

Sentencing Rioters

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Abstract: This article examines the possible justifications for heightened sentences for those who commit offences during a riot. The topic is of salience given recent incidents in Dublin and developments in the sentencing of rioters in England and Wales. The article argues that there is compelling reason to avoid deterrence-based justifications for increases to sentence length in this jurisdiction, but that proper consideration of proportionality can justify elevated sentencing levels. The article then turns to the difficulties of distinguishing between protesters and rioters at sentencing. Here it examines the case for reduced culpability for protesters before addressing practical examples of borderline cases.

Keywords: Sentencing; Riot; Protest; Freedom of Assembly; Guideline Judgments; Criminal Law.

Introduction

In November 2023, there was large-scale public disorder in inner city Dublin to include alleged offences of assault, violent disorder, riot, intimidation, harassment, arson, criminal damage, theft, and public disorder. An Garda Síochána has reported that the disorder from the night resulted in dozens of vehicles damaged or destroyed (including a Luas tram destroyed by fire and 15 Garda vehicles damaged); dozens of businesses damaged; and 13 injured Gardaí.¹ Significant sentences have been reported for those involved in the 2023 riots. Reported sentences include two years' imprisonment for an offender who pleaded guilty to theft and rioting related to looting

* Trinity College Dublin. I am grateful to the editor, the anonymous reviewers, Tom O'Malley, and Illan Rua Wall for their feedback on an earlier draft. This paper also benefited from comments received at the University of Galway Law Review 2026 launch event. Finally, my thanks to Alice Kelly for exceptional research assistance.

¹ An Garda Síochána, 'update in advance of 1st Anniversary of Serious Public Disorder, Dublin City Centre, November 23rd, 2023' (An Garda Síochána, 19 November 2024) <www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2024/november/update-23-an-garda-siochana-update-in-advance-of-1st-anniversary-of-serious-public-disorder-dublin-city-centre-november-23rd-2023.html> accessed 9 December 2025.

cigarettes and gathering rubbish that was subsequently set on fire.² Another person was sentenced to five and a half years for assaulting a Garda amongst other offences related to the riot.³ A further person was sentenced to two and a half years' imprisonment for assaulting three Gardaí and throwing a gas canister at a Garda van having been 'swept up in the frenzy' of the riots.⁴ In the aftermath of the unrest, the Policing Authority documented two important trends. First, a substantial increase in protests across Ireland, from approximately 375 protests in 2022 to more than 700 in 2023.⁵ Secondly, that there has been 'growing public expression and manifestation of hatred, xenophobia, negative stereotyping...[i]ncluding in the format of protest activity.'⁶

In October 2025, following the alleged sexual assault of a 10-year-old, a protest group called 'Stop Citywest Hotel' called for a protest in front of the hotel, which had recently been purchased by the state to provide accommodation to those seeking international protection. That protest went ahead without major incident. The following evening, after a swell of online activity, large crowds gathered outside the hotel and reportedly threw fireworks, bottles, and bricks at Gardaí. A Garda van was burnt out and two officers were hospitalised.⁷

With this context it is of clear contemporary relevance to ask how should those who commit offences in a riot be sentenced? What of those who commit an offence during a protest? And what is the difference between a riot and a protest? The topics are not only of practical importance considering the above-described incidents in Dublin, but also due to a lack of direct Irish appellate authority, and recent comparative case law,

² Isabel Hayes, 'Man who helped gather rubbish to set on fire during Dublin riots jailed for two years' (*Western People*, 18 November 2025) <www.westernpeople.ie/man-who-helped-gather-rubbish-to-set-on-fire-during-dublin-riots-jailed-for-two-years-arid-78119.html> accessed 9 December 2025.

³ Paul Reynolds, 'Man jailed over attack on garda during Dublin riots' (*RTÉ*, 8 October 2025) <www.rte.ie/news/courts/2025/1008/1537515-dublin-riots-thomas-fox/> accessed 9 March 2026.

⁴ Fiona Ferguson, 'Man jailed for assaulting three gardaí after being "swept up in frenzy" of Dublin riots' (*The Journal*, 5 December 2025) <www.thejournal.ie/man-who-assaulted-three-gardai-after-being-swept-up-in-frenzy-of-dublin-riots-jailed-6895094-Dec2025/> accessed 9 December 2025.

⁵ Policing Authority, *Assessment of Policing Performance 2023* (Policing Authority, March 2024) 16.

⁶ *ibid* 17.

⁷ Jack McCarron and Kate McDonald, 'From outrage to unrest: How the clashes in Citywest unfolded' (*RTÉ*, 25 October 2025) <www.rte.ie/news/primetime/2025/1024/1540424-from-outrage-to-unrest-how-the-clashes-in-citywest-unfolded/> accessed 9 December 2025 and Jackie Fox and Paul Reynolds, 'Two gardaí hospitalised, 23 arrested at Citywest protest' (*RTÉ*, 23 October 2025) <www.rte.ie/news/dublin/2025/1022/1539883-citywest-dublin/> accessed 9 December 2025.

which indicates that the seriousness of an offence may be increased by a context of riot and decreased by a context of protest. Here, I first consider the arguments for a sentencing uplift for rioters drawing on authority from England and Wales. I then address how well these arguments transfer to this jurisdiction in principle before engaging with some possible risks when sentencing rioters both where guideline judgments are available and where they are not. I then take three examples of plausible sentencing exercises in the context of riot. The final substantive section engages with the further difficulties which arise at the borders of riot and protest. It first engages with the case for reducing the sentences of offenders who are partaking in non-violent protest before taking practical examples of how riots and protests can interact and drawing out lessons for sentencing.

Justifying an uplift for riots

Assume that an offender on a night out has committed criminal damage by breaking the windows of a commercial premises in Dublin. Now assume that the unfortunate shop owner suffers the same fate when a different offender commits the same offence in the same manner, during a later riot. In both cases, the direct damage to the shop is the same, but should the sentencing for the standard incidence of criminal damage and the damage during a riot differ?

The context of rioting was considered by the Court of Appeal of England and Wales in *R v Blackshaw*, a conjoined appeal following the August 2011 Riots.⁸ The Criminal Division noted that both it and the Sentencing Guidelines Council had prepared guidelines on relevant offences (theft, handling stolen goods, and burglary), but that these guidelines did not account for offending during a riot and, as such, an upward departure from those guidelines was 'inevitable.'⁹ The degree of uplift for offences during the riot was considerable. It has been documented that the immediate custody rate in magistrates' courts increased more than threefold and that the average sentence length for offences committed during the riots was over double that for comparable offences committed in 2010.¹⁰ In the Crown Court, the immediate custody

⁸ [2011] EWCA Crim 2312, [2012] 1 WLR 1126.

⁹ *ibid* [16].

