

# SENTENCING GUIDELINES IN ENGLAND AND WALES: RECENT DEVELOPMENTS AND EMERGING ISSUES

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## I

### INTRODUCTION

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 U.S. guideline schemes have failed to find a market outside of the United States. Canada explicitly rejected the use of presumptive guidelines in the 1980s, Western Australia in 2000, while England and Wales declined their adoption in 2008.<sup>1</sup> Having rejected the U.S. model, a number of other jurisdictions have been developing guideline schemes of different kinds.<sup>2</sup> Among these countries, England and Wales has made the greatest progress; definitive guidelines have now been issued for most offenses. In fact, this is the only jurisdiction<sup>3</sup> outside the United States to have developed and implemented a comprehensive system of guidance, consisting of offense-specific guidelines as well as generic guidelines.<sup>4</sup> This article describes and explores recent developments in England.<sup>5</sup>

Although the effects of various reforms and specific guidelines have been studied for decades, it is too early to draw definitive conclusions about the

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1. See generally Julian V. Roberts, *Structuring Sentencing in Canada and England and Wales: A Tale of Two Jurisdictions*, 23 CRIM. L.F. 319 (2012).

2. A guideline scheme based upon starting sentences was proposed in Israel. See Oren Gazal-Ayal & Ruth Kannai, *Determination of Starting Sentences in Israel—System and Application*, 22 FED. SENT'G REP. 232, 232 (2010). This system has yet to be implemented, although reform legislation was passed in January 2012.

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 & Claire Browning, *New Zealand's Sentencing Council*, 2008 CRIM. L. REV. 287.

4. All guidelines are available at the website of the Sentencing Council, <http://sentencingcouncil.judiciary.gov.uk/>.

5. Hereinafter, for the sake of brevity, I will refer to this jurisdiction simply as England, but with no disrespect to my Welsh forefathers intended.

impact of English sentencing guidelines in practice. 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 guidelines authority in this jurisdiction lacked the mandate and the resources to monitor the application of its own guidelines. Fortunately, this state of affairs is now changing.

#### A. Overview of Article

Developments in England carry important lessons for other jurisdictions, particularly those interested in structuring sentencers' discretion without adopting a U.S.-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 that commenced its work in April 2010.

The Sentencing Council of England has significantly broader powers and responsibilities than its predecessors, and correspondingly has greater research resources as well. The Council has revamped the guideline structure and the new format is described using a common offense to illustrate the English sentencing methodology. The final section of the article addresses some important challenges confronting the English guidelines and the Sentencing Council. This includes the way in which guidelines and guidelines authorities respond to novel or unexpected waves of criminality that have the potential to create a "punitive surge." England was confronted with such a scenario in August 2011 when riots took place in many cities, and I describe the role and response of the courts and the guidelines. To the extent possible, the discussion is situated within the context of the guideline schemes found in the United States and proposed in New Zealand.

#### B. The Context

Like judges in almost all other common law jurisdictions, sentencers in England have long enjoyed wide discretion, restricted only by appellate review and a limited number of mandatory sentences. All of this changed in 1998 with the creation of an advisory body, the Sentencing Advisory Panel (SAP), a development that 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.<sup>6</sup> In 2003, the guidelines movement shifted up a gear when the Criminal Justice Act 2003 created a second statutory body, the Sentencing Guidelines Council (SGC).<sup>7</sup>

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6. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 38 (William Twining et al. eds., 5th ed. 2010); Andrew Ashworth, *The Sentencing Guideline System in England and Wales*, 19 S. AFR. J. CRIM. JUST. 1, 2 (2006).

7. See Criminal Justice Act, 2003, c. 44, § 167.

Henceforth, the SAP provided its advice to the SGC, which then devised and ultimately issued definitive guidelines following extensive consultation. The next important step occurred with passing the Coroners and Justice Act 2009.<sup>8</sup>

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 prompted the government to commission a review of the use of imprisonment and of sentencing guidelines.<sup>9</sup> The second development was creating a Working Group, which recommended a revamp of the current arrangements, rather than adoption of a completely new system of guidelines.<sup>10</sup> U.S.-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive and contrary to the traditions of English sentencing. The rather unwieldy, bicameral structure comprised of the SAP and the 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.<sup>11</sup> Sentencing in England 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, replaced the SAP and the SGC. 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.

### C. 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.<sup>12</sup> The Council also has to monitor the operation and effects of its guidelines. Additionally, it must draw conclusions about the factors that 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 have argued that this is a central function

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8. Coroners and Justice Act, 2009, c. 25.

9. See LORD CARTER OF COLES, *SECURING THE FUTURE: PROPOSALS FOR THE EFFICIENT AND SUSTAINABLE USE OF CUSTODY IN ENGLAND AND WALES* (2007), available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05\\_12\\_07\\_prisons.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_12_07_prisons.pdf).

