PREFACE

The object of this book is to provide a comprehensive account of public order law. The emphasis is upon public order law in the context of protest, but not to the exclusion of other relevant aspects of the subject.

The law of public order is often made to reflect its time. The Public Order Act 1936 was born out of the fascist marches of the 1930s. The Public Order Act 1986, still the bedrock of the modern law, came after the Southall riots of 1979 and the Brixton disorders of 1981, events fuelled by a blend of race and inner city discontent. More recently the Serious Organised Crime and Police Act 2005 tried, but failed, to bring an end to what some MPs called 'unsightly' camps of protestors, outside the home of democracy in Parliament Square.

Just as protest itself has moved on from the miners' strike and secondary picketing at factories in the 1970s and 1980s to environmental issues such as GM crops; nuclear power stations; and airport runways; protest against war and conflict has always brought people to the streets. Once it was the Vietnam war, now it is Iraq, Afghanistan, and Palestine, Burma, and Sri Lanka, to name but a few. Protest may often seem a symbol of somebody else's problems far away: a lone protestor and a tank in Tiananmen Square; monks in Tibet; students in Tehran; even the refusal of Rosa Parks to give up her seat on the bus in Montgomery, Alabama. But sometimes it happens in your own backyard, often a local issue of burning concern—an ugly skyscraper; a mobile telephone cell mast; a village bypass. Then you hear, in Surrey or Cheshire, 'I never thought I'd join the great unwashed.' In short, protest may be international or local, on big issues or small. But as long as it is peaceful, it forms an important role, described by a senior judge as 'the lifeblood of democracy'.[1]

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It is not always peaceful, though. Disorder has taken place not just in London, but in Southall and Brixton, and in Trafalgar Square against the poll tax in 1990. In Bradford in 2001 race protest became violent and widespread, and was prosecuted as riot, with heavy deterrent sentences. There has been police violence too. It may be rare but it is not new. It is always shocking. For example, in 1979 Blair Peach, a teacher, was killed by still unidentified police officers on his way home from a demonstration in Southall. Exactly thirty years later in 2009 a newspaper seller, not a protestor, was pushed over and baton struck by a police officer. He was on his way home too, trying to avoid police no-go zones to control protests at the G20 summit in London.[2] Minutes later he collapsed and later died, apparently of a heart attack.

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[1] Lord Steyn in *R v Home Secretary of State, ex p Simms* [2000] 2 AC 115, 126.
[2] See <http://www.guardian.co.uk> video footage.

But despite some violence and discontent, and the ever present threat of public terrorism, the theme of liberty still runs strong and deep. And for good reason. Whatever view you hold about the purpose or effect of demonstrating, public protest is at the heart of any reasonably free and open democracy. It is the outward and visible sign of serious complaint, usually by those who have no more power than the right to vote every few years. What I wrote twenty years ago still holds good today: 'The right to peaceful protest is a traditional and legitimate expression of a point of view. Peaceful protest is public, open and visible. It is designed to inform, persuade and cajole. It may be a nuisance; it may even be intended to be. It is often noisy and inconvenient. But it is a legitimate form of public expression, protected by the European Convention on Human Rights.' That Convention has now become embodied in the Human Rights Act 1998.

Freedom of expression in public has long been enshrined in English law—not in statute but by statements of the judges. Lord Denning said in 1976 in *Hubbard v Pitt* that 'The right to demonstrate and the right to protest on matters of public concern . . . are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done.'[3] He referred to 'the undoubted right of Englishmen' to meet together, to go in procession, to demonstrate, and to protest on matters of public concern.[4] Lord Justice Sedley stated in *Redmond-Bate v DPP*[5] that 'Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear.'