¹⁰ Julian V Roberts, 'Points of Departure: Reflections on Sentencing Outside the Definitive Guidelines Ranges' (2012) 6 Criminal Law Review 439, 440-441. See also, Jose Pina-Sánchez, Carly Lightowlers and

rate for relevant offences rose from 33% to 85%, and the average length of custodial sentences increased by 50%.¹¹

The Court in *Blackshaw* placed emphasis on two rationales in justifying uplifts for offences committed during the riots: deterrence and heightened culpability. On deterrence, Judge LCJ wrote:

There is an overwhelming obligation on sentencing courts to do what they can to ensure the protection of the public, whether in their homes or in their businesses or in the street and to protect the homes and businesses and the streets in which they live and work ... [T]he imposition of severe sentences, intended to provide both punishment and deterrence, must follow ... They must be punished accordingly, and the sentences should be designed to deter others from similar criminal activity.¹²

Deterrence continues to play a role in the sentencing of rioters. In *R v Cush*, the Court of Appeal recently addressed the sentencing of those who had taken part in violent disorder across England in the summer of 2024 following the tragic killing of three children at a dance class in Southport.¹³ The Court reaffirmed *Blackshaw* writing:

If public safety is under threat because of the potential spread of violence across the nation, then deterrence may be of the *highest importance* ... Defendants who choose to involve themselves in activity which threatens the safety and well-being of communities across the nation must therefore expect *severe sentences* designed not only to punish them but also to deter others.¹⁴

Blackshaw has attracted notable criticism in general and specifically with reference to its reliance on a logic of deterrence.¹⁵ Deterrence may be individual, aiming to affect the offender, or general, aiming at other people. As will be clear from the above paragraphs, the Criminal Division's focus has been, and remains, on general deterrence. There are numerous normative and empirical arguments against placing

Julian Roberts, 'Exploring the punitive surge: Crown Court sentencing practices before and after the 2011 English riots' (2017) 17(3) *Criminology and Criminal Justice* 319.

¹¹ Roberts (n 10) 441.

¹² *Blackshaw* (n 8) [4].

¹³ [2024] EWCA Crim 1382, [2025] 1 WLR 387.

¹⁴ *ibid* [11] (emphasis added).

¹⁵ See, for instance, Roberts (n 10); Barry Mitchell, 'Sentencing Riot-related Offending: Considering *Blackshaw* and Others' (2011) 10 *Archbold Review* 4.

weight on general deterrence at sentencing. Perhaps foremost amongst these is that '[t]here is not robust evidence to show that harsher sentences generally produce greater marginal deterrent effects.'¹⁶ Without such evidence, general deterrence appears to be punishment without purpose. There is thus reason to be sceptical of deterrent sentencing of rioters. Do potential rioters know of the sentencing increases that would apply? Would deterrence-based increases affect their decision-making? Would concern for arrest be a weightier factor? Is it right to instrumentalise offenders by punishing them above that which would be proportionate in order to send a message to others?¹⁷

It may also be asked whether reference to deterrence is necessary in the context of riots. The other strand of justification for an uplift in *Blackshaw*, heightened culpability, is more compelling and, as will be seen, more transferable to this jurisdiction. Offences must not be assessed in isolation, but in their context. Those who undertake a mercy killing share an intent, conduct and a caused outcome with those who kill for revenge or profit. But our instinct is that a lower sentence for the mercy killing can be justified. This is due to the reduced culpability of that offender: whereas wider purpose is largely irrelevant for establishing criminal liability, it can be integral to sentencing where courts look to impose a punishment proportionate to the particular wrongdoing before them.

In *Blackshaw*, the then Lord Chief Justice wrote to this effect as follows:

It is elementary that sentencing courts cannot ignore the context in which the crime or crimes for which sentence is to be passed was committed. It is an essential feature in the assessment of culpability ... In other cases, including the present appeals, the context hugely aggravates the seriousness of each individual offence. None of these crimes was committed in isolation. Eight of them were intrinsic to or arose from the widespread lawlessness and two more were intended to contribute to or aggravate it at a time when the disorders were at their most disruptive and alarming.¹⁸

¹⁶ Jay Gormley, *Reconceptualising the effectiveness of sentencing: four perspectives* (Sentencing Council 2024) 16.

¹⁷ See further, Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) 7 Criminal Law Review 564.

¹⁸ *Blackshaw* (n 8) [8].

In *Cush*, Carr LCJ accepted that where an offence is committed during a riot, its seriousness is heightened, but the *dictum* here is somewhat less clear on the rationale for the uplift:

In the context of widespread and significant public disorder, it is not only the precise individual acts of an offender that matter. It is the fact that the offender is taking part in violent disorder, threatening violence against other people and/or property, and is part and parcel of widespread threatening and alarming activity. That is the gravamen of the offending: being one of those who, by weight of numbers, pursues a common and unlawful purpose. Thus, whilst what an individual offender may have done themselves is of relevance, their acts must not be taken in isolation; rather the court must look at the whole picture.¹⁹

The paragraph may be read as supporting a focus on culpability with its reference to 'the gravamen of the offending' stemming from a common *purpose* and its citation of the preceding paragraph from *Blackshaw*.²⁰ It may also be read as indicating consideration of the increased harm posed by offenders during a riot due to their contributions to a wider state of unlawfulness. Both possibilities merit consideration and will be addressed in the context of this jurisdiction below.

It should also be noted that in 2020 the Sentencing Council published a guideline for the offence of riot, which took the unusual step of detailing a general aggravating factor, applicable to all other offences.²¹ Where an offence was committed in the context of a riot this would be 'a severely aggravating feature'.²² What we can discern from the authorities from England and Wales then is that, first, deterrence remains a fundamental justification for increasing the sentences of those who offend during a riot. Secondly, there has been a consistent call for higher sentences in pursuit of proportionality, but these calls have been framed in different ways, be it higher culpability, the contribution to wider harms, or serious aggravation.

¹⁹ *Cush* (n 13) [8].

²⁰ *ibid* [8] citing *Blackshaw* (n 8) [8].

²¹ Sentencing Council, 'Riot' (Sentencing Council, 2020) <<https://sentencingcouncil.org.uk/guidelines/riot/>> accessed 25 March 2026. Perhaps the unusual placement of a general factor in an offence specific guideline explains why that guideline is not mentioned in *Cush* (n 13).

²² *ibid*. *Cush* also refers to a context of rioting as aggravating in its discussion of general principles and the specific applicants: (n 13) [19], [43], and [54].

Application in Ireland

What lessons can be drawn from the above for the sentencing of those who offend during a riot in Ireland? In this section, I consider existing authorities on sentencing in context and violent disorder as an aggravating factor. Having noted the limits of existing authorities, I examine whether sentencing judges may draw on the rationales in the above comparative authorities with respect to deterrence sentencing or increases based on offence severity. I then offer comment on sentencing rioters both where there is an available guideline judgment from a superior court and when there is not. Lastly, I take three brief indicative examples of plausible sentencing exercises to draw out the individual nature of sentencing in this context.