10. SENTENCING COMM'N WORKING GROUP, *SENTENCING GUIDELINES IN ENGLAND AND WALES: AN EVOLUTIONARY APPROACH* (2008), available at [http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/ITS+++sent+councils+report+evolutionary+approach+08/\\$FILE/sentencing-guidelines-evolutionary-approach.pdf](http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/ITS+++sent+councils+report+evolutionary+approach+08/$FILE/sentencing-guidelines-evolutionary-approach.pdf).

11. *Id.* For further discussion of the events leading up to creation of the Sentencing Council, see generally Andrew Ashworth, *Sentencing Guidelines and the Sentencing Council*, 2010 CRIM. L. REV. 389; Julian V. Roberts, *Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales*, 51 BRIT. J. CRIMINOLOGY 997 (2011).

12. Sections 127–30 of the Coroners and Justice Act 2009 specify a list of “other functions” of the Council. Coroners and Justice Act, 2009, c. 25, §§ 127–30.

of a sentencing guidelines authority.<sup>13</sup> 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 Coroners and Justice Act 2009 also states that the Council “may promote awareness of matters relating to the sentencing of offenders . . . in particular . . . the cost of different sentences and their relative effectiveness in preventing re-offending.”<sup>14</sup>

The Sentencing Council is required to publish a report about “non-sentencing factors” that are likely to have an impact on the resources needed for sentencing.<sup>15</sup> 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 considerations relating to the remand prison population.<sup>16</sup> Finally, the Council is also charged with assessing the impact of all proposed government policies and legislation that may affect the provision for prison places, probation, and youth justice services.<sup>17</sup> Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organizations responsible for devising and disseminating sentencing guidelines.<sup>18</sup> The ensemble of duties is also more extensive than those imposed upon sentencing commissions and councils in other jurisdictions.

## II

### SENTENCING GUIDELINES IN ENGLAND: THE NEW FORMAT

The Council’s first definitive guideline, covering the offenses of assault, came into effect on June 13, 2011.<sup>19</sup> This guideline replaced 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 Council. The Council has now issued a number of other offense-specific guidelines, including drugs and burglary. Over time, the Council will re-format and re-issue the existing guidelines in the new format; however, since definitive guidelines must be preceded by an extensive public and professional

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

14. Coroners and Justice Act, 2009, c. 25, § 129(2).

15. *Id.* § 131(1).

16. *Id.* § 131(4).

17. *Id.* § 132(1).

18. 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 twenty-five members while the new Council is composed of fifteen 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.

19. The definitive assault guideline as well as all guidelines issued by the previous statutory authority may be found at <http://www.sentencingcouncil.org.uk>.

consultation,<sup>20</sup> it will take several years before all the guidelines issued by the previous Council are replaced. For the foreseeable future, then, sentencers in England will need two sets of guidelines on hand when sentencing, with the relevant guideline being determined by the offense for which the sentence is being imposed.

#### A. General Approach to Structuring Sentencers' Discretion

Sentencing consistency is pursued in various ways in different guidelines. Some systems—such as those found in U.S. jurisdictions—achieve consistency by specifying ranges of sentences and by discouraging departures from those ranges.<sup>21</sup> In contrast, the guidelines in England promote uniformity at sentencing by prescribing a sequence of steps for courts to follow when sentencing an offender, while also allowing a significant degree of discretion. 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 revised guideline structure contains a series of nine steps, of which the first two are the most critical.<sup>22</sup>

#### B. Example: Domestic Burglary

The definitive guideline for domestic burglary illustrates the new guidelines format.<sup>23</sup> As with most offenses for which a definitive guideline has been issued, this offense is stratified into three levels of seriousness. The guideline provides a separate range of sentence and starting point sentence for each seriousness category. Step one, and indeed section 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.<sup>24</sup> The three categories reflect gradations in harm and culpability, with the most serious category, 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 that the case being sentenced involves both lesser harm *and* a lower level of culpability.

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20. See Coroners and Justice Act, 2009, c. 25, § 120(6).

21. See Andrew Ashworth, *Techniques for Reducing Sentence Disparity*, in PRINCIPLED SENTENCING 243, 249–54 (Andrew von Hirsch et al. eds., 3d ed. 2009).

22. Appendix A, *infra*, contains a summary of the steps.

23. SENTENCING COUNCIL, BURGLARY OFFENCES: DEFINITIVE GUIDELINE (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Burglary\\_Definitive\\_Guideline\\_web\\_final.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf). There is an additional complication when sentencing for this offense. 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 and impose a custodial term of at least three years, unless it is satisfied that there are particular circumstances relating to any of the offenses or to the offender that would make it unjust to do so. Powers of the Criminal Courts (Sentencing) Act, 2000, c. 6, § 111.

24. Coroners and Justice Act, 2009, c. 25, § 125(3)(b).

### C. Determining the Offense 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 that 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 sentence range running from a low-level community order to twenty-six-weeks custody, whereas the highest category sentence range runs from two to six years of imprisonment.

