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35 years later: re-examining the offence of riot in the Public Order Act 1986

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ABSTRACT

2021 marked the 35th year of the passage of the most important public order legislation in England, the Public Order Act 1986, and saw an ambitious attempt by the Government to 'overhaul' public order law, in the form of the Police, Crime, Sentencing and Courts Bill. 2021 also marked 10 years since the devastating 2011 riots in England. In this context, this article analyses the necessity of and justifications for the riot offence. It argues that the riot offence is neither necessary from an instrumental perspective nor targeted at the mischiefs of public fear and overthrow of the state. Instead, the crux of the offence is the group element, shedding light more generally on public order law's ideological function of imposing a specific form of 'order' and its susceptibility to abuse. The riot offence should therefore be abolished.

Keywords: public order law; criminal law; riots; disorder; law reform; policing; Law Commission.

INTRODUCTION

It has been difficult to escape news of 'riots' in recent years. In July 2021, South Africa was rocked by unrest triggered by the arrest of former president Jacob Zuma. In January 2021, a mob stormed the seat of the United States (US) Congress, attempting to overturn the results of the 2020 presidential election. In May 2020, a police killing sparked mass 'Black Lives Matter' protests in the US, some of which turned violent. In 2019, Hong Kong saw months of demonstrations and street fighting between protestors and the police. Unrest has also occurred recently in the Philippines, Chile, Nigeria, amongst many other countries.[1]

Although Britain has escaped any serious recent unrest, it is only a matter of time before another major riot occurs – and not just because major riots have occurred at (almost) 10-year intervals since 1981: the Brixton riot in 1981; the poll tax riots in 1990; the Bradford and Oldham

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1 Karen McVeigh, 'Protests predicted to surge globally as Covid-19 drives unrest' *The Guardian* (London 17 July 2020).

riots in 2001; and the widespread riots in London and other English cities in 2011. Numerical superstitions aside, experts and leaders have warned that the Covid-19 pandemic and the Government's plan to relax conditions for police stop and search will likely lead to increased youth violence and disorder,[2] and that the conditions which led to the 2011 riots still exist.[3] Notably, at the time of writing (in 2021), there have already been at least two incidents of riot: a demonstration in Bristol in March 2021 against the Police, Crime, Sentencing and Courts Bill (the PCSC Bill) that 'turned violent', leading to eight people being charged with riot;[4] and a riot in Swansea in May 2021 for which five men were arrested on suspicion of rioting.[5]

2021 also marked 35 years since the enactment of the Public Order Act 1986 (the 1986 Act), which sets out the main public order offences in English law. The 1986 Act was enacted towards the end of a period that saw several instances of serious rioting, such as the Southall riots of 1979, the Brixton riots of 1981 and 1985 and the Broadwater Farm riot of 1985. During and after its passage, it was criticised for its failures to consider the underlying rationale for public order law as a whole[6] and to codify public order law.[7] Since then, public attention to public order issues has waxed and waned. The relative tranquillity of the last decade has meant that crime and law and order, as an issue of public interest, has taken a back seat to other political issues such as membership of the European Union, immigration and the economy.[8] But this is likely to change, with Covid-19 restrictions on gatherings, the PCSC Bill (since the time of writing enacted as the Police, Crime,

2 Jessica Murray, 'Youth violence likely to explode over summer, UK experts fear' *The Guardian* (London 23 July 2021); 'Letters: Tory crime strategy will increase risk of major public disorder' *The Guardian* (London 28 July 2021).

3 Niamh McIntyre, Pamela Duncan and Haroon Siddique, 'Conditions that led to 2011 riots still exist today, experts warn' *The Guardian* (London 30 July 2021).

4 'Bristol: eight people charged with rioting over first kill the bill protest' (*Sky News* 13 May 2021). At the time of publication, court proceedings remain ongoing: Clara Bullock, 'Woman jailed after kicking Bristol riot police' (*BBC News* 28 February 2023).

5 'Five more arrested in Mayhill riots investigation' (*ITV News* 4 June 2021). Since the time of writing, 18 people have been convicted of 'rioting' (it is unclear if all were convicted of the riot offence specifically): 'Eighteen people jailed for their part in Mayhill riot' (*South Wales Police* 19 December 2022).

6 A T H Smith, 'Law Commission Working Paper No 82 — Offences Against Public Order' [1982] Criminal Law Review 485, 486; Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford University Press 1993) 161, 165.

7 A T H Smith, *The Offences Against Public Order including the Public Order Act 1986* (Sweet & Maxwell 1987) 6; Richard Card, *Public Order Law* (Jordans 2000) 3.

8 Ipsos MORI, 'Ipsos MORI Issues Index June 2020'.

Sentencing and Courts Act 2022) and recent public protests renewing awareness of public assemblies and state and police control over such assemblies.

As such, it seems appropriate now to examine the state of public order law. In this article, I focus on the most serious public order offence – riot – but much of my discussion is also relevant to public order law generally, especially the other two group offences: violent disorder and affray. I first consider the instrumental justifications for the necessity of a riot offence. I argue that the offence is unnecessary as most acts constituting riot are adequately punished by means of other offences. In the following section, I examine the main non-instrumental grounds which are said to form the bases for criminalising riot. In other words, what mischief does riot specifically target? Of the three candidates – putting the public in fear; overthrow of the state; and the so-called 'weight of numbers' – only the last one really 'fits' within the statutory definition of riot. Yet it is questionable why group behaviour or even group violence should be specifically punished. In the penultimate section, I argue that riot and other public order offences are susceptible to abuse and serve a number of objectionable ideological functions. I conclude that the offence of riot should be abolished.

IS A RIOT OFFENCE NECESSARY?

As stated in the introduction, the modern offence of riot was introduced in 1986 in the context of serious public disorder in the late 1970s and early 1980s.[9] This disorder prompted the Government to consider updating the law on public order. Following a consultation process and a report by the Law Commission[10] and a Home Office White Paper,[11] a Public Order Bill, which was largely in line with the Law Commission's recommendations,[12] was passed as the 1986 Act. The 1986 Act modernised but retained the 'principal features of the structure and application of the common law offences'.[13] The Law Commission's view was that serious offences were needed to deal with serious

9 Peter Thornton, *Public Order Law: Including the Public Order Act 1986* (Financial Training Publications 1987) 1–2. See, generally, Townshend (n 6 above) 159; Phil Scraton, '"If you want a riot, change the law": the implications of the 1985 White Paper on Public Order' (1985) 12 Journal of Law and Society 385.

10 Law Commission, *Offences Against Public Order* (Law Com Working Paper No 82 1982); Law Commission, *Offences Relating to Public Order* (Law Com No 123 1983).