In *People (DPP) v Smith*, the Court of Appeal reaffirmed that participation in violent disorder may be an aggravating factor for another offence, there manslaughter.²³ The requirements to prove violent disorder are specified in section 15(1) of the Criminal Justice (Public Order) Act 1994:

- (a) three or more persons who are present together at any place ... use or threaten to use unlawful violence, and;
- (b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety ...

Riot is also criminalised in the 1994 Act, section 14 of which specifies:

- (1) Where—
 - (a) 12 or more persons who are present together at any place ... use or threaten to use unlawful violence for a common purpose, and
 - (b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety ...

By extension from *Smith*, a context of the offence of riot too would function as an aggravating factor. This appears beyond doubt as the Supreme Court has made clear

²³ [2024] IECA 184.

in both *People (DPP) v FE* and *People (DPP) v Faulkner* that where the event of a crime also includes another crime this will function as an aggravating factor. In the former case, Charleton J specified:

In so far as a problem in relation to separate crimes and whether these are part of and should inform the same incident, the following may be stated: where the event involves an aggravating factor which is also a crime, the admission of the accused to the event, or conviction on the event, as including the aggravating factor informs the seriousness of the offence.²⁴

Later, in *Faulkner*, Charleton J detailed 16 propositions related to sentencing a crime as an event. Perhaps the foremost proposition was as follows:

When embarking on a crime, it is commonplace that several offences may be committed. As well as sentencing for a crime, a judge is sentencing for the event that makes up a sensible, or commonsense, view of the crime. A crime should not be split up into sections which render it no longer an event.²⁵

Where a person was sentenced for a serious offence and they had also committed the offence of riot, the latter offence would be an aggravating factor.²⁶ For present purposes though, we are still left with important queries. First, to what degree should a context of riot aggravate an offence and why? Secondly, what of the situation where a person commits an offence during what is as a matter of fact a riot, but the offence of riot is not proven? In light of these uncertainties, this section will draw on the above comparative authorities to establish how a context of riot ought to affect sentencing in Ireland.

Before considering matters of substance, it should be asked how can a context of riot affect a sentence if the offence of riot is not proven or not charged?²⁷ The former

²⁴ [2019] IESC 85, [2021] 1 IR 217 [29].

²⁵ [2024] IESC 16 [9].

²⁶ In the other direction, where a court is sentencing riot and takes a less serious offence into consideration, say assault, the latter offence should increase the total punishment to reflect 'the overall seriousness of the offending'. It would be insufficient to merely state that the less serious offence had been taken into consideration without uplifting the sentence for the principal offence: *People (DPP) v Mountassir* [2025] IESC 53 [161] (O'Malley J).

²⁷ An argument that there can be no possibility of aggravation for a factual context of riot where the offence of riot has not been proven is unlikely to succeed. By analogy, in *Mountassir* (n 26) [134] (O'Malley J) the Supreme Court made clear that there may be heightened sentences for offending in

circumstance may arise because, for example, the offender does not use violence themselves but does engage in criminal damage, or there is no clear common purpose between the participants. The latter would, of course, arise where the DPP chooses to prosecute an alternative overlapping offence. Relevant guidance can be drawn from the principles detailed in *Faulkner*, especially that a person cannot be sentenced for a crime of which they have not been found guilty; a judge is to sentence for a crime in context; and that a judge may need to make findings of fact related to the seriousness of the offence.²⁸ One way of doing this may be for the judge to take judicial notice of a clear context of factual rioting, but, and as will be seen, there can be significant contestation over what constitutes a riot because of its possible overlap with protest. As such, a more appropriate fact-finding mechanism would be for counsel to present evidence with the prosecution bearing the burden of establishing the context of rioting beyond a reasonable doubt.²⁹

We may now turn to how well the sentencing logics adopted in England and Wales might transfer to Ireland. As a starting point, there is good reason to avoid a deterrence rationale for the sentencing of rioters due to the empirical and normative difficulties with the theory noted above. In this jurisdiction, there is particular need to be cautious of a deterrence logic due to the constitutional requirement to impose a proportionate sentence when sentencing for an offence that is not subject to a mandatory penalty.³⁰ As Henchy J held in *State (Healy) v Donoghue* in light of Article 38(1), read alongside other provisions of the Constitution, 'where guilt has been established or admitted' the offender must receive 'a sentence appropriate to his degree of guilt and his relevant personal circumstances.'³¹ This has recently been reaffirmed in the Supreme Court in *People (DPP) v Mountassir* where O'Malley J specified that it is a 'constitutional principle that in all sentencing decisions other than those involving a mandatory penalty the sentencing judge must impose a sentence that is proportionate to the gravity of the offence and to the personal circumstances of the offender.'³²

the context of relationships, which do not fall within the statutory aggravation prescribed by the Domestic Violence Act 2018, s 40.

²⁸ *Faulkner* (n 25) [9].

²⁹ See further, Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 31.31-31.38; Dermot PJ Walsh, *Walsh on Criminal Procedure* (3rd edn, Round Hall 2024) 57.07-57.15.

³⁰ *Lynch v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1.

³¹ [1976] IR 325 (SC) 353.

³² *Mountassir* (n 26) [92].

Appellate judgments have also clarified the process of imposing a proportionate sentence.³³ It is best practice to first impose a headline sentence based on the gravity of the offence.³⁴ At this stage, the judge appraises the culpability of the offender and the harm done. Having established a headline sentence, the judge will then account for any personal mitigation such as a guilty plea or remorse. If a judge were to conclude that an offence deserved a sentence of two years, but that in pursuit of general deterrence, they would make the sentence three years, that would clearly be susceptible to challenge as unconstitutional. Exorbitant sentences justified by reference to deterrence, above that which is proportionate, must be avoided.

Against this, it may be said that the appellate courts have acknowledged deterrence as a legitimate principle of sentencing in Ireland. For example, in *DPP v DO'S* a wholly suspended sentence for child cruelty was criticised for its failure 'to send a deterrent message'.³⁵ More recently, in *People (DPP) v Crotty*, the Court of Appeal likewise held that a three year suspended sentence was unduly lenient because it 'gave undue weight to the mitigating factors and did not properly take account of general deterrence'.³⁶ Yet it is open to question whether appeal to deterrence is having an effect on sentencing or whether it is a rhetorical device applied in a context where proportionality dictates that a more severe sentence ought to be imposed.³⁷ If deterrence has an independent effect on the severity of the sentence, it may be queried how proportionality is respected. If it does not have such an effect, it may be queried why such reference is needed. As the Court of Appeal has itself acknowledged, the engagement with deterrence in appellate judgments has been 'superficial'.³⁸

Any limits on the capacity of deterrence to justify sentencing uplifts for rioters are not the end of the matter. If the actions of an offender in a riot cause wider harm, a wider risk of harm or if they are more culpable, there is good, and constitutionally sound, reason for an increased sentence. That is not to increase the sentence to deter, but to recognise the seriousness of the offence in context. There are good reasons stemming

³³ See, for instance, the statement of Edwards J in *People (DPP) v Byrne* [2017] IECA 97 [26]-[27].

