because the property he had illegally acquired had been looted from a store during the riots, the court imposed a term of 27 months custody. A sentence of this severity would normally be associated with much more serious criminal conduct. It is hard to see how the context can justify aggravation on this scale; at the end of the day, despite the ongoing events, the offence was still one of receiving stolen property worth about £300.

**Ersatz Guidelines?**

The second threat to the guidelines involves the introduction of a new source of guidance, created spontaneously by a group of trial judges without the imprimatur of the Court of Appeal or the statutory guidelines authority (the Sentencing Council). In Carter, the court laid down sentencing guidelines ranges for a variety of offences associated with riot related offences. In addition, the text of the judgment provides what are effectively “starting points”, when it notes “As a starting point….any adult offender .. who took part in crimes of the type described ..must expect to lose his liberty for a significant period.” The language suggests a judicial presumption of custody in all cases.

Since they were developed in relation to behaviour defined as outside the scope of current guidelines, it is unsurprising that they are at odds with existing definitive guidelines issued by the Sentencing Council and its predecessors. Moreover, unlike the definitive guidelines which courts must follow (according to s. 125(1(a) of the Coroners and Justice Act 2009), the Manchester guidelines were not developed after any systematic research, without a protracted public and professional consultation, and were not subject to any parliamentary scrutiny. In short, they represent the personal sentencing preferences of a small group of judges in one city – ersatz guidelines, if you like.

To what extent then, should they guide sentencers in other parts of the country? Would it be appropriate for courts in other cities affected by the riots – Bristol or London – to follow the Manchester guidelines when sentencing for RRO? Surely not; if this question is answered in the affirmative, it would mark the introduction of another player in the already crowded sentencing environment. Thus Parliament creates the statutory framework (including sentencing objectives and certain sentencing principles); the Court of Appeal periodically issues guideline judgments; the Sentencing Council devises and issues definitive guidelines, and now local courts have evolved their own tariffs and ranges.

The importance of ensuring that guidance emanates from the Council or Court of Appeal is not restricted to rare occurrences such as the August riots. Although the sentencing

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65 See *Carter supra* note 54.

66 *Id.*, para 14, emphasis added; the language suggests a judicial presumption of custody in all cases.

67 These steps are all necessary before the Sentencing Council issues a definitive guideline.

“guidelines” which arose in August 2011 did so in relation to a rare event – the riots and mass looting which appeared to have no obvious precipitating event – less dramatic instances of local court initiatives may well arise. For example, if courts perceive a sudden rise in a particular form of criminality in their area, they may decide to impose exemplary sentences by setting higher ranges in the interests of deterring such conduct.

Response of the Sentencing Council and the Court of Appeal

How did the legitimate sources of guidance respond to the sentences imposed in the riot cases, and in particular the Manchester’s Recorder’s rogue guidelines? The Sentencing Council discussed riot-related sentencing at its September meeting and responded by issuing a press statement to the effect that the Court of Appeal would be shortly be hearing appeals arising from sentencing decisions involving riot-related offending and that the Council would not be commenting further.69 The Court of Appeal had rather more to say, in a lengthy judgment issued in October 2011.

R.v. Blackshaw and Others70

On the critical issue of relevance to this essay, the Court of Appeal took a clear position. It noted that “It is inappropriate for Crown Court judges to issue, or appear to be issuing, sentencing guidelines”.71 In this sense the Court departed from the position taken by the Recorder of Manchester. However, the two courts were in agreement that the riot related offending was of a nature not envisaged by -- and therefore not encompassed within -- the existing guidelines. The Court of Appeal quoted and endorsed the Manchester’s recorder’s judgment: “..the context in which the offences of the 9th of August were committed takes them completely outside the usual context of criminality...For these reasons I consider that the Sentencing Guidelines for specific offences are of much less weight in the context of the current case and can properly be departed from.”72

Blackshaw therefore strengthens the role of guidelines in one respect – noting that only the Council and the Court of Appeal have the authority to issue sentencing guidelines. But at the same time the judgment sidelines the guidelines by rejecting the view that guidelines represent a starting point for the determination of sentence. In reviewing the specific cases on appeal the Court provided no link to the offence-specific guidelines as a point of departure, nor any link to an important generic guideline, namely that of overarching seriousness.73 The offence-specific guidelines may be of limited utility in sentencing riot-related offending (except as a point of departure), but the principles guiding the determination of seriousness apply across the entire range of crime seriousness – which is why it is an overarching guideline in the first place. In this sense the Court of Appeal went

71 Id. para 20.
72 Id. para 17.
beyond the Recorder of Manchester, appearing to ascribe no weight to the existing body of
guidance issued by the statutory guidelines authority.\textsuperscript{74}

2. Achieving Consistency

Communications dealing with the guidelines or the Council repeatedly stress that the aim is
to promote consistency of approach rather than consistency of outcome although greater
consistency in the way that sentencers around the country approach sentencing will promote
more consistent outcomes. The challenge to a guidelines authority is to ensure that the
guidelines are followed. In the English context, however, it is worth noting that a number of
elements permit considerable latitude to a court at sentencing, and it is worth recapitulating
these at this point.

- First, the enabling statute permits a court to impose a sentence outside the
guidelines, if it would not be in the interests of justice to follow them – the
“departure” provision;
- Second, compliance with the guideline is defined by the statute as imposing a
sentence within the relatively wide total \textit{offence} range – not the more restrictive
\textit{category} range – the difference between the two ranges being very large;
- Third, movement between the categories of seriousness is permitted: having
determined that a particular category range is appropriate, a court may
nevertheless later move into a higher or lower category if there is a sufficient
constellation of aggravating or mitigating factors.