11 Home Office and Scottish Office, R*eview of Public Order Law* (Cmnd 9510 1985).

12 Richard Card, *Public Order: The New Law* (Butterworths 1987) 11.

13 Law Commission, *Offences Relating to Public Order* (n 10 above) para 2.2.

disturbances to public order and that changes should be made with caution in an area of law closely connected with individual liberties.[14]

The 1986 Act replaced the common law offence of riot with a new statutory offence:

> Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.[15]

The statutory offence differs from the common law offence in a few ways, including that the minimum number of persons required is increased from 3 to 12 and that the defendant must actually use violence rather than just threaten it.[16] However, as intended by the Law Commission, the principal features of the common law offence remain, such as the need for group violence, a common purpose and a hypothetical bystander to fear for their personal safety (albeit that at common law there was some doubt as to whether an actual bystander needed to be present).[17]

During the consultation period, some commentators made submissions to the Law Commission that the riot offence should be abolished without replacement.[18] The National Council for Civil Liberties, for example, argued that rioters could be charged with 'simpler offences ... with adequate maximum penalties'.[19] The use of violence required to commit an offence of riot will almost always fall under one or more 'mainstream' offences,[20] such as criminal damage (including arson), assault, possession of an offensive weapon, public nuisance, theft and burglary. It is noteworthy that a number of these overlapping offences carry significant penalties at least as heavy as the maximum sentence of 10 years' imprisonment for riot; criminal damage also carries a maximum sentence of 10 years' imprisonment,[21] whilst aggravated criminal damage and arson each carry a maximum sentence of life imprisonment.[22] Even burglary, when committed in respect of a dwelling, has a higher maximum sentence than riot: 14

14 Ibid.
15 Public Order Act 1986, s 1.
16 Thornton (n 9 above) 9.
17 Ibid 59.
18 Law Commission, *Offences Relating to Public Order* (n 10 above) para 1.12.
19 Peter Thornton, *We Protest: The Public Order Debate* (National Council for Civil Liberties 1985) 23. See also Card (n 12 above) 11–12; Card (n 7 above) 83.
20 Thornton (n 19 above) 24–25; Smith (n 7 above) 76–77; Law Commission, *Offences Against Public Order* (n 10 above).
21 Criminal Damage Act 1971, s 4.
22 Ibid.

years,[23] which may surprise laypersons, who may think that the public order offence of riot is more serious than a property offence of burglary.[24]

The statistics on riot convictions in Table 1 and Table 2 show that the riot offence has been used, as envisaged by the Law Commission and the Home Office,[25] primarily to deal with the most serious situations of disorder. The general prevalence of riot convictions is low, with the number of offenders convicted or cautioned between 1987 and 2009 (inclusive) averaging 17 and the number of defendants convicted between 2004 and 2020 (inclusive) averaging just 4.5. The latter period includes the timeframe between 2014 and 2020 (inclusive) when no one was tried for riot. There are notable spikes in the numbers for 2002 and 2011, which are likely to relate to the Bradford and Oldham

Table 1: Number of offenders cautioned or convicted for riot between 1987 and 2009 (inclusive)[26]

Year	Convicted or cautioned
1987	8
1988	30
1989	30
1990	3
1991	10
1992	31
1993	18
1994	3
1995	11
1996	11
1997	0
1998	0
1999	0
2000	2
2001	10
2002	137
2003	46
2004	13
2005	7
2006	1
2007	3
2008	5
2009	9

23 Theft Act 1968, s 9(3)(a).

24 Carly Lightowlers and Hannah Quirk, 'The 2011 English "riots": prosecutorial zeal and judicial abandon' (2015) 55 British Journal of Criminology 65, 71.

25 Home Office and Scottish Office (n 11) para 3.16; Law Commission, *Offences Relating to Public Order* (n 10 above) paras 2.10–2.11.

26 Data sourced from Ministry of Justice, Criminal Statistics: England and Wales 2009 Statistics Bulletin: Annex A: Additional Tables' (October 2010) (Table 11); Home Office, *Criminal Statistics: England and Wales 2000: Statistics Relating to Crime and Criminal Proceedings for the Year 2000* (Cm 5312 2001) 126 (Table 5.18); Home Office, *Criminal Statistics: England and Wales 1997: Statistics Relating to Crime and Criminal Proceedings for the Year 1997* (Cm 4162 1998) 52 (Table 5.18).

Table 2: Number of defendants tried for riot between 2004 and 2020 (inclusive)[27]

Year	Tried	Convicted	Acquitted
2004	13	12	1
2005	14	7	7
2006	1	1	0
2007	5	3	2
2008	3	3	0
2009	12	9	3
2010	1	0	1
2011	1	1	0
2012	27	20	7
2013	1	1	0
2014	0	0	0
2015	0	0	0
2016	0	0	0
2017	0	0	0
2018	0	0	0
2019	0	0	0
2020	0	0	0
Total	**78**	**57**	**21**

riots of 2001 and the English riots of 2011 respectively. Although these statistics suggest that the riot offence remains a tool used by prosecutors in practice, they do not shed any light on whether alternative offences could have been charged.

However, the data specifically relating to the 2011 riots do suggest that the riot offence is significantly less used compared to other offences. The figures for police recorded crime during the 2011 riots show that only 3 per cent of recorded crimes fell under 'disorder', with only 1 per cent being 'violent disorder' (the riot offence is not specifically documented).[28] By contrast, acquisitive crimes such as

27 Data sourced from Ministry of Justice, 'Criminal justice system statistics publication: Crown Court: pivot table analytical tool for England and Wales (12 months ending December 2004 to 12 months ending December 2014)' (21 May 2015) and Ministry of Justice, 'Criminal justice system statistics publication: Crown Court: pivot table analytical tool for England and Wales (12 months ending December 2010 to 12 months ending December 2020)' (20 May 2021).

28 Home Office, 'Overview of recorded crimes and arrests resulting from disorder events in August 2011' (October 2011) 12.

burglary comprised half of all recorded crimes and criminal damage comprised 36 per cent.[29] The data on convictions are even more telling: there were only 21 defendants convicted of riot in 2011 and 2012,[30] compared to 2158 defendants proceeded against at magistrates' courts for all offences (as of 10 August 2012) that related to the 2011 riots.[31] Riot therefore accounted for, at most, 1 per cent of the offences for which participants of the 2011 riots were convicted.

The Law Commission took a different view on the need for a riot offence.[32] One of its conclusions was that, without the offence, 'the law would not be able to deal adequately with those who provoke or lead wide-scale public disturbances and who resist the efforts of the police to restore order'.[33] But this reasoning is questionable: in terms of the severity of punishment, we have already discussed equally heavy sentences being available for the more 'mainstream' offences that are likely to cover acts constituting riot.

As for provocation or leadership, this seems to be a narrow mischief that could be addressed with a more specific offence than riot. The typical case of a riot offender will be a participant, rather than a leader, of a riot. In any event, provocation or leadership would likely fall under the inchoate offences of either encouraging or assisting an offence (commonly known as incitement, after the common law offence that it replaced) or conspiracy.