³⁴ *Mountassir* (n 26) [98]-[102].

³⁵ [2019] IECA 307 [26].

³⁶ [2025] IECA 33 [46].

³⁷ Ashworth (n 17) 567-568.

³⁸ *People (DPP) v DW* [2018] IECA 143 [63]. In keeping with this remark, neither of the sentencing exercises undertaken by the Court of Appeal in the above-mentioned cases engaged with deterrence: *DO'S* (n 35) [28]-[29]; *Crotty* (n 36) [49]-[54].

from harm and culpability to elevate sentences for rioters. With respect to harm, where a person engages in offending during a riot, they not only commit an offence of, say, criminal damage, but they also *contribute to the wider state* of lawlessness. The harms done during a riot are greater than the sum of their parts; it is the combination of offending that can lead to widespread fear, the need for significant state intervention, and the more limited capacity to respond to other emergencies. In *R v Keys*, following the Broadwater Farm Estate riots, Lane LCJ acknowledged that even where the actions of a participant were peripheral, '[h]e must ... take some share of the blame for the overall picture' because 'he ... help[ed] to promote the totality of the affray'.³⁹ Rioters should be accountable for their contribution to this wider state of affairs as much as for the direct harm that they have caused.⁴⁰ In addition, rioters impose a further *risk of harm* by perpetuating the riot.⁴¹ The comparison of the harm done in criminal damage before and during a riot at the start of the previous section was thus not wrong, but it was incomplete.

With respect to culpability, the concept is not precisely defined in Irish law, but is broader than an assessment of *mens rea* and encapsulates wider notions of blameworthiness.⁴² A person who offends during a riot will not only have the required *mens rea* for the offence but will have *knowingly contributed* to a situation where harm to others and their property is more likely and which, due to its scale, is harder to police. It would be remarkable if an offender could successfully claim that they did not know they were contributing to a wider state of unlawfulness. *Blackshaw* was right then to hold that those who offend during riots are more culpable, but the offending is also of higher harm. Given that offences during a riot are more serious with respect

³⁹ (1987) 84 Cr App R 204, 207. See also, *R v Fox* [2005] EWCA Crim 1122, [2006] 1 Cr App R (S) 17 [16]; *Cush* (n 13) [8].

⁴⁰ The Supreme Court has recognised that social harm is an important facet of assessments of offence gravity: *Mountassir* (n 26) [105] (O'Malley J).

⁴¹ The point was mentioned in the individual sentencing exercises in *Cush* (n 13) [25] and [28]. In this jurisdiction, the possibility of provoking others to engage in unlawfulness has been accepted as a factor speaking against the availability of a reasonable excuse defence for a charge of wilful obstruction contrary to section 9 of the Criminal Justice (Public Order) Act 1994: *DPP (Coffey) v Bennett* [2018] IECA 9 [16]-[18]. More generally, an increased risk of harm has been accepted to increase the gravity of an offence: *Mountassir* (n 26) [102] (O'Malley J). There is notable criminal law theory scholarship on liability for risked harms to include Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (OUP 1987) ch 5; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) ch 5. In the context of sentencing, see Thomas O'Malley, *Sentencing: A Modern Introduction* (Clarus Press 2025) 136-138.

⁴² *Mountassir* (n 26) [116]-[118] (O'Malley J).

to the two core aspects of sentencing, harm and culpability, there is good reason for heightened sentences in this context. This may in a particular case take the sentence outside the norms or any guidance that has been offered for standard instances of the offence.

Roberts has argued that where a court must sentence rarer forms of offences, such as offending during a riot, it could pose threats to proportional sentencing.⁴³ The first threat may be referred to as a within offence category threat. As a norm, causing serious harm should attract a higher sentence than assault causing harm and significantly more than assault. But if rioting provides undue weight, the risk is that an assault aggravated by riot would receive a sentence more comparable to what tends to be appropriate for a more serious type of assault offence. The second suggested threat is an across offence category; violent offending should receive higher sentences, as a rule, than property offences. As with the offence-type criticism, if a judge places too much weight on deterrence or a riot as aggravating, it may lead to 'proportionality being trumped' where, for instance, a crime of criminal damage received a similar sentence to what tends to apply in the context of serious violence.⁴⁴

Judges will, of course, need to be mindful that any appeal to the seriousness of a riot does not lead to the imposition of sentences out of keeping with proportionality within, or across, offence types. A reasonable litmus test once the judge has arrived at a presumptive headline sentence may then be comparison to standard instances of the same offence and/or more serious offences. Assume a judge is to sentence a person for criminal damage during a riot. They may then say to themselves, 'I had intended to impose X years, and that would be notably higher than for a standard criminal damage, is that justified in the circumstances?' And, likewise, they may pose, 'the proposed sentence would be comparable to that for a serious instance of assault causing harm. Is that proportionate or worthy of reconsideration?' If such exercises were undertaken, the particular wrongs of offending during a riot would have to be kept firmly in mind. Criminal damage during a riot, to continue the example, is a

⁴³ Roberts (n 10) 443. For wider consideration of proportional sentencing theory see e.g., Andrew von Hirsch, *Censure and Sanctions* (OUP 1993); Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (7th edn, Hart Publishing 2021) ch 4; O'Malley (n 41) 125-146.

⁴⁴ Roberts (n 10) 443.

property offence, but it is also an intentional contribution to widespread unlawfulness where others are put at risk.

Having established a proportionality-based case for heightened sentences for offences committed during a riot, we can now assess a couple of possible complexities in the process of sentencing rioters. Certain offences likely to be completed in the context of a riot are the subject of guideline judgments such as burglary⁴⁵ and assault causing harm.⁴⁶ Guideline judgments provide sentencing bands, usually at three levels, for the relevant offence based on existing practice and proffer factors which speak to a particular offence coming within each band.⁴⁷ When an offender is sentenced with reference to a guideline judgment, the judge will use the guideline to set a headline sentence, which accounts for the harm, culpability and aggravating factors in the case. The judge will then account for any mitigating factors.

As an example, the Court of Appeal developed guidance for burglary in *People (DPP) v Casey*.⁴⁸ An offence in the low range of seriousness would receive a headline sentence of up to four years' imprisonment; with the middle range being four to nine years; and the high range at nine to 14 years.⁴⁹ Where a number of aggravating factors were present it would indicate that the offence was one of midrange.⁵⁰ Where a large number of factors were present or one or more of the factors was particularly serious, the offences would fall into the high range.⁵¹ The factors identified by the court included targeting of residential properties of vulnerable persons; ransacking a dwelling; taking a weapon; injuring the victim; and taking items of high monetary value.⁵² Guideline judgments are a means to assist in the structuring of sentencing so as to ensure proportionality; they are not to be applied in a mechanical or artificial

⁴⁵ *People (DPP) v Casey* [2018] IECA 121, [2018] 2 IR 337.