But the common law cases started from a negative standpoint. Protest was lawful only when it infringed no other law. Since then the Human Rights Act 1998 has incorporated into English law the European Convention on Human Rights. And freedom of expression and freedom of assembly, Articles 10 and 11 of the Convention, have taken their place in the front row. They are positive rights, and although they are not absolute rights, any violation of them must be justified by the State. Decisions of the European Court of Human Rights have frequently repeated the value of these rights. For example in *Handyside v UK*[6] the Court recognized that 'Freedom of expression constitutes one of the essential foundations of . . . a [democratic] society, one of the basic conditions for its progress and for the development of every man.' The State now has a positive duty to safeguard Article 10 and 11 rights. While Convention rights are not 'a trump card', the courts are obliged to ensure that the exercise of them is 'practical and effective', not merely 'theoretical and illusory'.[7]

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[3] [1976] QB 142, 178.
[4] See also *Kent v Metropolitan Police Commissioner*, The Times, 15 May 1981.
[5] [2000] HRLR 249; [1999] EWHC Admin 732.
[6] (1976) 1 EHRR 737, para 49.
[7] *Artico v Italy* (1981) 3 EHRR 1, para 33.

This is a big change: from a negative standpoint to a positive assertion of rights. The change means that any interference with the right of expression or assembly by way of protest must be 'prescribed by law', justified by the State, and be 'proportionate' in terms of restriction. Even protest causing disruption may be tolerated, and therefore not prosecuted; so long as the disruption is peaceful; does not put the safety of the public at risk; is of modest duration; and does not interfere substantially with the rights of others.[8] The new approach is illustrated by a decision about Parliament Square. Westminster City Council tried to remove by way of injunction Brian Haw's encampment there as an obstruction of the highway. The finding against the Council included the 'significant consideration' that Haw was exercising his right to freedom of expression on a political issue, and directly in front of Parliament which he wished to influence over its policy towards Iraq.[9]

But there have been many other developments in the law of public order in recent times. Since I wrote *Public Order Law* in 1987, shortly after the 1986 Act came into force, much has changed. The main public order offences have remained the same both in the Act and elsewhere. Riot, violent disorder, and affray in the 1986 Act and lesser offences elsewhere such as obstruction of the highway and obstructing a police officer in the execution of his duty are still widely used, alongside old common law breach of the peace powers.

But a remarkable number of new measures have been created or approved. *Justice* has described them as 'a bewildering array of [overlapping] powers and offences', decreasing the foreseeability and predictability of the law. They include 'kettling'. The House of Lords decided in *Austin v Metropolitan Police Commissioner*[10] that the police could 'in very exceptional circumstances' cordon off a group of protestors for hours on end, without food, drink, or toilets, in order to prevent an imminent breach of the peace.

Other offences and powers not designed to inhibit protest have been used by the police: for example, dispersal under the Anti-social Behaviour Act 2003 (ss 30–6), and the use of the Protection from Harassment Act 1997, originally designed to catch stalkers. The Human Rights Joint Committee of the House of Commons has recommended the repeal of the 'insulting words' element of the offence of harassment, alarm, or distress, contrary to s 5 of the Public Order Act 1986, which has been used inappropriately, for example against a protestor with a sign, 'Scientology is not a religion, it is a dangerous cult' and a student in Oxford who called a police horse 'gay'. There are new powers under the Police Reform Act 2002 for Police Community Support Officers and new powers to stop vehicles (s 59). Trespassers (and unauthorized campers) may now be prosecuted in a number of specific circumstances (Criminal Justice and Public Order Act 1994, ss 61, 68, 69, 77; Serious Organised Crime and Police Act 2005, s 128).

And terrorism has brought its cost. Five Acts of Parliament dealing with terrorism have been passed this last decade alone. Within them there are controversial measures affecting everyday activity, which are used at demonstrations against protestors and journalists. These include wide stop and search powers without the need for the police to have any

[8] Although there is some conflict of European authority: see Ch 10.
[9] *Westminster City Council v Haw* [2002] EWHC 2073, QB, Gray J, see 3.122 et seq and 4.46.
[10] [2009] 1 AC 564.