Of course, it may be that, where a defendant has encouraged a riot in general terms rather than encouraging any specific form of violence, a charge of incitement to riot is an easier route for the prosecution than having to prove incitement to another substantive offence. A case in point is provided by the convictions of two men for 'inciting rioting' on Facebook during the 2011 riots.[34] The specific offence was encouraging or assisting offences believing that one or more would be committed, contrary to section 46 of the Serious Crime Act 2007. The prosecution established that one of the defendants, Blackshaw, had encouraged riot, burglary and criminal damage.[35] He was sentenced to four years' imprisonment,[36] a sentence that could have been imposed even without the riot element of the charges. However, the prosecution was unable or unwilling to prove that the other defendant,

29 Ibid.
30 See Table 2.
31 Ministry of Justice, 'Public disorder of 6th–9th August 2011 statistical tables – September 2012' (13 September 2012) Table 1.2.
32 Law Commission, *Offences Relating to Public Order* (n 10 above) paras 6.7–6.10.
33 Ibid 6.8.
34 *R v Blackshaw* [2011] EWCA Crim 2312.
35 Ibid [54].
36 Ibid.

Sutcliffe, had encouraged any offence other than riot.[37] Sutcliffe had created an event invitation on Facebook to meet in Warrington for 'The Warrington Riots', which included a photograph of riot police in a 'stand off position' with a group of 'rioters'.[38] He eventually realised the enormity of his action and cancelled the event, although there is doubt as to whether he did this knowing that the police were searching for him.[39] In any event, no riot occurred in Warrington.[40]

Setting aside the lack of actual harm and the question of whether inciting an offence that does not subsequently occur should be criminalised, on which much academic ink has been spilled,[41] the choice of charge (incitement to riot rather than incitement to an offence against the person or property) suggests that the prosecution was unable even to identify specific persons or property that could have been *potentially* harmed. In these circumstances, it is questionable whether Sutcliffe deserved any punishment and, if so, why. I return to this issue in the next section, when I discuss the mischief that riot tackles.

Even if Sutcliffe deserved punishment, alternatives to riot were available. For example, he could conceivably have been arrested and bound over,[42] albeit that this would not have resulted in a conviction. The charge could also have been public nuisance instead,[43] which has been expressly recognised by the House of Lords as overlapping with public order offences.[44] Public nuisance is:

> doing an act not warranted by law, or omitting to discharge a legal duty, where the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone.[45]

37 Ibid [59].
38 Ibid [60].
39 Ibid [71].
40 Ibid [61]–[63].
41 See eg Andrew Ashworth, 'Defining criminal offences without harm' in Peter Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (Butterworths 1987); Celia Wells and Oliver Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law: Text and Materials* 4th edn (Cambridge University Press 2010) 311–316.
42 *Lansbury v Riley* [1914] 3 KB 229 (KB).
43 Cf *R v Madden* (1975) 1 WLR 1379 (CA) where the court accepted that a bomb hoax telephone call could constitute a public nuisance if it affected a sufficiently wide class of the public.
44 *R v Rimmington* [2005] UKHL 63.
45 Ibid.

Public nuisance is problematic in terms of being even more broadly defined than riot.[46] However, if Sutcliffe was to be punished at all, public nuisance would have 'fit' better given that the consequences caused were not an actual riot or any actual harm but people being 'appalled', 'put in fear' and 'disturbed'.[47] In fact, making hoax bomb calls and making a video threatening to bomb an aircraft have been successfully prosecuted using public nuisance charges.[48] The statutory replacement for public nuisance proposed in the PCSC Bill makes this 'fit' even clearer, as it targets conduct that causes 'serious distress, serious annoyance, serious inconvenience and serious loss of amenity'.[49]

The offence of riot may have a further instrumental function of enabling a defendant to be charged where there are evidential difficulties preventing a charge of a specific offence of violence to the person or property: that is, where they can be proved to have participated in a group which has harmed persons or property but cannot be proved to have actually committed that harm themselves.[50] This argument was made by the Law Commission in its Working Paper,[51] but was absent in its final report.[52] Perhaps the Law Commission recognised what Thornton calls the 'danger of using … "a crime of the utmost importance in the law of public order" to circumvent "evidential difficulties" in proving guilt',[53] although it did continue to rely on a similar argument in relation to affray.[54] In any event, in such circumstances, a charge of joint enterprise to commit one of the offences against the person or property could be brought against all the members of the group, provided the necessary intent is proven.[55]

There is one more gap that the riot offence might fill. Riot requires the offender to have used violence, but 'violence' is defined broadly (and circularly) in the 1986 Act: it is 'any violent conduct' and there

46 The House of Lords and the Law Commission accepted that public nuisance is sufficiently certain: ibid; Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com Consultation Paper No 193 2010) paras 4.2–4.7.

47 *R v Blackshaw* (n 34 above) [72].

48 Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358 2015) para 3.16.

49 Police, Crime, Sentencing and Courts HL Bill (2021-22) 40, cl 60(2)(c). Since the time of writing, this clause has been enacted as s 78 of the Police, Crime, Sentencing and Courts Act 2022.

50 Thornton (n 19 above) 24.

51 Law Commission, *Offences Against Public Order* (n 10 above) para 5.11.

52 Law Commission, *Offences Relating to Public Order* (n 10 above) paras 6.7–6.10.

53 Thornton (n 19 above) 24.

54 Law Commission, *Offences Relating to Public Order* (n 10 above) para 3.5.

55 *R v Jogee* [2016] UKSC 8 [1], [88]. See also Thornton (n 19 above) 24–25.

is no need for any person or property to be actually harmed or for any intent to do such harm. The violence merely needs to have been capable of causing such harm.[56] In theory, therefore, riot may cover acts of 'violence' that do not fall under any of the mainstream offences (except public nuisance, which is so broad that it arguably could cover all acts capable of constituting riot), many of which require actual harm. In practice, however, it is difficult to think of many such acts. Thornton suggests that 'violent' conduct could include 'running through the streets in a gang, heavy pushing at barriers or police cordons, and even a large number of pickets or demonstrators shouting threats to dissuade people from continuing to work'.[57]

Whilst some people would characterise these actions as 'violent', I would suggest that many would not. In any event, the point is that 'violence' for the purposes of the riot offence is so vague that it is unlikely to meet the 'standard of clarity and precision' that Lord Sumption held is required of the elements of a criminal offence.[58] This is particularly important in the context of public order law, which implicates fundamental rights and principles such as the right to freedom of assembly and equality before the law and can restrict the civic life that is crucial to the flourishing of democracy. Furthermore, imprecision enables abuse. I return to this theme later in this article. For now, the looseness of the definition of 'violence' leads to the question, 'Why should the violence that constitutes riot be specifically punished?'

WHAT MISCHIEF DOES RIOT TARGET?

In the previous section, I argued that riot overlaps with offences against the person and property in that acts constituting riot would almost always fall under one of the latter offences. However, I conceded that certain acts of 'violence' that can cause harm, but which do not in fact cause harm, can constitute riot but not fall under one of the 'mainstream' offences. This raises the question of why these acts should be criminalised under riot.

Furthermore, it might be argued that, even where acts constituting riot could be punishable as an offence against the person or property, there is something different about those acts, morally or otherwise, that makes riot the most appropriate offence to convey censure. This argument, which is essentially about labelling,[59] is distinct from the

56 1986 Act, s 8.

57 Thornton (n 9 above) 11.

58 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [239].