⁴⁶ See the informal guidance in *People (DPP) v McGrath* [2020] IECA 50. The maximum sentence for the offence has since been increased to ten years by the Criminal Justice (Miscellaneous Provisions) Act 2023, s 20.

⁴⁷ For recent appellate discussion see *Faulkner* (n 25) [34]-[37]; *Mountassir* (n 26) [92]-[125] (O'Malley J). For commentary, see O'Malley (n 41) 525-528.

⁴⁸ *Casey* (n 45).

⁴⁹ *ibid* [49] as approved in *Faulkner* (n 25) [26]-[33]. The low range is not explicitly referred to in *Casey* but extends to four years by implication. This was later made explicit in *Faulkner*.

⁵⁰ *ibid* [48].

⁵¹ *ibid* [48].

⁵² *ibid* [40]-[47].

manner.⁵³ In other words, the appropriate headline sentence follows not from matching facts to indicative factors listed in guideline judgments but from assessing the gravity of the offences in all the circumstances.⁵⁴ Where a commercial burglary occurs in the context of a riot, it may need to receive a sentence at the upper end of that range or indeed higher depending on the circumstances of the case.

Many other offences likely to be completed in the context of a riot, such as criminal damage and theft, have not been the subject of a guideline judgment.⁵⁵ Where a rioter is convicted of an offence without such guidance, the judge, in setting a headline sentence, will have to consider (1) their contribution to the total harm of the riot; (2) the increased risk of harm by encouraging others; and (3) the offender's knowing contribution to a situation where harm to others and their property is more likely.

One important complexity here is that judges must be mindful of avoiding the risk of double counting for certain offences. Double counting occurs when one sentencing factor affects the sentence more than once; the concern frequently arises where the offender is sentenced for multiple offences.⁵⁶ However, double counting may also arise when sentencing for a single offence where what is usually an aggravating factor is inherent to the offence. For example, it may constitute double counting to aggravate an offence of driving whilst intoxicated with reference to intoxication as an aggravating factor.⁵⁷

This raises the question of whether an offence of violent disorder or even riot can be aggravated by the wider context of a riot. This is not as straightforward as it may appear. It may be argued that the strictures of both offences do not require a context of widespread riot to be completed and that the offences are thus not comparable to the above example of double counting for intoxication. Violent disorder requires only that three people use or threaten unlawful violence in a manner that would cause a

⁵³ *People (DPP) v O'Byrne* [2013] IECCA 93 [18] (O'Donnell J); *Mountassir* (n 26) [136] (O'Malley J).

⁵⁴ *O'Byrne* (n 53) [18]; *Mountassir* (n 26) [98] and [136] (O'Malley J); *Casey* (n 45) [49]; *People (DPP) v Mahon* [2019] IESC 24, [2019] 3 IR 151 [48]; *Faulkner* (n 25) [9].

⁵⁵ Criminal Damage Act 1991, s 2(1); Criminal Justice (Theft and Fraud Offences) Act 2001, s 4(1).

⁵⁶ *People (DPP) v Connors* [2018] IECA 227 [26]. For critical analysis of totality and double counting, see Rory Kelly, 'Totality: Principle and Practice' (2022) 7 Criminal Law Review 562, 568-570.

⁵⁷ It would not be double counting to elevate the offence because of the *degree* of intoxication. It would be double counting to set a high initial sentence due to the degree of intoxication and then to aggravate for the presence of intoxication. On intoxication as a sentencing factor in Irish law, see O'Malley (n 41) 159-164.

reasonable person to fear for their or another's safety.⁵⁸ Riot requires 12 or more people to use or threaten 'unlawful violence for a common purpose,' causing the same reasonable fear for safety.⁵⁹ The core wrongs required to establish both offences, inevitably, overlap with the reasons why a context of wider rioting should aggravate other types of offence. In consequence, when sentencing for violent disorder or riot it may be simpler, depending on the particular facts, to avoid attempting to account for any additional wrongs associated with the broader riot separately. Instead, it may be preferable to treat the particular instance of the offence as one occurring at the more serious end of the spectrum. In sum, and regardless of method used, where the judge is sentencing for rioting or violent disorder, care will be needed so as to avoid double counting harm or culpability factors that are constitutive of the offence.⁶⁰

I now take three examples of plausible sentencing exercises that may arise in the context of a riot and give some indication as to how they may be resolved. First, how should a judge sentence a person who has not only attended, but organised a riot? If a person can be shown to have organised a riot, there is a case for a considerable increase to their sentence because they are central to bringing about a widespread state of unlawfulness, and they will have done so deliberately. This corresponds to wider and established case law demonstrating the heightened culpability of those who take on a leading role in offending.⁶¹ One point that will require particular care in practice is the question of fact as to whether a person is in fact an organiser of a riot, or whether they have merely messaged about a prior planned riot through social media or messaging services. Support for a planned riot may increase culpability, but it should not do so to the same degree as being an organiser. A further difficulty will be as to whether a person has planned a riot or a protest that became a riot. The distinction between riots and protests will be discussed further in the next section.

⁵⁸ Criminal Justice (Public Order) Act 1994, s 15.

⁵⁹ *ibid* s 14.

⁶⁰ A comparable warning against double counting is contained in Sentencing Council (n 21): 'Care should be taken not to double count aggravating factors which were relevant to the culpability assessment, particularly in cases where culpability is assessed as high.'

⁶¹ *People (DPP) v Fitzpatrick* [2025] IECA 20 [31]; *People (DPP) v O'Reilly* [2023] IECA 66 [33]; *People (DPP) v Samuilis* [2018] IECA 316 [41]. The factor is included in O'Malley's list of general aggravating factors: O'Malley (n 29) 7.06.

Secondly, assume that a person commits an offence during a riot but does not care much for the riot; it is just a useful distraction.⁶² Say, an opportunist thief who would have been equally content if the commotion had been caused by a parade or peaceful protest. Such an offender would still have knowingly contributed to widespread unlawfulness and would have done so for personal gain. They would still have taken the same risks as a rioter with respect to stimulating further harm and they should still be accountable for contributing to the total state of unlawfulness. The opportunist would thus share the harm and culpability factors that make offending as part of a riot so serious. It is thus suggested that sentencing judges should give little weight to arguments to the effect that a person was committing the offence during a riot, not as part of the riot.

Thirdly, what of a judge who is to sentence a 17-year-old who pleaded guilty to criminal damage during a riot who has underlying mental health problems and no previous convictions? The sentencing of children and young people involved in a riot is likely to give rise to considerable difficulties with respect to accounting for their culpability in arriving at an appropriate headline sentence. It is also far from fanciful to imagine such cases progressing to the Superior Courts given Gardaí indications of the notable involvement of young males in public disorder at Citywest.⁶³

A 17-year-old who committed an offence during a riot would share the risk of stimulating wider harms and the contribution to the total state of unlawfulness. But what of their comparative culpability? It is likely that they would have knowingly contributed to widespread unlawfulness. Yet culpability extends beyond matters of *mens rea* and purpose. It is commonly recognised that children are not as developmentally mature or as morally blameworthy as adults, and that they are more easily influenced than others.⁶⁴ The Supreme Court has recently captured the point

⁶² See, likewise, O'Malley (n 29) 7.23.