The step one factors relate to harm and culpability. Examples of factors indicating greater harm include soiling, ransacking, or vandalizing the property during the burglary, and committing the offense while the occupier is at home. Factors indicating higher culpability include a significant degree of planning and carrying a weapon. Lesser harm is indicated when the damage was limited or nothing was stolen. Lower culpability circumstances include when the offender was exploited by others or the offender had a mental disorder. The exhaustive nature of the list of factors is an innovation, and means that courts are restricted to considering only factors on the step one list when identifying which category is appropriate. This feature of the guidelines may play an important role in promoting a consistent approach to sentencing since it will restrict sentencers to a limited list of factors. Having determined the relevant category range, a court moves to step two.

At step two, the guideline provides a sentence range as well as a starting point sentence for the range. Courts use the corresponding starting point sentence to shape a sentence that 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.

### D. Using Starting Point Sentences

Starting point sentences are a feature unique to the guidelines in England. Under the U.S. 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 lengths. For example, in Minnesota, robbery carries a presumptive sentence length of between fifty and sixty-nine months for an offender with a single criminal-history point.<sup>25</sup> With such narrow ranges of

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25. 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 COMM’N, MINNESOTA SENTENCING GUIDELINES (2004), *available at* <http://www.msgc.state.mn.us/guidelines/guide04.doc>.

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 set of guidelines, although these have yet to be implemented.<sup>26</sup> When devising its guidelines, the New Zealand Law Commission studied both the English and the U.S. 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 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, 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, courts would be required to use two very different sets of guidelines—one with and one without this defining feature.<sup>27</sup>

#### E. Definition of Starting Point Sentence

The new guidelines format changes the definition of the “starting point” sentence. The earlier SGC guidelines defined the starting point sentence 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,<sup>28</sup> as few offenders appear for sentencing following a contested trial and without any criminal antecedents.<sup>29</sup> The starting point for the Council’s guidelines applies to all offenders, irrespective of plea or previous convictions.

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26. See Warren Young & Andrea King, *Sentencing Practice and Guidance in New Zealand*, 22 FED. SENT’G REP. 254 (2010); Young & Browning, *supra* note 3.

27. I have already noted that two sets of guidelines are currently in operation, one being those issued by the former council and not yet replaced by the Sentencing Council. If the two sets of guidelines were radically different—for example, one with and the other without a starting point sentence—sentencing would be even more challenging for courts.

28. See, e.g., Ian Edwards, *Draft Sentencing Guidelines for Assaults*, 174 CRIM. L. JUST. WKLY. 677, 677 (2010).

29. Exact statistics are not available, but in 2009, only fourteen percent of offenders appeared for sentencing without any prior convictions. See MINISTRY OF JUSTICE, SENTENCING STATISTICS: ENGLAND AND WALES 2009 at 82 (2010), available at <http://www.justice.gov.uk/downloads/statistics/mojstats/sentencing-stats/sentencing-stats2009.pdf>. Similarly, only thirty percent of defendants in 2011 who entered a plea pleaded not guilty. MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2011, at 47 (2012), available at <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf>. The percentage of defendants pleading not guilty and having no prior convictions is likely to be small.

This change in the definition of the starting point found favor with respondents to the professional consultation,<sup>30</sup> and has been welcomed by practitioners.

#### F. 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 that 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 first consider aggravating factors and then subsequently consider mitigating factors. Considering both kinds of factors simultaneously represents a more holistic approach to the determination of seriousness.

The aggravating factors contained in the domestic burglary guideline include committing the offense while on bail or licence and committing the offense 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 offense. The guideline also specifies factors that 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 jurisdiction,<sup>31</sup> 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, more controversially, “good character and/or exemplary conduct.”<sup>32</sup> Most importantly, the guideline makes it clear that the list of factors at step two is, unlike step one, non-exhaustive. The non-exhaustive nature of the list creates additional discretion for a court as well as room for counsels’ submissions on personal mitigation to reflect the highly variable circumstances of individual offenders.

#### G. 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 that have the most important influence on sentence severity—for

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30. See SENTENCING COUNCIL, ASSAULT GUIDELINES 5 (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Assault\\_guideline\\_-\\_Response\\_to\\_the\\_consultation.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Assault_guideline_-_Response_to_the_consultation.pdf).

31. Ashworth, for example, notes that “in practice the range of factors advanced in mitigation is enormously wide.” ASHWORTH, *supra* note 6, at 170.

32. It is controversial because this factor is unrelated to harm or culpability, and raises the possibility that the offender is being sentenced for his character. For a discussion of the role of mitigation and the effect of guidelines, see the exchange in Julian V. Roberts, Mike Hough & Andrew Ashworth, *Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales*, 2011 CRIM. L. REV. 524 and Austin Lovegrove, *There Are More Things in the Public’s Sentencing Than in Your Philosophy: A Response to Roberts, Hough and Ashworth*, 2011 CRIM. L. REV. 531. For mitigation and aggravation more generally, see MITIGATION AND AGGRAVATION AT SENTENCING (Julian V. Roberts ed., 2011).