59 See, by way of analogy, the Law Commission's arguments in relation to the need for a public nuisance offence: Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (n 48 above) paras 3.23–3.26.

instrumental arguments I discussed in the last section, which related to the need to secure punishment in the sense of 'hard treatment'. The Law Commission's final report alludes to this, arguing that the absence of a riot offence would '[fail] to give significant recognition to the factors of the weight of numbers used for a common purpose, to which ... considerable importance is attached by the common law'.[60]

What, then, is different about using violence as part of a large group of people with a common purpose, compared to the use of violence by an individual, and violence that falls short of the 'mainstream' offences? To answer this question, I consider the larger question of what social values and interests public order law seeks to protect and preserve. Smith identifies two candidates: one is the 'inchoate' interest of preventing public fear of physical harm being caused to persons or property,[61] and the other is nothing less than the constitutional stability of the country.[62] I will discuss the latter first.

It is true that some riots were perceived historically as threatening the rule of the reigning monarch or the state, particularly during the Hanoverian era.[63] However, the common law offence of riot was a misdemeanour only,[64] and there is some authority that it was limited to riots with a private common purpose.[65] Hence, the offence was not directed at riots with the character of rebellions and insurrections, but at the less threatening riots that were commonplace from the late seventeenth century to the early nineteenth century.[66] During this period, riots tended not to be seen as threats to the state,[67] and the English elite 'lived on rather casual terms with popular volatility as long as the latter did not ... challenge the fundamentals of the current system'.[68] Riots were not concerned with overthrowing the social order

60 Law Commission, *Offences Relating to Public Order* (n 10 above) para 6.9.

61 Smith (n 6 above) 486; Smith (n 7 above) 1–2.

62 Smith (n 7 above) 1–3.

63 Adrian Randall, *Riotous Assemblies: Popular Protest in Hanoverian England* (Oxford University Press 2006) 23–24.

64 Smith (n 7 above) 2; Michael Supperstone, *Brownlie's Law of Public Order and National Security* 2nd edn (Butterworths 1981) 120.

65 Law Commission, *Offences Relating to Public Order* (n 10 above) para 6.25; Supperstone (n 64 above) 132; Card (n 12 above) 18.

66 David Williams, *Keeping the Peace: The Police and Public Order* (Hutchinson 1967) 12; Carl J Griffin, *Protest, Politics and Work in Rural England, 1700–1850* (Palgrave Macmillan 2014) xiii.

67 Townshend (n 6 above) 10–11.

68 Allan Silver, 'The demand for order in civil society: a review of some themes in the history of urban crime, police, and riot' in David J Bordua (ed), *The Police: Six Sociological Essays* (John Wiley & Sons 1967) 19. See also Randall (n 63 above) 20; Townshend (n 6 above) 10.

but were often a form of protest or collective bargaining, with specific demands that could be accommodated within the existing order.[69]

When a riot came to be perceived as a threat to the state's authority, it would be dealt with as treason[70] or by way of the Riot Act 1714 (1 Geo 1 St 2 c 5), which was enacted in response to various internal and external threats to the fledgling Hanoverian regime, such as the Jacobites.[71] The Riot Act created felony offences of failing to disperse an hour after a proclamation had been read and of demolishing, or beginning to demolish, certain buildings, including churches and dwellings.[72] In addition, the reading of the Riot Act enabled the application of 'a kind of modified martial law', under which rioters were transformed not just into felons but also traitors against the Crown who therefore could be lawfully executed.[73] Even after the enactment of the Riot Act, however, prosecutors in the eighteenth century still favoured the charge of riot at common law, with the felony offence being reserved for the most serious cases.[74]

Although the Riot Act has now been repealed,[75] and common law riot replaced with a statutory offence in the 1986 Act, the offences of treason and treason felony remain on the statute books.[76] Incitement of violent conduct to overthrow the state can also constitute sedition.[77] If attempts to violently overthrow the state should be criminalised, it remains the case that treason, treason felony or sedition, not riot, most appropriately convey censure for that act.

It is debatable, of course, whether the offences of treason and sedition are necessary today. The Law Commission in 1977 thought

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69 Silver (n 68 above) 15–17; Randall (n 63 above) 17, 20–23, 42–43; Steve Hall and Simon Winlow, 'The English riots of 2011: misreading the signs on the road to the society of enemies' in David Pritchard and Francis Pakes (eds), *Riot, Unrest and Protest on the Global Stage* (Palgrave Macmillan 2014); R Quinault and J Stevenson (eds), *Popular Protest and Public Order: Six Studies in British History 1790–1920* (George Allen & Unwin 1974) 26.

70 Smith (n 7 above) 1–2; Williams (n 66 above) 248–250; John Baker, *The Oxford History of the Laws of England: Volume VI 1483-1558* (Oxford University Press 2003) 584–585.

71 Griffin (n 66) 169; Randall (n 63 above) 2–3, 24–25; Richard Vogler, *Reading the Riot Act: The Magistracy, the Police and the Army in Civil Disorder* (Open University Press 1991) 1.

72 Riot Act 1714, ss I–II, IV.

73 Ibid ss I–III.

74 W Nippel, '"Reading the Riot Act": the discourse of law enforcement in 18th century England' (1985) 1 History and Anthropology 401, 415.

75 Statute Law (Repeals) Act 1967 s 1, sch 1 pt 5.

76 Treason Act 1351; Treason Felony Act 1848. See Supperstone (n 64 above) 230–234; Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (Law Com Working Paper No 72 1977) paras 39, 57.

77 Supperstone (n 64 above) 234–240.

that, although sedition was no longer necessary,[78] a specific offence to penalise conduct aimed at overthrowing the constitutional government was needed to reflect the nature of the act as a crime against the state.[79] Considering the issue again in 2008, it questioned the need for treason offences in peacetime and referred to the use of public order offences to deal with 'serious civil unrest', but noted that treason laws could be 'simplified and pruned'.[80] The implication is that some form of treason law is still necessary.

As for the specific issue of riots threatening the state, there has not been a single instance of a riot or other public assembly in England and Wales in the post-war era that has seriously threatened to overthrow the state,[81] even indirectly, for example by causing a collapse in the rule of law. This is not to say that there are no rioters or protestors who wish to overthrow the current system of government, such as some anarchists or communists, but the aims of these people tend to be quite tangential to what actually fuels most contemporary rioting. This is evident from an examination of the largest protests in England and Wales's contemporary history, such as the march against the Iraq War in 2003 and the tuition fee protests of 2011, and of the most serious riots, such as the poll tax riots in 1990, the Bristol riot of 1980, the Brixton riot of 1981, the Bradford riot of 2001 and the England riots of 2011, not one of which was aimed at revolution or extra-constitutional governmental change.

The recent Capitol Hill 'riot' in the US cautions against concluding that there will never be a riot that threatens to overthrow even an established democratic state. However, the mischief in those circumstances is not the riot as such, but the attempted coup. Riot is not the right label for attempting to violently overthrow the state. The elements of the riot offence almost pale into insignificance compared to the gravity of the treason offences, 'the most serious of all criminal offences':[82] to establish riot, a group of only 12 rioters is required, of which only the offender needs actually to use violence, and no harm or fear needs to have been caused. Riot's maximum sentence of 10 years is also trivial compared to the maximum of life imprisonment for treason by levying war and treason felony.[83]

78 Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (n 76 above) para 77.