⁶³ Gardaí specifically appealed to young males to avoid becoming involved in public disorder at Citywest: An Garda Síochána, 'Update 5 and Notice of Media Briefing - Serious Public Disorder, Saggart, Co Dublin – 21st/ 22nd October 2025' (*An Garda Síochána*, 23 October 2025) <www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2025/october/update-5-and-notice-of-media-briefing-serious-public-disorder-saggart-co-dublin-21st-22nd-october-2025.html> accessed 9 December 2025.

⁶⁴ *People (DPP) v BM* [2025] IECA 185 [49]; O'Malley (n 41) 306-309; Sentencing Council, *Sentencing Children and Young People* (Sentencing Council, 2017) <<https://sentencingcouncil.org.uk/guidelines/sentencing-children-and-young-people>> accessed 9 April 2026; Ashworth and Kelly (n 43) 377.

well, stating that young age 'can reduce culpability' because it 'affect[s] the level of insight and control that a person has over their choices and actions, and [it] therefore affect[s] the level of responsibility that can fairly be attached to the offender.'⁶⁵

For these reasons, it is suggested that the extent of any uplift arising from the context of a riot should be, at least, reduced due to the offender's status as a child. It would feel somewhat jarring to mitigate for immaturity whilst also aggravating sharply for rioting when immaturity may be the underlying cause of participating in the riot. That is, children may be more easily influenced to participate in the riot and some may not think consciously about the decision before participating.⁶⁶ In *Blackshaw*, the Court of Appeal of England and Wales gave short shrift to the argument that the offending was 'mindless' and followed widespread offending by others.⁶⁷ But even in this case that promoted the condign punishment of rioters, the Court did acknowledge that none of the appellants were children, young offenders or had 'significant mental health problems.'⁶⁸ It thus left a space for a more parsimonious approach to the sentencing of children.

It is here important to recall that the Children Act 2001 makes explicit reference to age and level of maturity as factors to consider in the sentencing of children and specifies that 'in particular, a period of detention should be imposed only as a measure of last resort.'⁶⁹ Judges should make every effort to avoid custodial sentences for children who commit offences during a riot and where such a sentence must be imposed, it should be deferred unless there is a compelling case for immediate detention.⁷⁰ Though the example considers a child, many of the same considerations should apply when sentencing a young adult.⁷¹

⁶⁵ *Mountassir* (n 26) [121] (O'Malley J).

⁶⁶ Gareth Morrell, Sara Scott, Di McNeish and Stephen Webster, *The August riots in England: Understanding the involvement of young people* (NatCen 2011) ch 4.

⁶⁷ *Blackshaw* (n 8) [9] (Judge LCJ).

⁶⁸ *ibid* [9] (Judge LCJ).

⁶⁹ Children Act 2001 s 96.

⁷⁰ Compare to (1) the suspending of Dylan Willis's sentence in *Cush* (n 13) [39]-[48]; and (2) the comment as to the position of children, young people and those 'with significant mental health problems' in *Blackshaw* (n 8) [9] (Judge LCJ).

⁷¹ See further O'Malley (n 41) 346-349.

Riot or protest?

Riots and protests may overlap in numerous ways. As described in the introduction, the Citywest Hotel riots followed protests at the same location the day prior, which had passed with little trouble.⁷² The riots that gave rise to the Court of Appeal decision in *Blackshaw* had begun as protests outside Tottenham Police Station, after the shooting of Mark Duggan, which became violent.⁷³ This overlap creates difficulties at sentencing because there is an argument that those who commit certain offences during a protest should receive lesser sentences. If that is correct, there is a clear practical need to be able to distinguish between rioters and protesters at sentencing. In this section, I engage with the rationale for reduced sentencing for protesters before dealing with a series of hypotheticals that illustrate the difficulties in distinguishing protesters from rioters at sentencing.

Absent direct Irish authority, a useful starting point on the reduced culpability of those who commit offences whilst engaged in civil disobedience was provided by the Court of Appeal in England and Wales in *R v Trowland*, which concerned a Just Stop Oil protest that closed a major road for around 40 hours.⁷⁴ Giving judgment, Carr LJ observed that protesters may, in some cases, have lesser culpability than other offenders:

a conscientious motive on the part of protesters may be a relevant consideration, in particular where the offender is a law-abiding citizen apart from their protest activities. In such cases, a lesser sanction may be appropriate: a sense of proportion on the part of the offender in avoiding excessive damage

⁷² McCarron and McDonald (n 7).

⁷³ *Blackshaw* (n 8) [24].

⁷⁴ [2023] EWCA Crim 919, [2024] 1 WLR 1164. There has been a wider stream of case law concerning penalties for protesters in the United Kingdom and before the European Court of Human Rights. See, for instance, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 [97]–[99]; *R v Hallam* [2025] EWCA Crim 199, [2025] 4 WLR 33; *Kudrevičius v Lithuania* (Judgment) [GC] App No 37553/05 (15 October 2015) *Bodson v Belgium* (Judgment) ECtHR App No 35834/22 (16 January 2025) [119]–[121]. For brief comment, see Brian Christopher Jones, ‘The Recent Civil Disobedience Fidelity to Law’ (2025) 96(3) *The Political Quarterly* 538, 542–543.

or inconvenience may be matched by a relatively benign approach to sentencing.⁷⁵

There may indeed be good reason for the reduced sentencing of protesters based on culpability where such protest is non-violent, in furtherance of a genuinely held belief,⁷⁶ and the interference with others' rights is no more than is necessary to engage in the act of civil disobedience.⁷⁷ In the same direction, the European Court of Human Rights has an established jurisprudence to the effect that where an offence limits freedom of assembly, there is a need for parsimony in punishment due to the risk of 'a chilling effect on the legitimate exercise of the right'.⁷⁸ The Court has held that the more severe the relevant sanction imposed, the less likely that an interference with the right to assembly will be proportionate and that criminal sanctions 'require particular justification'.⁷⁹

Returning to *Trowland*, the court also placed two important limits on this principle. First, the more serious the offence, the less likely that a conscientious motive will reduce culpability.⁸⁰ This is a sensible limitation. Mass protest will almost inevitably

⁷⁵ *Trowland* (n 74) [50]. See also, *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, 177 (Lord Hoffmann). The judgment in *Trowland* (n 74) [50] also notes deterrence as a possible rationale for reduced sentences for protesters. That rationale is of less relevance in this jurisdiction as discussed above.