There is therefore a high degree of flexibility – courts are able to move around within
the guidelines and are not restricted to a particular category level range; as well they may
escape the guidelines altogether by means of the “interests of justice” test. Ultimately,
consistency of approach and outcome is therefore achieved – to the extent that it is achieved
- not through restrictive limits on the sentencing discretion in any particular case but by the
imposition of a step-by-step methodology. The idea is, presumably, that if all sentencers
follow the same method, a more consistent approach will be the consequence and consistency
will ensue.

\textit{Guidelines and the Prison Population}

This essay has explored the nature and function of the English guidelines. Perhaps it
is worth commenting on what these guidelines do not do. The Sentencing Commission
Working Group lamented the inability to make prison projections with a degree of accuracy
found in states such as Minnesota.\textsuperscript{75} This is one reason why the Working Group

\textsuperscript{74} A number of authors have criticised this judgment; see Andrew Ashworth, \textit{Departures from the
ARCHBOLD REVIEW (forthcoming 2011). Scholars have criticised the Court of Appeal on a
number of grounds. For example, having set aside both the Manchester Recorder’s guidelines and the
official sentencing guidelines the Court offered no further guidance to lower courts. \textit{Blackshaw}
contains no advice on the quantum of aggravation that arises as a result of committing an offence
during a riot, or even where to begin determining the appropriate range of sentence. In this sense it
represents a throw-back to sentencing in the absence of guidelines.

\textsuperscript{75} SENTENCING COMMISSION WORKING GROUP supra note 7.
recommended a tighter compliance requirement – to ensure that a higher proportion of sentences fell within the guidelines ranges; only once this occurred would prison population projections become more precise.

However, the English guidelines were not designed to constrain prison admissions, and ironically, the first decade under the guidelines also witnessed an increase in the size of the prison population.\(^{76}\) This growth in the prison population was incremental and long-term, but the guidelines also fail to contain short-term bursts in punitiveness of the kind discussed in this essay. Guidelines advocates who believe that guidelines should be responsive to, and constrain prison populations will see this feature of the English arrangements as a clear weakness.

The problem is exacerbated because the statutory language of the custodial threshold is not particularly rigorous. Thus, Section 152(2) of the Criminal Justice Act 2003 provides that:

\[\text{The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more of the offences associated with it, was so serious that neither a fine alone nor a community order can be justified for the offence.}\]

Whether a custodial term is justified will depend in large measure upon the perceptions of the individual sentencer, as we have seen in terms of the recent riot-related offending. Many sentencers seem to hold the view that any offending occurring within the context of a mass disturbance means that custody follows as inevitably as night follows day. This highlights perhaps the most problematic element of sentencing in this jurisdiction: the subjective threshold for the imposition of a term of custody. This provision has manifestly failed to constrain the use of custody as a sanction – but that is a story for another day.

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\(^{76}\) The guidelines were not responsible for this increase of course, which was triggered by a number of factors such as an increased tendency to use custody, independent of any changes in the nature of cases appearing for sentencing and the imposition of longer terms of custody as a result of statutory changes to the sentencing framework; see Andrew Millie, Jessica Jacobson and Mike Hough, *Understanding the Growth in the Prison Population in England and Wales*, in *THE PERSISTENT PRISON: PROBLEMS, IMAGES AND ALTERNATIVES* (C. Emsley ed., 2005); SENTENCING COMMISSION WORKING GROUP, *Id.*
Appendix A:

Example of Sentencing Guideline Structure

Offence: Domestic Burglary

Maximum Penalty: 14 years’ custody (when tried on indictment).

Total Offence Range: Low level Community Order to 6 years custody

Step 1: Use the factors provided in the guideline which comprise the principal elements of the offence to determine the category which is appropriate:

Category 1: Greater harm and high culpability;

Category 2: Greater harm and lower culpability or lesser harm and higher culpability;

Category 3: Lesser harm and lower culpability.

Step 2: Use the Starting Point from the appropriate offence category to generate a provisional sentence within the category range. The Starting Point applies to all offenders irrespective of plea and previous convictions. The guideline contains a list of additional aggravating and mitigating factors. These factors affect crime seriousness or relate to personal mitigation and should result in upward or downward adjustment from the Starting Point.

<table>
<thead>
<tr>
<th>Offence Category</th>
<th>Starting Point</th>
<th>Category Sentence Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>3 years custody</td>
<td>2 – 6 years’ custody</td>
</tr>
<tr>
<td>2.</td>
<td>12 months custody</td>
<td>High level community order – 2 years’ custody</td>
</tr>
<tr>
<td>3.</td>
<td>High level community order</td>
<td>Low level community order – 26 weeks custody</td>
</tr>
</tbody>
</table>

77 Theft Act (c.62) (1996)

78 E.g., violence used against victim; victim deliberately targeted; offender a member of a gang; significant planning or organization.

79 Greater harm means that serious injury must normally be present.

80 E.g., victim forced to leave her home; offence committed while offender on licence.

81 E.g., remorse; no previous convictions; offender is sole carer for dependent relatives.
Step 3: Consider if any reduction should be made to reflect assistance offered or provided to the prosecution.

Step 4: Consider the level of reduction appropriate to reflect a guilty plea.\(^{82}\)

Step 5: Consider whether the offender meets dangerousness criteria necessary for imposition of an indeterminate or extended sentence.\(^{83}\)

Step 6: If sentencing for more than one offence apply the totality principle to ensure that the total sentence is just and proportionate to the total offending behaviour.

Step 7: Consider whether to make a compensation order and/or other orders.

Step 8: Give reasons for and explain the effect of the sentence on the offender.

Step 9: Consider whether to give credit for time on remand or bail.

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\(^{82}\) To a maximum of one third if the plea is entered at first possible opportunity.

\(^{83}\) E.g., a life sentence; imprisonment for public protection (IPP) or an extended sentence.