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reasonable suspicion (Terrorism Act 2000, ss 44–47), for example against a protestor and a journalist outside an arms fair at the Excel Centre in Docklands.[11] These sections also give further powers to stop vehicles. There are powers which are perceived to criminalize photographing and filming of police officers (Counter-Terrorism Act 2008, s 76). At the same time the police have been criticized for collecting their own data on individuals who have acted lawfully.[12]

The 'designated area' provisions are designed to curb protests in Parliament Square and opposite Downing Street by requiring at least twenty-four hours' notice (Serious Organised Crime and Police Act 2005, ss 132–8). Gordon Brown's promise in 2007 to repeal them remains unfulfilled. When the Home Office was asked to state what alternative laws were available should the Parliament Square powers be repealed, it itemized twenty-two separate available powers and offences without it being 'an exhaustive list'.

This may all be a far cry from the sweeping powers given to local police in Zimbabwe to ban political rallies and prosecute for criticizing the president (Public Order and Security Act 2002, ss 16, 26, and 27). But there is a trend, driven by political will and reflected in other areas of the criminal law, to keep making more law without codification or apparent thought for the adequacy of existing powers. With this backdrop of increasing laws and perhaps increasing uncertainty as to what the law exactly is, we have ventured to guide the lawyer, student, and citizen through the maze. If the emphasis lies inevitably with the criminal law and police powers, civil law aspects are not ignored.

I would like to thank the team of authors for their hard work and dedication to this project. Special thanks must go to Faye Judges who as publishing editor has born the brunt of tardy text, along with Emma Barber at OUP. It has been a pleasure to work with them. Thanks also to Anna Edmundson, Alison Pickup, Gemma Hobcraft, Sarah Hemmingway, David Wood, and Bridget Palmer for their valued legal research.

The law is stated, with best endeavours at accuracy, as at 15 January 2010. At this time s 290(2) of the Criminal Justice Act 2003, which will extend the power of magistrates to sentence for a single offence which carries imprisonment from six months to fifty-one weeks, is not yet in force. Nor are various provisions of the Policing and Crime Act 2009 which received Royal Assent on 12 November 2009.

PETER THORNTON
Central Criminal Court
Old Bailey
15 January 2010

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[11] The *Gillan* case [2006] 2 AC 307, and despite police guidance that the power 'must never be used as a public order tactic' (National Policing Improvement Agency). Cf., however, the decision of the European Court of Human Rights, at 6.87 et seq.

[12] For the limits on collection and storage, see *Wood v Metropolitan Police Commissioner* in the Court of Appeal, at 10.48 et seq.

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10. Human Rights

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THE PUBLIC ORDER ACT 1986: OFFENCES

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A. Introduction

1.01 This chapter examines the main criminal offences under the Public Order Act 1986—those of riot (s 1), violent disorder (s 2), affray (s 3), causing fear or provocation of violence (s 4), and causing harassment, alarm, or distress (s 5). It will look at the origins of the Act, the essential elements of the offences, defences and sentencing. It will also look at aspects of the Act's compatibility with the European Convention on Human Rights.[1]

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) as scheduled by the Human Rights Act 1998, Sch 1.

1.02 The Public Order Act 1986 abolished the common law offences of riot, rout, unlawful assembly, and affray (s 9(1)). It also replaced offences under the Public Order Act 1936 (s 9(2)). The 1986 Act was passed amid the tumult of industrial unrest and social discord in the inner cities which characterized the early 1980s. It was an attempt to clarify and rationalize, but not to codify, the law of public order.