⁷⁶ The court in *Trowland* was quite clear that it is not for the judiciary to judge the merits of particular causes: (n 74) [50]. There has been some criticism of this in commentary querying whether every belief will be and should be equally important at sentencing: Lyndon Harris, 'Sentencing: *R v Trowland* (*Morgan*) Court of Appeal (Criminal Division): Carr LJ, Cutts and Thornton JJ: 31 July 2023; [2023] EWCA Crim 919' (2023) 12 Criminal Law Review 800, 803-804. Here it should be noted that the European Court of Human Rights has a developed case law concerning how the protections of freedom of assembly in Article 11 of the ECHR do not apply to assemblies which 'deny the foundations of a "democratic society"'. See, eg, *Fáber v Hungary* (Judgment) ECtHR App no 40721/08 (24 July 2012) [37].

⁷⁷ By comparison, in this jurisdiction there is clear authority that the policing of a riot must be proportionate: *Lynch v Fitzgerald* [1938] IR 382 (SC). The focus in the context of sentencing will be proportionality in the sentencing law sense of the term; that is between the offence and the sentence imposed: *Lynch* (n 30) [54]. It may also be argued that lower culpability may follow from recent Supreme Court *dicta* to the effect that culpability may be increased where an offender 'intentionally maximised the harm done': *Mountassir* (n 26) [122] (O'Malley J). By extension, if an offender has intentionally minimised harm done, this would seem to indicate lesser culpability.

⁷⁸ O'Malley (n 41) 190-191. See, for example, *Nemtsov v Russia* (Judgment) ECtHR App no 1774/11 (31 July 2014) [77]; *Balçık v Turkey* App (Judgment) ECtHR App no 25/02 (29 November 2007) [41].

⁷⁹ *Kudrevičius* (n 74) [146]. There is limited Irish case law concerning freedom of assembly: Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Publishing 2018) para 7.6.138.

⁸⁰ *Trowland* (n 74) [50].

cause disruption by the fact that a large group has gathered in a place and indeed this is often an intentional means of achieving the protest's aim.⁸¹ By comparison, more serious offending risks losing the protesters message in the means of communication. Rawls draws distinctions between violent and non-violent offending, and between behaviours that affect other's civil liberties and those which do not:

To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address. Indeed, any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act.⁸²

In fact, those who commit serious violent offences may have their culpability *increased* by a political motivation. For example, schedule 21 to the Sentencing Act 2020 of England and Wales, imposes a whole life starting point for murder committed 'for the purpose of advancing a political, religious, racial or ideological cause'.⁸³

As a second limitation, the court in *Trowland* specified that although a conscientious motivation may reduce culpability, an offender can remain highly culpable due to other factors.⁸⁴ This is, again, a reasonable limit because culpability may be raised by significant premeditation, sophisticated planning and the offender taking on a leading role.⁸⁵ It would go too far to say that all protesters *must* automatically be regarded as offenders of low culpability.

Even if the reader is not satisfied that protesters should sometimes receive lesser sentences on the basis of reduced culpability, there remains good reason to distinguish between protesters and rioters. Protest-related offending may or may not be of lower culpability, but riot-related offending will generally justify higher sentences as discussed above. In broad terms, rioters' sentences should be increased whereas

⁸¹ See further Illan rua Wall, 'The right to protest' (2024) 28(8–9) *The International Journal of Human Rights* 1378, 1383.

⁸² John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 366 as cited in Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience" (2004) 10(4) *Res Publica* 337, 349. Brownlee provides a limited defence of some forms of violence constituting civil disobedience at pp 348–350.

⁸³ See, likewise, Kimberley Brownlee's claim that 'modest coercion does not muffle disobedients' moral plea in the way that radical protest does, and so its use can be consistent with the persuasive aims of civilly disobedient communication': Kimberley Brownlee, 'The communicative aspects of civil disobedience and lawful punishment' (2007) 1(2) *Criminal Law and Philosophy* 179, 181.

⁸⁴ *Trowland* (n 74) [72].

⁸⁵ See generally, O'Malley (n 41) 139–140. Note 'extensive planning' is recognised as a factor increasing culpability in *Trowland* (n 74) [72].

protesters' sentences may, in some circumstances, be decreased. Yet drawing the line between a protest and riot for the purposes of sentencing is more challenging than may be expected.⁸⁶ A core facet of the distinction is whether those in attendance engaged in violence.⁸⁷ However, it would be overly simplistic to assume that the presence of violence renders an entire gathering a riot and all participants rioters.⁸⁸ I will take a series of examples to illustrate the complexities.

First, assume that D attends a planned protest concerning a perceived social injustice. The plan, which D knows and intends to follow, is to spray paint a slogan drawing attention to state inaction onto a government building.⁸⁹ D spray paints the building as planned. The event later becomes more aggressive with shouting at Gardaí followed by the lobbing of rocks and other projectiles and, ultimately, a full-scale riot ensues.

On these facts, assume that D sees what is happening, decides this is not what they wanted to participate in and leaves. On such facts, D should be sentenced as a protester and not a rioter. The sentencing judge would need to scrutinise the timelines and D's state of knowledge because violence may have started elsewhere before D became aware of it. But if D withdraws as soon as they become aware of violence, an elevation of sentence would be inappropriate. This is, of course, on the assumption that D did not contribute to the escalation either through their offence or more generally. It is wholly conceivable that the build-up to spray painting (say by shoving past Gardaí to get to the building) or the message spray painted (an incendiary slogan) could be seriously aggravating.

Now assume on the same starting facts that D instead stays, participates in the riot and throws a rock at a Garda. D would be sentenced for (1) criminal damage during the protest, and (2) assaulting a peace officer during the riot.⁹⁰ The severity of the latter offence would be increased by the riot context. The criminal damage offence is more

⁸⁶ cf *Hyland v Dundalk Racing (1999) Ltd* [2014] IEHC 60 [73].

⁸⁷ For clarity, a person may still commit an offence where their conduct is non-violent protest: *Bennett* (n 41). For comment on the limitations of the right to assembly in Article 40.6.1.ii of the Constitution, see Niamh Barry and Macdara Ó Drisceoil, 'Constitutional Right to Protest and the Freeman on the Land Movement' (2017) 1 IJSJ 40.

⁸⁸ For comment on violence and the limits of Article 11 of the ECHR, see David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing 2010) ch 3.

⁸⁹ Contrary to Criminal Damage Act 1991, s 2(1).

⁹⁰ Contrary to Criminal Justice (Public Order) Act 1994, s 19.

difficult and fact contingent. If D had attended the protest without knowing or believing that it may become a riot, there is a case to be made that they should still benefit from any reduction in culpability for protesters with respect to the criminal damage. On such facts, it seems likely that the less serious protest offence would be taken into account when arriving at an appropriate sentence for the assault offence.⁹¹

As a final alternative, assume that D is the first to shout at and hurl items at Gardaí. Here, D's assault would be significantly aggravated because they played a central role in turning a peaceful protest into a violent riot. They would bear significant responsibility for the wider risk of harm this transition entails. Again, the criminal damage would likely be taken into account when sentencing for the assault. The key difference lies in the markedly increased seriousness of the offence, which here triggered the riot.