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 that 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.<sup>33</sup>

It is always going to be challenging to ensure that the two stages are clearly distinguishable. Some factors identified at step one may not be viewed by all as primordial, and some factors assigned to step two may not be seen as secondary in nature. For example, vandalizing the property may not always be more important than committing an offense that results in the victim having to leave her home, although 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 be 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.

#### H. 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.<sup>34</sup> 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 “[t]he 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.”<sup>35</sup> Section 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.”<sup>36</sup>

The custodial threshold is now embedded in the guideline, an important omission from the previous guidelines. Thus the new format guideline advises that when sentencing category 2 or 3 offenses (the two less-serious categories), the court should also consider (1) whether the custodial threshold has been passed, (2) if it has been met, whether a custodial sentence is unavoidable, and

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33. SENTENCING COUNCIL, *supra* note 23, at 8–9.

34. See Criminal Justice Act, 2003, c. 44, §§ 148(1), 152(2); see also Ashworth, *supra* note 6, at 300.

35. Criminal Justice Act, 2003, c. 44, § 152(2).

36. *Id.* § 153(2).

finally (3) whether the sentence of imprisonment should be suspended. These directions constitute a salutary reminder to sentencers of the statutory requirement to consider the hierarchy of sanctions and the statutory criteria that 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.

### I. Additional Steps Towards Final Disposition

After step two, a court proceeds through the remaining seven steps of the guidelines methodology, which may be briefly summarized. Step three directs courts to take into account provisions in the Serious Organized Crime and Police Act 2005<sup>37</sup> that 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 sentence reductions 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.<sup>38</sup> 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.<sup>39</sup> 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<sup>40</sup> and will do at some future point.

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 principle<sup>41</sup> is invoked at step six for cases in which the court is sentencing an offender for more than a single offense, or where the offender is currently serving a sentence. This principle requires courts to adjust the sentence to ensure that the total sentence is just and proportionate to the offending behaviour.

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

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37. Serious Organized Crime and Police Act, 2005, c. 15, §§ 73–74.

38. Criminal Justice Act, 2003, c. 44, § 144.

39. See SENTENCING COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA 5–6 (2007), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-\\_Revised\\_2007.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_2007.pdf).

40. Coroners and Justice Act, 2009, c. 25, § 120.

41. In 2012, the Council issued a guideline dealing with the application of the totality principle. See SENTENCING COUNCIL, OFFENSES TAKEN INTO CONSIDERATION AND TOTALITY (2012), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Definitive\\_guideline\\_TICs\\_\\_totality\\_Final\\_web.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf).

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. One recent model for a compliance provision is contained in the proposed New Zealand sentencing guidelines.<sup>42</sup> The statute regulating these guidelines states that “a court must impose a sentence that is consistent with any sentencing guidelines that are relevant in the offender’s case, unless the court is satisfied that it would be contrary to the interests of justice to do so.”<sup>43</sup>

The jurisdiction with the most experience with presumptive sentencing guidelines is of course the United States, 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.<sup>44</sup>

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 “[t]he [departure] factors are intended to describe specific situations involving a *small number* of cases.”<sup>45</sup> Indeed, the Minnesota guidelines manual warns users that “the purposes of the Guidelines cannot be achieved unless the presumptive sentences are applied with a *high degree of regularity*. Sentencing disparity cannot be reduced if courts depart from the Guidelines frequently, certainty in sentencing cannot be attained if departure rates are high.”<sup>46</sup>

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42. See Young & Browning, *supra* note 3.

43. Sentencing Amendment Act 2007 § 12 (N.Z.).

44. MINN. SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 2 (2012) (emphasis added), available at <http://www.msgc.state.mn.us/guidelines/2012%20MN%20Sentencing%20Guidelines%20and%20Commentary.pdf>.

45. *Id.* at 46 (emphasis added).

46. *Id.* at 40 (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

## A. England and Wales

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.”<sup>47</sup> 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.”<sup>48</sup> 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.<sup>49</sup>

## B. The Current Compliance Requirement in England

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

(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.*<sup>50</sup>

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

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the guidelines unless the judge finds substantial and compelling reasons to impose a departure.” OR. ADMIN. R. 213-008-001 (2012), available at <http://www.oregon.gov/CJC/SG.shtml>.

47. Criminal Justice Act, 2003, c. 44, § 172(1).

48. *Id.* § 174(2).

49. *Id.* § 172.