79 Ibid 59, 61.

80 Law Commission, *Tenth Programme of Law Reform* (Law Com No 311 2008) paras 2.28–2.30.

81 See eg Townshend (n 6 above) ch 7.

82 Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (n 76 above) para 21.

83 Supperstone (n 64 above) 233.

Turning to the 'inchoate' interest of preventing public fear of harm, the riot offence is inchoate in that it proscribes conduct (the use of unlawful violence as part of a group of 12 or more persons) that is likely to result in a particular outcome (public fear of physical harm). As is generally the case with inchoate offences,[84] it does not matter whether the outcome occurs. The violence needed for riot does not necessarily need to harm a person or property (nor does it need to have been intended to do so); it merely needs to have been capable of causing such harm.

It is noteworthy that the offence is purportedly aimed at the *fear* of physical harm, not at the physical harm itself or even the *risk* of the physical harm, unlike offences of risk creation such as drunk driving or criminal damage endangering the life of another. As Card puts it, the need for the offences of riot, violent disorder and affray seems to be based on so-called 'group offending' 'caus[ing] particular fear in ordinary members of the public and increased difficulties for the police'.[85] The gravamen of these three offences, and what marks them out as public order offences, is said to be their 'capacity to put in fear a notional bystander of reasonable firmness'.[86] The Law Commission expressly refers to 'terror' marking the character of common law affray as an offence against public order.[87]

But is it really the case that the public fear caused by a large group of people threatening or using violence is what marks riot as distinct from offences against the person or property? For one thing, since the 'person of reasonable firmness present at the scene' is hypothetical,[88] no one actually needs to be put in fear of harm. For example, an armed burglary of an unoccupied rural cottage carried out by 12 persons who violently broke down the door could constitute riot, even if no one witnessed the burglary.[89] Similarly, participants in a gang fight within a private dwelling could be convicted of riot even if they were all willing participants and there were no bystanders.[90]

It seems then that, although the commission of the riot offence will normally involve situations where there is public fear and alarm, the offence is not, strictly speaking, directed at protecting against fear as such. As Ashworth puts it, the 1986 Act grants an 'express

84 Ashworth (n 41 above) 9.

85 Card (n 7 above) 83.

86 Ibid 93.

87 Law Commission, *Offences Relating to Public Order* (n 10 above) para 3.29. 'Terror' or 'alarm' was required for riot at common law: Supperstone (n 64 above) 131; Thornton (n 9 above) 12–13.

88 1986 Act, s 1(4).

89 Cf *London and Lancashire Fire Insurance Company, Ltd v Bolands, Ltd* [1924] AC 836 (HL).

90 Adapting an example from Smith (n 7 above) 78.

dispensation' that any member of the public be put in fear, which he argues 'virtually undermines' the rationale for the riot offence.[91] A simpler explanation is that preventing fear is not the real rationale. Notably, the Law Commission, when rejecting the notion that it should be necessary for an actual bystander to be put in fear, stated that 'the function of the bystander is really to act as a measure of the requisite degree of violence'.[92]

Moreover, there are 'mainstream' offences which also purport to address fear, such as common assault (an act which causes another to apprehend immediate unlawful violence), public nuisance (as discussed in the previous section), threatening to kill,[93] threatening to damage or destroy property[94] and threatening violence to secure entry into occupied premises.[95] The last three, like riot, do not require anyone to be put in fear.[96] The existence of these offences further reduces any distinctiveness of the riot offence to the sole fact that it involves a group of at least 12 people.

The real mischief targeted by the riot offence is not public fear of harm, nor attempts to overthrow the state, but group violence, with the emphasis being on the 'group' element. Textbooks on public order law almost invariably quote a passage from Sachs LJ's judgment in *Caird* which is said to identify the real crux of the riot offence;[97] indeed, it is quoted four times in the Law Commission's final report:[98]

> [Riot] derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose ... The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers.[99]

This theme was later picked up by Lord Lane in a case relating to the 1984 miners' strike:

> It must have been obvious to all those participating in the picketing that their presence in large numbers was part of the intimidation and threat. It must have been clear to them that their presence would, at the least, encourage others to threats and/or violence, even if they themselves said nothing.

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91 Ashworth (n 41 above) 17.
92 Law Commission, *Offences Relating to Public Order* (n 10 above) para 3.32.
93 Offences Against The Person Act 1861, s 16.
94 Criminal Damage Act 1971, s 2.
95 Criminal Law Act 1977, s 6.
96 Ashworth (n 41 above) 9.
97 Smith (n 7 above) 76; Thornton (n 9 above) 7.
98 Law Commission, *Offences Relating to Public Order* (n 10 above) paras 2.10, 6.4, 6.7, 6.11.
99 *R v Caird* (1970) 54 Cr App R 499 (CA), 505–507.

> One of the first requirements of any civilised society is that bullying should not succeed, that mere physical strength or strength of numbers should not be permitted to coerce the weaker or the fewer in number.[100]

As Blake argues, this is equivalent to suggesting that gathering in large numbers amounts to a criminal offence.[101] Although there is nothing inherently dangerous or harmful about a crowd,[102] the broad definition of 'violence' for the purposes of riot, discussed in the previous section, means that the slightest disturbance by a group of at least 12 people – pushing at police cordons; shouting in an intimidating fashion; throwing drink cans and plastic bottles[103] – can theoretically lead to a riot charge. The emphasis of the offence is very much on the weight of numbers, not the violent conduct. In fact, of all the charges brought in relation to the 1984 miners' strike, only 8.4 per cent were for crimes of *actual* violence, namely assaulting a police officer, actual bodily harm, grievous bodily harm, murder, wounding and possession of an offensive weapon.[104]

Somewhat incongruously, Lord Lane continued in his judgment as follows, seeming to imply that riot is but assault writ large:

> This requirement is exemplified inter alia by the common law offence of assault. An assault is any act by which the defendant intentionally, or recklessly, causes the victim to apprehend immediate unlawful violence. There is no need for it to proceed to physical contact.[105]

THE USE AND ABUSE OF THE RIOT OFFENCE

I have concluded that the riot offence is neither instrumentally necessary for adequate punishment nor justified on the grounds of protection

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100 *R v Mansfield Justices, ex parte Sharkey* [1985] 1 QB 613 (QB), 627.

101 Nick Blake, 'Picketing, justice and the law' in Bob Fine and Robert Millar (eds), *Policing the Miners' Strike* (Lawrence & Wishart 1985) 110; Nadine El-Enany, '"Innocence charged with guilt": the criminalisation of protest from Peterloo to Millbank' in David Pritchard and Francis Pakes (eds), *Riot, Unrest and Protest on the Global Stage* (Palgrave Macmillan 2014) 75.

102 George Gaskell and Robert Benewick, 'The crowd in context' in George Gaskell and Robert Benewick (eds), *The Crowd in Contemporary Britain* (Sage 1987) 12–13; John Edwards, Robin Oakley and Sean Carey, 'Street life, ethnicity and social policy' in George Gaskell and Robert Benewick (eds), *The Crowd in Contemporary Britain* (Sage 1987) 76–77; Clifford Stott et al, 'Tackling football hooliganism: a quantitative study of public order, policing and crowd psychology' (2008) 14 Psychology, Public Policy and Law 115, 136.