The first example allows for an assessment of the relative seriousness of offending as a protest becomes a riot. The second set of starting facts will help to draw out the difficulties related to what may be described as 'mixed crowd cases' in which some in attendance are protesting and some are rioting. Assume that D attends a largely peaceful event at which they commit a non-violent protest offence: blocking a road as part of a climate change protest.⁹²

As a first extension, assume that a small minority (five out of 200) of participants behave violently, throwing projectiles at motorists trying to go around the blockade. On such facts, D should still benefit from any reduction in culpability associated with civil disobedience. D intended to engage in non-violent protest and they neither participated in nor supported the minority's violence.⁹³ Useful comparison can be made to the *dictum* of Hogan J in *Hyland v Dundalk Racing (1999) Ltd* concerning the lawfulness of a protest:

The right of free speech and free assembly are critical constitutional rights and they are vital to the functioning of the free and democratic society posited by

⁹¹ Per proposition 3 in *Faulkner* (n 25) [9].

⁹² Contrary to Criminal Justice (Public Order) Act 1994, s 9. For discussion of the reasonable excuse defence in that context see *Bennett* (n 41).

⁹³ See, likewise, the case law on the applicability of Article 11 of the ECHR: the 'sporadic violence' of others does not remove a non-violent protester's Convention rights eg, *Russ v Germany* (Judgment) ECtHR App no 44241/20 (20 May 2025) [36].

Article 5 of the Constitution. The principle of proportionality comes into play here and the right of protest is not to be lost *merely* because of the regrettable lapses on the part of an undisciplined minority.⁹⁴

The question in the context of sentencing is, of course, not one of lawfulness: D has committed an offence, but Hogan J's point cross-applies. The actions of a minority should not result in D being sentenced as a rioter as opposed to a protester.

More challenging sentencing exercises would arise where a protester continued to protest knowing this was encouraging the violent behaviour of the others.⁹⁵ In such cases, D's culpability may be both (1) increased, for knowingly encouraging the more serious offending through their wilful obstruction and (2) decreased for acting within a protest context. The precise balance of these culpability factors would depend on the particular facts.⁹⁶

As another extension, assume that about half those in attendance, including D, are there to obstruct a road for a short period, but the other half are rioters attacking motorists and emergency workers. In such genuinely mixed crowd cases, Hogan J's *dictum* is less applicable. If D knew or believed that a significant portion of the crowd intended to commit violent offences, their sentencing profile would have features associated with standard cases of both rioters and protesters. On the one hand, they have committed a minimal non-violent act in keeping with a genuinely held political belief. On the other, their presence may knowingly embolden the rioters or lend social cover to violence.

Where the vast majority of attendees are peaceful, and D neither supports nor contributes to the violence, aggravation for a rioting context is difficult to justify. By contrast, where the majority are rioting and D knows this and knows their conduct risks emboldening the rioters, aggravation becomes more likely. Inevitably, there will be

⁹⁴ *Hyland* (n 86) [88] (emphasis in original). See, likewise, in the context of the European Convention on Human Rights: *Primov v Russia* (Judgment) ECtHR App no 17391/06 (12 June 2014) [155]; *Shmorgunov v Ukraine* (Judgment) ECtHR App no 15367/14 (21 January 2021) [490]-[491]. Note that *Hyland* was appealed to the Court of Appeal: [2017] IECA 172.

⁹⁵ cf Hogan et al (n 79) para 7.6.163.

⁹⁶ It is far from unusual to have culpability factors that point in opposite directions. Consider, for instance, an offender who led and planned an offence but who had a very sympathetic underlying motivation.

testing borderline cases concerning very mixed crowds. Here, D's knowledge and belief will be central. A guiding principle, or at least a starting point, may be: did D knowingly contribute to a riot, or did D intend to contribute to a peaceful protest? Little more than a starting point can be offered as so much will be fact specific. In practice, any given case may be a mixed crowd case *and* involve a transition from a protest to a riot.

What is more, questions will arise as to what on the facts constitutes an effective withdrawal by a protester when violence arises. Will this require leaving the relevant location? What of the protestor who moves away from the violence to rejoin a part of the protest that has remained non-violent? Could non-assistance to a violent minority be sufficient? Would disavowal ever be required? At a level of generality, perhaps it can be said that the greater the degree of violence and the greater the individual's connection to that violence, the greater the action that would be required for there to have been an effective withdrawal.⁹⁷

Added to these complexities, there will be any other number of offence- and offender-related factors such as the scale and severity of the riot, previous convictions, plea, intoxication and age. The purpose of the above examples is twofold. First, to demonstrate that a simple distinction cannot be drawn between riot and protest with reference to violence. Secondly, to draw out some of the complexities which may arise where it is contestable as to whether a person has committed a criminal offence during a protest (which may reduce culpability) or a riot (which will increase harm and culpability).

Conclusions

The riots in 2023 and 2025 give rise to questions across the criminal justice system. How should Gardaí respond to such offending both during the riot and in its aftermath? How should the DPP select an offence with which to charge? This latter question is pertinent given the overlap between numerous offences that may occur during a riot.⁹⁸ The focus in this article has been on sentencing. When sentencing

⁹⁷ As above, the European Court of Human Rights has held that the 'sporadic violence' of others in attendance will not result in a peaceful protestor forfeiting their Article 11 protections nor will a real risk of violence caused by those outside the organiser's control: *Laguna Guzman v Spain* (Judgment) ECtHR App no 41462/17 (6 October 2020) [34]; *Primov* (n 94) [155]. For comment, see Mead (n 88) 69.

⁹⁸ As in other contexts, decisions earlier in the criminal justice system may have significant ramifications for the sentencing of rioters. See generally Ashworth and Kelly (n 43) 57-61; O'Malley (n 41) 11-13.



rioters, there are sound reasons to impose elevated penalties. These reasons are the rioter's contribution to the wider harms associated with the riot; the risk of further harms by perpetuating the riots; and a heightened culpability for contributing to these wider harms knowingly or intentionally. Of course, every sentencing exercise will be fact specific, as was demonstrated by the three brief examples of issues which may arise when sentencing rioters in practice. Those exercises related to sentencing young people; those who have messaged about attending riots online; and those who commit offences during a riot unrelated to the riot.

Sentencing at the boundaries of rioting and protest also raises numerous difficulties. There are plausible arguments for imposing shorter sentences on those who offend as part of a non-violent protest due to their lower culpability. The underlying question of fact for the judge, therefore, will be as to whether they are sentencing a rioter or a protester, a distinction that may become blurred and contested in practice. Both the sentencing of rioters in general and the distinction between rioters and protesters at sentencing are ripe for appellate consideration. It is hoped that if and when such cases arise, the analysis in this article will assist.