50. Coroners and Justice Act, 2009, c. 25, § 125 (emphasis added).

clarifies what is meant by the duty to sentence within a range.<sup>51</sup> As noted, most offenses are stratified into several levels of seriousness, each with its own range of sentence. The duty on courts is to sentence within the *total offense range*, rather than the narrower range associated with any particular category of seriousness.<sup>52</sup> The total offense range is relatively wide and naturally increases to reflect the seriousness of the offense. For example, domestic burglary carries a total sentence range of a low-level community order to six years in custody; a court may sentence anywhere in this range and still be compliant with the guidelines.<sup>53</sup>

More serious offenses 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 twelve years in length and remain compliant with the guidelines—a degree of discretion that has been criticized by some commentators for being too permissive.<sup>54</sup> 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 2009 focus a court’s attention on the relevance of the guidelines, yet permit considerable judicial discretion to impose a fit sentence.<sup>55</sup>

### C. Sentencing Outside the Total Offense Range

As noted, the total offense range for domestic burglary runs from a low-level community order up to six-years custody, yet the maximum penalty for this offense is fourteen-years imprisonment when tried on indictment. A custodial “zone” therefore exists between the guideline range ceiling of six years and the statutory limit of fourteen-years imprisonment. For the most serious offenses, this zone between the ceiling of the total offense range and the statutory maximum will be greater than the eight-year range for domestic burglary. Accordingly, a natural question to pose is, what is 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 offense range specified by the guideline;

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51. The relevant provision in the Criminal Justice Act 2003 did not specify whether compliance entailed sentencing within the category range or the wider offense range, although a number of appellate decisions endorsed the former interpretation. See Julian V. Roberts, *Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales*, 51 BRIT. J. CRIMINOLOGY 997, 5 (2011).

52. For further discussion, see *id.*

53. See SENTENCING COUNCIL, *supra* note 23, at 8–9, available at [http://sentencingcouncil.judiciary.gov.uk/docs/Burglary\\_Definitive\\_Guideline\\_web\\_final.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf).

54. Andrew Ashworth, *Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council*, 2010 CRIM. L. REV. 389.

55. See Roberts, *supra* note 51.

however, there will be a small number of cases that fall into the most serious category (category 1) 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 offense range) would require justification. Using the language of the statute, this justification would entail an explanation of why it would be “contrary to the interests of justice” to impose a sentence within the guideline total offense range.<sup>56</sup>

## IV

### EMERGING ISSUES AND CHALLENGES TO THE GUIDELINES

#### A. Compliance Rates

Compliance statistics are routinely collected and published by the U.S. sentencing commissions. 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. As the first statutory body created to promote guidelines (in 1998), the Sentencing Advisory 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,<sup>57</sup> but this research was terminated before data became available. The new Council has a statutory duty to monitor the “operation and effect of its sentencing guidelines.”<sup>58</sup> 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.”<sup>59</sup>

#### B. Compliance Trends

In 2012 the Sentencing Council issued the first year’s worth of data from its survey of Crown Court Sentencing Survey (CCSS).<sup>60</sup> This survey requires Crown court judges to complete a form summarizing the key elements of the sentencing decision, including the critical question of whether the sentence imposed was within or outside the guidelines. The first statistical release does

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56. Coroners and Justice Act, 2009, c. 25, § 125(1)(b).

57. *See generally* MANDEEP DHAMI AND KAREN SOUZA, SENTENCING AND ITS OUTCOMES PROJECT: PART ONE PILOT STUDY REPORT (2009), available at <http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/sentencing-outcomes-research.htm>.

58. Coroners and Justice Act 2009 § 128(1)(a).

59. *Id.* § 128(2)(a).

60. SENTENCING COUNCIL, CROWN COURT SENTENCING SURVEY (2012), available at [http://sentencingcouncil.judiciary.gov.uk/docs/CCSS\\_Annual\\_2011.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2011.pdf).

not provide “departure” statistics for all sentences imposed but only for three assault offenses; subsequent releases will presumably provide comprehensive statistics on this issue.

With respect to the three offenses 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 offense range (rather than the category-specific range), very few dispositions will fall outside the compliance zone. For the three offenses, as expected, almost all sentences fall within the guidelines range. For two of the assault offenses, only three percent of sentences fell outside the guidelines range, while for the third offense eight percent were outside the range.<sup>61</sup>

### C. Role of Guidelines in Responding to Punitive Surges

One of the functions of sentencing guidelines is to serve as a “circuit breaker,” preventing bursts of punitiveness from affecting sentencing practices.<sup>62</sup> One obvious source of increased severity is the legislature, where politicians sometimes introduce tough mandatory sentences that distort sentencing practices and undermine principles such as proportionality and restraint.<sup>63</sup>

A less obvious source of episodic punitiveness is the judiciary itself. If courts have great discretion at sentencing, and appellate courts intervene only relatively rarely, individual sentencers may feel emboldened to periodically pursue harsher than normal sentencing in an attempt to curb rising crime rates. For example, sentencers may draw upon their personal observations of a local rise in offending to impose “exemplary,” punitive sentences. It may also be the case that the judicial culture in some jurisdictions is more responsive to public pressure to “get tough” with offenders. Some researchers have argued that the courts in England have been influenced by a public desire to punish offenders more severely.<sup>64</sup> For example, sensitivity to public pressure has been cited as one cause of the sharp rise in the prison population in England since 1995.<sup>65</sup> This

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61. *Id.* at 26–28.