1.03 Today, the Act is widely used, not only for the large-scale disorder which existed at the time of its inception, but also to deal with the low-level disorder and 'anti-social' behaviour which is the target of a range of recent government initiatives. In 2008/2009, there were over 37,700 reported public order offences, of which only three were riot and 1,020 violent disorder.[2]

1.04 Two important concepts are important to grasp at the outset. Firstly, although the 1986 Act deals with episodes of violence, it focuses less upon individual victims of violence (for whom the Offences Against the Person Act 1861 deals with various offences of assault), and more upon the wider public who may be caused to fear for their own personal safety by scenes of disorder. Hence, the 'victim' of the offences under the Act is not the person who is assaulted, but the hypothetical 'person of reasonable firmness present at the scene'. Secondly, although the Act is concerned with 'public' order, many of the offences can be committed in private.

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B. Riot: Public Order Act 1986, s 1

Historical development

1.05 Historically, serious riots such as the Sacheverell Riots of 1710 (which led directly to the passing of the Riot Act 1714) were prosecuted as high treason and met with the death penalty. The Chartists led by John Frost at the Newport Rising of 1839 were convicted of high treason and sentenced to be hanged, drawn, and quartered. Ultimately the Prime Minister, Lord Melbourne, commuted their sentences to transportation to Tasmania.

1.06 At common law the offence of riot (or riotous assembly) was defined by Hawk PC, bk 1, ch 65, s 1, as

> a tumultuous disturbance of the peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.

1.07 Thus, in the common law we can see the origins of the modern offence. At common law, there were five essential elements of riot

(a) the presence and participation of at least three persons;

[2] Walker et al, *Home Office Statistical Bulletin*: *Crime in England and Wales 2008/09* (July 2009). Curiously, however, aside from riot and violent disorder, the vast majority of those recorded offences are described by the Home Office as 'Other offences against the State and public order'.

(b) a common purpose, whether lawful or unlawful;
(c) the execution or inception of the common purpose;
(d) an intent to help one another by force if necessary against any opposition to the execution of the common purpose; and
(e) the use or threat of force in executing the common purpose which is such as to terrify at least one person of reasonable firmness.

The penalty at common law was life imprisonment. **1.08**

The Law Commission Report, *Offences Relating to Public Order*,[3] recommended a number of changes to the common law. Firstly, the Law Commission proposed a new offence of violent disorder as a middle ground between riot and affray. Violent disorder, as we will see later in this chapter, was designed to replace the common law offence of unlawful assembly and deal with incidents involving at least three people. The Law Commission queried whether, given that the new offence of violent disorder penalized acts of group violence with a maximum sentence of five years' imprisonment, the law of public order could effectively operate without any offence of riot.[4] Their answer was 'no', citing the case of *Caird*,[5] that riot is an offence 'which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose'. **1.09**

Therefore, secondly, the Law Commission proposed a substantial increase in the number of participants required in order to form a riot, from three to twelve. The Commission conceded that any number is to some extent arbitrary. However, twelve has some historical basis, since under the Riot Act 1714 (repealed in 1967), if twelve persons were still assembled one hour after the order for dispersal ('the reading of the Riot Act'), they were guilty of a felony. **1.10**

Thirdly, to reflect the extreme gravity of the offence, marked by the substantial increase in the number of participants and the contrast with violent disorder, the maximum penalty for riot would remain significantly higher than for other public order offences, at ten years' imprisonment (though no longer life imprisonment, as under the common law). Treason and Tasmania were no longer an option. **1.11**

Fourthly, the Law Commission recommended that the element of 'common purpose' be retained but attempted to clarify it. **1.12**

It will be noted that, fifthly, the mental element of the offence also changed, see below. **1.13**

With that brief, historical context in mind, we now turn to the modern offence of riot under the Public Order Act 1986. **1.14**

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[3] Law Com 123, 24 October 1983, Cmnd 9510.
[4] Ibid, p 9, para 2.10.
[5] (1970) 54 Cr App R 499, 505.

The definition of riot under the Public Order Act 1986, s 1

1.15 Riot is the most serious offence under the 1986 Act. The elements of the offence are defined in s 1 as follows:

> (1) 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.
> (2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.
> (3) The common purpose may be inferred from conduct.
> (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
> (5) Riot may be committed in private as well as in public places.
> (6) A person guilty of riot is liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both.