103 As occurred at the beginning of the poll tax riots: Ian Hernon, *Riot! Civil Insurrection from Peterloo to the Present Day* (Pluto Press 2006) 239–240.

104 Janie Percy-Smith and Paddy Hillyard, 'Miners in the arms of the law: a statistical analysis' (1985) 12 Journal of Law and Society 345, 350.

105 *R v Mansfield Justices, ex parte Sharkey* (n 100 above) 627.

against public fear and overthrow of the state. Instead, the offence, at its core, targets the supposed mischief of gathering in a group of 12 or more and exhibiting behaviour deemed to be 'violent'. In this section, I examine how the vagueness of the definition of the offence enables its abuse and serves less obvious, ideological functions.

An implication of the riot offence's lack of a need for an actual bystander to be put in fear is that riot charges and convictions do not depend on witness testimony or victim statements and are highly dependent on police accounts of events. As such, all other things being equal, the police are incentivised to prefer public order charges, even if charges of criminal damage or assault are justified, because of the lower evidential burden.[106] As Ashworth argues, there is 'little doubt that the public order … offences have been defined so as to favour the convenience of prosecutors' (and, by extension, the police).[107]

This factor, along with the low threshold for 'violence', is common to all three group disorder offences (riot, violent disorder and affray). These offences are therefore highly susceptible to deliberate abuse at worst, such as to curb political dissent, and careless misjudgement at best. Misjudgement by the police has certainly played a significant role in many riots in England, fuelled by an obstinate refusal to accommodate any version of public 'order' other than its own and exacerbated by the much-vaunted operational independence and increasing 'professionalisation' of the police.[108] As a police spokesman reportedly said during the Brixton riot in 1981: 'The police will not withdraw. The only people who control the streets of London are the Met.'[109] The same mindset is evident time and time again: the picketing miners at Orgreave were said to have 'no right to be there'; during the Toxteth riot of 1981, a warning was issued for 'law-abiding people [to] keep off the streets'.[110] More recently, the Commissioner of the Metropolitan Police defended the heavy-handed policing of a vigil on Clapham Common for a murdered woman, Sarah Everard, as follows: 'I don't think anybody who was not in the operation can actually pass a detailed comment on the rightness and wrongness.'[111]

However, the police view on 'rightness and wrongness' is not the only version of public order. The notions of 'order' and 'disorder' are

106 Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* 4th edn (Oxford University Press 2010) para 3.4.2.

107 Ashworth (n 41 above) 17. See also Sanders et al (n 106 above) para 3.4.2.

108 Townshend (n 6 above) 15, 139, 191–202.

109 Paul Gordon, '"If they come in the morning …" The police, the miners and black people' in Bob Fine and Robert Millar (eds), *Policing the Miners' Strike* (Lawrence & Wishart 1985) 164.

110 Scraton (n 9 above) 390.

111 'Sarah Everard: Met Police chief will not resign over vigil scenes' (*BBC News* 14 March 2021).

highly contested and 'historically and politically contingent', being 'intimately connected with the dominant power relationships of a society'.[112] Minority subcultures, such as those of the communities in Brixton in 1981 or Broadwater Farm in 1985 (or even football fans),[113] have their own norms and form of order. When these norms clash with the norms of the dominant culture, physical conflict may result.[114] Furthermore, rioting is not inherent to collective behaviour but develops when a form of order seen as illegitimate is imposed, through police coercion, on a crowd.[115] For example, the Broadwater Farm riot of 1985 was triggered by a disproportionate police response, including the premature deployment of riot gear, in response to a march in protest at the death of a local woman during a police raid.[116] Such marches were a 'conventional mode of peaceful protest in that community' and would normally follow a script well-known to both residents and the police. In this instance, however, it was perceived and portrayed by the police as a 'menacing incident'.[117] Notably, it was another 'ritual' march through Broadwater Farm to the police station in protest of the shooting of Mark Duggan and a heavy-handed attempt by police to disperse the resulting gathering that triggered the 2011 English riots.[118]

More significantly, the nebulousness of the group disorder offences can enable their abuse for the purpose of legitimising the crushing of political dissent. For example, the striking miners of 1984 were depicted as 'violent mobs' and 'invading hordes', despite the evidence of their violence being thin, as discussed in the previous section.[119] Rowdy

112 Chris Cunneen and Mark Findlay, 'The functions of criminal law in riot control' (1986) 19 Australian and New Zealand Journal of Criminology 163, 166. See also Wells and Quick (n 41 above) 228; Townshend (n 6 above) 15.

113 Football disorder tends to occur when coercive police intervention leads to 'ordinary' fans uniting with 'hooligans' around a perception of victimisation: Stott et al (n 102 above).

114 Philip Norton, 'Introduction' in Philip Norton (ed), *Law and Order and British Politics* (Gower 1984) 5.

115 Clifford Stott and John Drury, 'Contemporary understanding of riots: classical crowd psychology, ideology and the social identity approach' (2017) 26 Public Understanding of Science 2, 12; Stott et al (n 102 above) 136. See also Benjamin Bowling, Robert Reiner and James Sheptycki, *The Politics of the Police* 5th edn (Oxford University Press 2019) 89–90, 93–94.

116 Clive Bloom, *Violent London: 2000 Years of Riots, Rebels and Revolts* (Sidgwick & Jackson 2003) 443.

117 Wells and Quick (n 41 above) 229; Matthew Moran and David Waddington, *Riots: An International Comparison* (Macmillan 2016) 132–133.

118 Moran and Waddington (n 117 above) 116, 131–134.

119 Bob Fine and Robert Millar, 'Introduction: The Law of the Market and the Rule of Law' in Bob Fine and Robert Millar (eds), *Policing the Miners' Strike* (Lawrence & Wishart 1985) 18–19; Blake (n 101 above) 109; Percy-Smith and Hillyard (n 104) 350.

behaviour, such as 'pushing and shoving on the picket line',[120] was equated with violence. The strikes culminated in the well-documented 'Battle of Orgreave', a 'series of set piece battles' between the police and the miners.[121] Notoriously, the subsequent trial of 15 miners for riot collapsed after police evidence was discovered to have been fabricated.[122]

By contrast, in the previous year, the same police force had allowed to pass uneventfully the 'noisy and extremely boisterous' 'Thatcher Unwelcoming' demonstration led by local politicians and local leaders in Sheffield in 1983, despite there being some 'minor hostility' in the form of throwing of foodstuffs.[123] One factor for the difference in treatment appears to be 'the perceived legitimacy of the demonstration from a senior police perspective'.[124]

As Wells and Quick argue, all this demonstrates

> the malleability of the notion of disorder as a threat to state authority and the ways in which it can be appealed to reinforce punitive state reactions to forms of behaviour which, taken as individual instances, would not be seen in nearly such threatening terms. In such contexts, we can see that the use of the term 'public' signifies not a particular sphere of activity (already hard to define) but rather the conception of order which prevails: that of the state or particular powerful groups within it.[125]

Public order offences serve symbolically to affirm the authority of the state and the 'agencies of control',[126] as well as to legitimise the state's, or the police's, conception of order. If the police are merely enforcing the law, the 'rightness' of their coercive actions cannot be questioned.