62. Another constraint on responsive bursts of punitiveness would be some kind of delay—waiting until the punitive atmosphere triggered by such mass disorder dissipates. The courts in August and September wasted little time in sentencing offenders convicted of riot-related offending. Incorporating some kind of “second look” at sentencing beyond the conventional avenue of appellate review might also prevent excessive sentencing at times of high emotion, although no such mechanism exists in England and Wales.

63. A good example is Canada, where the federal government has been introducing mandatory sentences of imprisonment for the last few years; the latest draft of such sentences are contained in 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 Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and Other Acts. Bill, 2011, H.C., Bill [C-10].

64. See, e.g., M. HOUGH ET AL., *THE DECISION TO IMPRISON: SENTENCING AND THE PRISON POPULATION* 26 (2003).

65. Andrew Millie et al., *Understanding the Growth in the Prison Population in England and*

jurisdiction may be more susceptible than most to such pressures in light of the fact that most sentencing decisions (approximately ninety-seven percent in 2009) are taken by lay magistrates. One of the justifications for lay sentencing is to incorporate community values to a greater degree than may be possible with a professional judiciary.

#### D. Sentencing Offenders Convicted of Offenses During the 2011 Riots

A guidelines scheme would (and should) constrain both legislators and sentencers from periodic surges of punitiveness. In August 2011, the extraordinary riots taking place 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. Charges were laid for a wide range of offenses including burglary of a commercial property, receiving stolen goods, and theft.

The judiciary responded expeditiously to the individuals convicted of offenses occurring during this period; in doing so, some judgments undermined the guidelines by affirming that the offense was so far removed from conventional offending to render the sentencing guidelines irrelevant. Considerable controversy arose over a memo sent around magistrates' courts by a legal advisor. The email advised courts to depart from the guidelines, asserting that "[t]he Sentencing Guidelines cannot sensibly be used to determine the sentence in cases arising from the recent disturbance/looting. When the guidelines were written, nothing like this was envisaged."<sup>66</sup> This memo attracted considerable commentary in the news media and seemed to suggest that courts would disregard the guidelines in all cases.

An 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 offenses committed takes them "completely outside the usual context of criminality," the court in *R. v. Carter* assumed the view that existing sentencing guidelines "can properly be departed from."<sup>67</sup> The judgment then outlines new starting point sentences and sentencing ranges for a wide range of offenses.<sup>68</sup> The Manchester Recorder's "guidelines" were

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*Wales*, in *THE PERSISTENT PRISON: PROBLEMS, IMAGES AND ALTERNATIVES* 102–04 (Clive Emsley ed., 2005).

66. The memo was ultimately made public by the Ministry of Justice in response to a Freedom of Information request.

67. Sentencing Remarks, *R. v. Carter*, [2011] EW Misc 12 (CrownC). See also Julian Baggini, *Guilty?: Can the Harsh Sentences Being Handed to Last Week's Rioters Be Justified?*, *GUARDIAN* (London), Aug. 18, 2011, at 4, available at <http://www.guardian.co.uk/uk/2011/aug/17/england-riots-harsh-sentences-justified> (under the title *England Riots: Are Harsh Sentences for Offenders Justified?*).

68. Sentencing Remarks, *R. v. Carter*, [2011] EW Misc 12 (CrownC). The criminal justice system could not be faulted 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 offenses had been committed. Ten cases were then heard by the Court of Appeal within a month.



immediately followed by a number of judgments from other courts, all of which endorsed the *Carter* ranges.<sup>69</sup> A typical example is found in *R. v. Twemlow*.<sup>70</sup> 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 twenty-one-year-old offender, a university student, was regarded by the court as of good character, and a pre-sentence report 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 six-months custody with a starting point sentence of a community order. This would appear to be the relevant category for the McGrath case. In the event, the court sentenced this offender to twenty-four-months imprisonment, reduced to eighteen 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.

#### E. Sentencing 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 offense 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;<sup>71</sup> it stipulates a sentence range of a fine to twenty-six weeks custody for property valued under £2,000. The SGC guideline applies to a first offender, so the twenty-six weeks should be increased somewhat for the purposes of comparison. If we consider the upper limit for this level of the offense to be higher, say, forty weeks to reflect this consideration, the aggravating effect of the riot context is nevertheless very striking. Under *Carter*, a burglar who takes part in breaking into a business premise is subject to a sentence length range

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69. See Sentencing Remarks, *R. v. Twemlow*, [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.” *Id.*

70. *Id.*

71. As noted, the Sentencing Council has issued a definitive guideline for non-domestic burglary. See SENTENCING GUIDELINES COUNCIL, NON-DOMESTIC BURGLARY: THEFT ACT 1968, available at [http://sentencingcouncil.judiciary.gov.uk/docs/Burglary\\_Definitive\\_Guideline\\_Magistrates\\_web.pdf](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 fifty-one-weeks custody, far short of the seven-year maximum established by the Manchester judges.

with an upper limit of 364 weeks (seven years).<sup>72</sup> 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 offenses, the judgment effectively creates an additional level of guidelines authority: local courts. Let us address these two issues in turn.