Furthermore, the existence and use of public order offences depoliticises situations of 'disorder', allowing the state to portray riot participants as mere criminals and to ignore any underlying

120 Fine and Millar (n 119 above) 18–19.

121 Cathie Lloyd, 'A national riot police: Britain's "third force"?' in Bob Fine and Robert Millar (eds), *Policing the Miners' Strike* (Lawrence & Wishart 1985) 66; David Waddington, 'Policing political protest: lessons of best practice from a major English city' in David Pritchard and Francis Pakes (eds), *Riot, Unrest and Protest on the Global Stage* (Palgrave Macmillan 2014) 18; John Alderson, *Principled Policing: Protecting the Public with Integrity* (Waterside Press 1998) 154–158.

122 Joanna Gilmore, 'Lessons from Orgreave: police power and the criminalization of protest' (2019) 46 Journal of Law and Society 612.

123 David Waddington, Karen Jones and Chas Critcher, 'Flashpoints of public disorder' in George Gaskell and Robert Benewick (eds), *The Crowd in Contemporary Britain* (Sage 1987) 165.

124 Waddington (n 121 above) 14; Waddington et al (n 123 above) 166–170.

125 Wells and Quick (n 41 above) 226.

126 Ibid 211.

grievances.[127] Focus shifts from the grievances of the riot participants to the punishment that they deserve.[128] The criminal law, for the purposes of establishing guilt, does not look at motive and, as such, it is said that 'we have no special law for protestors'.[129] However, this 'obscures the socio-political reality of [public disorder] and distracts public attention from the broad base of such public behaviour'.[130] The behaviour constituting the riot offence is decontextualised from its social context,[131] even though the social context is morally relevant.[132] It also allows the state to tackle political dissent without appearing to do so.[133] The case of the striking miners in 1984 is a case in point: their motives were obviously political and the then Prime Minister Margaret Thatcher herself described them as 'an organised revolutionary minority'.[134] Yet she also depicted them as mere criminals.[135] More remarkably, she expressed the same attitude towards disorder in Northern Ireland: 'a crime is a crime is a crime'.[136]

The 2011 English riots provide a potential complication to this argument. As discussed earlier, riot formed a very small proportion of the crimes recorded and the convictions. More generally, only a fifth of the defendants proceeded against at magistrates' courts for all offences relating to the 2011 riot were convicted for 'violent disorder' offences (defined broadly to include public order offences as well as other offences such as common assault and assaulting a constable).[137] This is even though some of the acquisitive offences charged would likely also have fallen under riot or violent disorder. Indeed, guidance issued to prosecutors by the Crown Prosecution Service stated that 'the offence of riot merits serious consideration'.[138]

However, the low prevalence of convictions for 'violent disorder' may be due to the 2011 riots being widely perceived as criminal. Although sparked by poor police communication following a police shooting, the riots were quickly associated predominantly with looting and have

127 Ibid 229.
128 Gilmore (n 122 above) 638.
129 Smith (n 7 above) 4.
130 Cunneen and Findlay (n 112 above) 170.
131 El-Enany (n 101 above) 89.
132 Wells and Quick (n 41 above) 214.
133 El-Enany (n 101 above) 79, 85.
134 Fine and Millar (n 119 above) 2.
135 Ibid.
136 Paddy Hillyard, 'Lessons from Ireland' in Bob Fine and Robert Millar (eds), *Policing the Miners' Strike* (Lawrence & Wishart 1985) 178.
137 Ministry of Justice (n 31 above) Table 1.2.
138 Lightowlers and Quirk (n 24) 71.

subsequently been described as 'consumerist' riots.[139] As the then Prime Minister David Cameron said: 'This was not a political protest or a riot about politics. It was common or garden thieving, robbing and looting.'[140] Even scholars of rioting remain divided on whether the riots were 'political'.[141] Absent any popular association of the riots with political grievances, there was no need for police and prosecutors to choose the relatively riskier charges of riot and violent disorder. By contrast, most of the defendants charged following the 2001 Bradford riots were convicted of riot.[142]

Riot, as an indictable offence, is always tried before a jury, which may serve as a last line of defence against politically motivated riot charges. Although only tentative conclusions can be drawn from the data, given the small number of riot trials in each year, the figures on acquittals seem to suggest that the choice to charge riot is a risky one for prosecutors. Out of the 78 defendants tried for riot between 2004 and 2013 (inclusive),[143] 21 (27%) were acquitted. This rate is about the same as the acquittal rates at the Crown Court in the same period for violent disorder (26%), but higher than those for public order offences (not limited to those in the 1986 Act) (18%) and all offences (20%).[144]

Although the statistics must be read with caution given the small sample size, they align with the notorious difficulty of securing convictions for riot at common law.[145] I have already mentioned the collapse of the riot charges against the miners at the 'Battle of Orgreave'. There were less well-known failures to convict other striking miners, including 13 riot acquittals by a Sheffield jury and eight acquittals in Nottingham for riotous assembly and affray.[146] The collapse of the riot trial relating to the Bristol riot of 1980 is also well-known: of the 12 defendants tried, eight were acquitted (including three after a direction from the judge). The trial collapsed as the jury were deadlocked on the remaining defendants, and a retrial was not sought.[147] Given that jury

139 Tim Newburn, 'The 2011 England Riots in Recent Historical Perspective' (2015) 55 British Journal of Criminology 39, 53–56.

140 Quoted in ibid 51.

141 Ibid; Sadiya Akram, 'Recognizing the 2011 United Kingdom riots as political protest: a theoretical framework based on agency, habitus and the preconscious' (2014) 54 British Journal of Criminololgy 375.

142 Lightowlers and Quirk (n 24) 71.

143 See Table 2. The corresponding data for 1987 to 2003, which are not available online, could not be obtained before finalisation of this article. As stated above, there were no riot trials between 2014 and 2020 (inclusive).

144 Ministry of Justice (21 May 2015) (n 27 above).

145 Thornton (n 9 above) 16–17; Williams (n 66 above) 240.

146 Hernon (n 103 above) 235; Thornton (n 19 above) 26–27.

147 Martin Kettle and Lucy Hodges, *Uprising! The Police, the People and the Riots in Britain's Cities* (Pan Books 1982) 34–38; Thornton (n 19 above) 26.

deliberations are secret, we may never know definitively why juries acquit riot defendants. The technical requirements may be one factor, with the requirement to prove a common purpose being described by Lord Scarman as a matter of 'great forensic confusion'.[148] It may not be too much of a stretch, however, to suggest that, in politically charged circumstances, modern juries are continuing a long historical tradition of jury sympathy for rioters.[149] Three of the Bristol jurors even joined in the post-trial celebrations![150]

Finally, English criminal law, with its emphasis on individual responsibility, is ill-suited to deal with riot, an essentially collective activity.[151] As Cunneen and Findlay argue, there is a contradiction in relying on the collective nature of the behaviour in justifying the offence but denying its relevance when determining individual responsibility.[152] This is compounded by the fact that only rioters who are arrested can be convicted. This issue does affect all crime – most offenders are not caught and therefore not charged and convicted – but the unfairness is particularly acute in the context of group disorder offences, given that the very gravity of the offences is derived from the presence of a group.