#### F. 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 offense or culpability of the offender. The extent to which factor X aggravates the sentence in case Y is properly left to judicial discretion. It is impossible for Parliament<sup>73</sup> to decide *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 individualization 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,<sup>74</sup> 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.<sup>75</sup> 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 Coroners and Justice Act 2009 to step outside the guideline maximum of one-third.<sup>76</sup> If courts were allowed (or encouraged) to select *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 offense 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

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72. If we consider fifteen weeks as an approximate midpoint of the existing guideline and five and one-half years (286 weeks) as the midpoint of the enhanced guideline, the latter is much longer than the former. See Sentencing Remarks, *R. v. Carter*, [2011] EW Misc 12 (CrownC).

73. This is one reason 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.

74. The Coroners and Justice Act 2009 directs the Sentencing Council to issue a guideline on the reduction for a guilty plea and a draft guideline will be issued at a later point. Coroners and Justice Act, 2009, c. 25, § 120(3)(a).

75. SENTENCING COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA 5–6 (2007), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-Revised\\_2007.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf).

76. Coroners and Justice Act, 2009, c. 44, § 125(1).

racially motivated—or this would constitute a classic case of the tail wagging the dog.

### G. Threat to Ordinal Proportionality

Ordinal proportionality is one of the requirements of desert-based sentencing. This requires offenses of differing seriousness to receive sentences of commensurate severity.<sup>77</sup> Rank-ordering is one of the sub-requirements of ordinal proportionality: offenses 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 offense of relatively low seriousness will be punished at a level of severity associated with a much more serious offense. Moreover, proportionality is not restricted to comparisons *within* crimes of the same offense; 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 offenses, but if serious frauds result in the imposition of a harsher disposal than, say, manslaughter, ordinal proportionality would be threatened.<sup>78</sup>

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 offenses associated with riot-related offenses. 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 I have described . . . *must* expect to lose his or [her] liberty for a significant period.”<sup>79</sup> 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,<sup>80</sup> 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.<sup>81</sup> In short, they represent the personal sentencing

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77. See ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 18–19 (Clarendon Press 1993).

78. This is why guidelines authorities generally devise guidelines for all offenses simultaneously, rather than developing them *seriatim* on an offense-by-offense basis, as has been the case in England and Wales.

79. Sentencing Remarks, *R. v. Carter*, [2011] EW Misc 12, at 6 (CrownC) (emphasis added).

80. According to section 125(1)(a) of the Coroners and Justice Act 2009.

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

preferences of a small group of judges in one city—ersatz guidelines, if you like.

It would be inappropriate for courts in other cities to follow the Manchester guidelines. If this occurred, 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;<sup>82</sup> 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 “guidelines” which arose in August 2011 did so in relation to a rare 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.

#### H. 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 Recorder’s guidelines? The Sentencing Council discussed riot-related sentencing and issued a press statement to the effect that the Court of Appeal would shortly be hearing appeals arising from sentencing decisions involving riot-related offending and that the Council would not be commenting further.<sup>83</sup> One reason why the Council did not issue a substantive response was that in order to issue a revised guideline or a new definitive guideline dealing with offending during a period of social disorder, the Council would have a statutory duty to follow several steps, including an extensive period of public consultation lasting several months.<sup>84</sup> The Court of Appeal, however, can act more expeditiously once it has received an appeal, and it had rather more to say in a lengthy judgment issued in October 2011.

#### I. *R. v. Blackshaw*<sup>85</sup>

On the critical issue of relevance to this article, the Court of Appeal took a clear position. It noted that “[i]t is however inappropriate for Crown Court

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Coroners and Justice Act, 2009, c. 25, § 120(5)–(6).

82. See, e.g., *R. v. Saw*, [2009] EWCA (Crim) 1.

83. *Statement Following Council Discussion on Sentencing for Offences Committed During the August Riots*, SENTENCING COUNCIL (Sept. 16, 2011), <http://sentencingcouncil.judiciary.gov.uk/news-stories.htm>. The Council did incorporate a new factor of committing the offense in the “context of general public disorder” in the next guideline it produced, relating to the sentencing of burglary offenses. SENTENCING COUNCIL, BURGLARY OFFENCES DEFINITIVE GUIDELINE 8 (2011), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Burglary\\_Definitive\\_Guideline\\_web\\_final.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf).

84. See Coroners and Justice Act, 2009, c.25, § 120 (5)–(6).

85. *R. v. Blackshaw*, [2011] EWCA (Crim) 2312.

judges to issue, or appear to be issuing, sentencing guidelines.”<sup>86</sup> In this sense the Court disagreed with the Manchester Recorder . 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 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.”<sup>87</sup>

*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, in reviewing the specific cases on appeal, the Court provided no link to the offense-specific guidelines as a point of departure, nor any link to an important generic guideline—namely that of over-arching seriousness.<sup>88</sup> The offense-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 fact, the guideline ranges are sufficiently high to accommodate aggravation of this kind, even though it was not anticipated when the guideline was constructed. Had courts not abandoned the guidelines so readily they could have drawn upon the many sources of guidance and still imposed enhanced sentences.<sup>89</sup>

## J. Achieving Consistency

Communications dealing with the guidelines or emanating from the Sentencing 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 surely 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.

1. 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;
2. Second, compliance with the guideline is defined by the statute as imposing

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86. *Id.* at ¶ 20.

87. *Id.* at ¶ 17.

88. SENTENCING GUIDELINES COUNCIL, OVERARCHING PRINCIPLES: SERIOUSNESS (2004), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Web\\_Seriousness\\_Guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Web_Seriousness_Guideline.pdf).

89. For a discussion of how courts sentencing riot-related offending could have benefited from the guidelines, see Julian V. Roberts, *Points of Departure: Reflections on Sentencing Outside the Definitive Guidelines Ranges*, 2012 CRIM. L. REV. 439.

a sentence within the relatively wide total *offense* range—not the more restrictive *category* range—the difference between the two ranges being very large;

3. 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 will arise 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.

Critics of the English guidelines and the statutory provisions regulating their application may argue that the degree of flexibility permitted by both will result in only modest gains in terms of consistency and predictability of outcomes. Time will tell; no evaluation research has yet been conducted to determine the effect of the guidelines on sentencing practices in trial courts. Once the new-format guidelines have been given an opportunity to “bed down,” it should be possible to conduct some analyses of sentencing practices before and after introduction of a specific guideline. It is clear, however, that a more restrictive regime, with a tighter compliance requirement, would almost certainly have proved unacceptable to the judiciary in England.<sup>90</sup>

#### K. Guidelines and the Prison Population

This article 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.<sup>91</sup> This is one reason why the Working Group 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.<sup>92</sup> This growth in the prison

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90. The judiciary encompasses lay magistrates courts as well as Crown courts. It is possible that lay magistrates would have found a more restrictive guidelines regime acceptable, since they have been using a set of guidelines applicable to their jurisdiction for a longer period of time.

91. SENTENCING COMMISSION WORKING GROUP, *supra* note 10, at 14.

92. 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

population was incremental and long-term, but the guidelines also fail to contain short-term bursts in punitiveness of the kind discussed in this article. 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 the court must not pass a custodial sentence unless it is of the opinion that the offense, or the combination of the offense and one or more of the offenses associated with it, was so serious that neither a fine alone nor a community order can be justified for the offense.<sup>93</sup>

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.

## V

### CONCLUSION

A number of jurisdictions are actively contemplating adopting more structured sentencing regimes, including some form of guidelines. The guidelines in England represent a useful model for consideration in this respect. It is too early to know definitively whether the guidelines have promoted more-consistent sentencing in this country, although there is a strong *prima facie* case that sentencing is likely to be more consistent—in light of the methodical approach to determining sentence, and the high rates of judicial compliance. Critics may argue that the guidelines still leave too much discretion to individual sentencers, but tighter guidelines would likely have proven impossible to implement.

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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 et al., *supra* note 58.

93. Criminal Justice Act, 2003, c. 44, § 152(2).

## VI

## APPENDIX A:

## EXAMPLE OF SENTENCING GUIDELINE STRUCTURE IN ENGLAND

*Offense: Domestic burglary*<sup>94</sup>

*Maximum Penalty: 14-years custody (when tried on indictment)*

*Total Offense Range: Low-level community order to 6-years custody*

**Step 1:** Use the factors provided in the guideline that comprise the principal elements of the offense<sup>95</sup> to determine the category that 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 offense 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<sup>96</sup> or relate to personal mitigation<sup>97</sup> and should result in upward or downward adjustment from the starting point.

Offense Category	Starting Point	Category Sentence Range
1.	3-years custody	2- to 6-years custody
2.	12-months custody	High-level community order to 2-years custody
3.	High-level community order	Low-level community order to 26-weeks custody

**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.

94. Theft Act, 1996, c. 62.

95. For example, factors indicating greater harm include violence used or threatened against victim, and soiling, ransacking, or vandalism of property. Factors indicating higher culpability include a significant degree of premeditation. Factors indicating lesser harm include limited damage or disturbance to property, and factors indicating lower culpability include when the offender was exploited by others.

96. For example, factors such as gratuitous degradation of the victim and offense committed while offender on license.

97. For example, factors such as remorse, no previous convictions, no relevant or recent convictions, and offender is sole carer for dependent relatives.



**Step 5:** Consider whether the offender meets dangerousness criteria necessary for imposition of an indeterminate or extended sentence.<sup>98</sup>

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

**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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98. For example, sentences such as a life sentence, imprisonment for public protection (IPP), or an extended sentence.