In *Caird*, Sachs LJ disposes of what he calls the 'Why pick on me?' argument as follows:

> [O]n these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace. It is, moreover, impracticable for a small number of police when sought to be overwhelmed by a crowd to make a large number of arrests ... Those who choose to take part in such unlawful occasions must do so at their peril.[153]

As with the more famous passage from his judgment, the emphasis is on the group element: rioters deserve punishment not because of violence, but because as a collective they have breached 'the peace' and 'overwhelmed' the police. Sachs LJ rejects the defendants' contention that their acts should be regarded in isolation, but goes on to consider the appropriate sentence for each individual defendant.[154]

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148 Quoted in Thornton (n 9 above) 12.

149 See eg Nippel (n 74 above) 417; Randall (n 63 above) 26–28; Bowling et al (n 115 above) 67.

150 Kettle and Hodges (n 147 above) 38.

151 Ralf Dahrendorf, *Law and Order* (Stevens & Sons 1985) 33; Smith (n 7 above) 2–3.

152 Cunneen and Findlay (n 112 above) 165. See also Wells and Quick (n 41 above) 212.

153 *R v Caird* (n 99 above) 506–507.

154 Ibid 507–509.

On a related note, it is interesting that acting under 'mass suggestion' was a mitigating factor under the Italian and Cuban penal codes,[155] perhaps reflecting the influential but now-discredited theory of Le Bon that posited the crowd as having a suggestible and primitive mind of its own that subsumed individual conscious personalities and individual rationality.[156] Hints of this mindset were discernible in reactions to the 2011 English riots: David Lammy, MP for Tottenham, where the riots first broke out, referred to the rioters as 'mindless', whilst Met Commander Adrian Hanstock referred to 'mindless thugs'.[157] The portrayal of crowds as 'mindless' serves to legitimise state repression and to delegitimise political grievances – civilisation must be protected from the pathology of mindlessness.[158] English criminal law, however, adopts the opposite extreme of pretending that individuals have perfect free will.[159] The crowd's influence is no excuse and, like intoxication, is even an aggravating factor.[160]

CONCLUSION

In a 1991 polemic, P A J Waddington takes issue with the 'critical consensus' of academia that is critical of the police's role in enforcing public order:

> In the event of widespread racist violence against ethnic minorities, there is no doubt that those who now complain about the policing of public order would be anxious to see the police take effective and, if necessary, forceful action, because now the police are not playing the part of oppressive ogres but are the equivalent of the 7th Cavalry.[161]

Waddington's point is that police tactics are 'a *means*, not an end' that can be used both to 'stifle legitimate protest' and 'protect vulnerable minorities'.[162] The same argument could apply to public order law. It is similar to the sentiment encapsulated in the adage that 'we have no special law for protestors'. The sentiment can also be found in the argument that, unlike in the eighteenth century, when riots were a

155 Thornton (n 19 above) 23–24; Hermann Mannheim, *Comparative Criminology: A Text Book* (Routledge & Kegan Paul 1965) 655.

156 Tim Newburn, 'The causes and consequences of urban riot and unrest' (2021) 4 Annual Review of Criminology 53, 55–56; Stott and Drury (n 115 above) 9.

157 Stott and Drury (n 115 above) 3.

158 Ibid 9.

159 Wells and Quick (n 41 above) 213–214.

160 Sentencing Council, 'Aggravating and mitigating factors'.

161 P A J Waddington, *The Strong Arm of the Law: Armed and Public Order Policing* (Clarendon Press 1991) 251.

162 Ibid.

form of 'articulate' protest that the elite listened to,[163] Britain now has democratic processes by which people can choose their representatives as well as the right to protest peacefully. The implication is that crowd violence no longer has any place in our political system, whatever the grievances.[164] 'A crime is a crime is a crime.'

In this article, I have not considered directly whether riots can be legitimate forms of protest; I will leave questions of the morality of or normative justifications for rioting to the political theorists and ethicists.[165] Waddington is also right to point out that not all riots are driven by a desire for progressive social change. In fact, some are just spontaneous outbreaks of violence not driven by any social or political grievance.[166] Furthermore, riots are hugely damaging, costly and traumatic events, and I have sought not to minimise these effects.

Nevertheless, there are significant problems with the offence of riot. First, it is unnecessary given the range of other offences available to punish riot participants, some of which have equal or higher maximum penalties. Second, the mischief that riot tackles is neither protection of the public from fear nor protection against overthrow of the state. The real 'mischief' is the gathering of people in groups, but there is nothing inherently dangerous or harmful about a crowd. Indeed, the right to freedom of assembly is fundamental to a healthy democracy. The breadth of the 'violence' needed to constitute riot allows the law to be enforced at the slightest hint of a disturbance. Third, because of this and the lack of the need for anyone to be actually harmed, the offence is ripe for abuse. If 'we have no special law for protestors', then why do we have a riot offence that is by its nature a discretionary law predicated on a particular notion of 'order' and 'disorder', that of those with power, such as the state and the police?

Given all this, the riot offence should be abolished (although the definition could be retained for the purposes of the Riot Compensation Act 2016). This is not the same as saying that riot participants should not be punished if they harm persons or damage property. That is what the offences against the person or property are for. Arrests, charges and convictions should not be based mainly on individuals being in a group, but on each individual's actions and the harm caused. The room for political value judgements in arrest and charging decisions would shrink: football hooligans and socially aggrieved rioters would

163 Silver (n 68 above) 17–19, 23.

164 Kettle and Hodges (n 147 above) 17; Stuart Hall, *Drifting into a Law and Order Society* (The Cobden Trust 1980) 9.

165 See eg Avia Pasternak, 'Political rioting: a moral assessment' (2018) 46 Philosophy and Public Affairs 384; Jonathan Havercroft, 'The British Academy Brian Barry Prize Essay: why is there no just riot theory?' (2021) 51 British Journal of Political Science 909.

166 Newburn (n 156 above) 63.

be punished equally if they commit one of the 'mainstream' offences in the course of a riot. Charging the 'mainstream' offences would also enable a more nuanced discussion of riots: actual violence to persons and property would not be condoned, but any grievances underlying riots would not be obscured by the criminal label of 'riot'. It is true that some acts that would constitute 'violence' under the riot offence may fall through the gaps if there is no riot offence. I discussed this issue and ventured that these acts would be few in number and queried whether they would actually be 'violent'. Why should 'violence' that falls short of even common assault be penalised, and penalised so heavily, other than because of the imagined dangerousness of the crowd?

Riots happen – frequently.[167] As we look back more than a decade to the 2011 English riots, we undoubtedly hope that the destruction wrought is not repeated. But when the next riot does happen, we can do better than to repeat the mistake of wielding the offence of riot.

167 See eg Bloom (n 116 above); Hernon (n 103 above); Vogler (n 71 above).