Jurisdiction

1.16 The offence of riot is triable only on indictment (s 1(6)), which means that it may only be tried in the Crown Court by judge and jury.

1.17 The offence of riot is reserved for exceptionally grave cases, as reflected by its maximum sentence of ten years and the fact that the consent of the Director of Public Prosecutions (DPP) is necessary before a prosecution can be instituted.[6]

1.18 The Crown Prosecution Service's *Charging Standards* outline the kind of disorder which might appropriately be charged as riot: the normal forces of law and order have broken down; due to the intensity of the attacks on police and other civilian authorities, normal access by emergency services is impeded by mob activity; due to the scale and ferocity of the disorder, severe disruption and fear is caused to members of the public; violence carries with it the potential for a significant impact upon a significant number of non-participants for a significant length of time; organised or spontaneous large scale acts of violence on people and/or property.[7]

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Essential elements of the offence

1.19 There are six essential elements of the offence of riot:

- twelve or more persons
- present together
- using or threatening unlawful violence
- for a common purpose (use of violence in furtherance thereof)
- a person of reasonable firmness
- mental element.

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[6] Section 7(1). No prosecution for an offence of riot or incitement to riot may be instituted except by or with the consent of the DPP.

[7] See <http://www.cps.gov.uk/legal/p_to_r/public_order_offences/index.html#_Charging_Standard>.

Twelve or more persons

1.20 The 1986 Act significantly increased the requisite quorum for a riot from three to twelve people. The Law Commission conceded that selecting any number was an arbitrary exercise, though twelve has some historical origin in the Riot Act 1714.[8] It has also been noted that twelve is something of a magic number in criminal law,[9] as it is the number required for a jury in a criminal trial. That said, in raising the number from three to twelve, the 1986 Act ensured that this offence was reserved for incidents beyond the scope of the average pub brawl.

1.21 The gravamen of riot, therefore, is the presence of large numbers. In reality, and given that the consent of the DPP is required, the offence will only be charged where there are significantly more than twelve participants, so it will rarely be necessary to conduct a head count.[10]

Present together

1.22 The twelve or more persons must be present together (see s 1(1)), though it is immaterial whether or not the twelve or more use or threaten unlawful violence *simultaneously* (s 1(2)). This suggests that their presence and activity should normally be proximate in time and place. Where separate incidents spring up over a period of time, for example over a period of days during repeated inner city tension in one broad locality, it is better practice to charge them as separate offences.[11]

1.23 Riot, as with other public order offences, such as affray, can be a continuing offence, but it is a question of fact and degree. Thus, it was held to be a single offence (of affray) where the accused were milling about, armed, and threatening violence over a period of four hours and across a radius of a quarter of a mile.[12] However, where the ingredients of an offence cease to exist for a period of time, the offence is over. Should those ingredients come into existence again, a second offence occurs. So, where the offenders travelled by coach to a number of different sites, causing terror at each, but were peaceful during transit between sites, then there were a number of separate offences rather than one continuous offence.[13]

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[8] Riot Act 1714 (Long title: 'An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing of the rioters'). Section 2 provided for a proclamation to be made 'in a loud voice' for a crowd to 'disperse themselves and peaceably to depart to their habitations'. This was the 'reading of the Riot Act'. Section 3 then provided 'That if such persons so unlawfully, riotously, and tumultuously assembled, or *twelve or more of them*, after proclamation made in manner aforesaid, shall continue together and not disperse themselves within one hour', then the justices of the peace, sheriffs, etc were empowered to 'seize and apprehend' such persons. Indeed the Act (as originally enacted) went so as to declare those lawmen involved in seizing and apprehending rioters, 'shall be free, discharged and indemnified, as well against the King's Majesty, his heirs and successors, as against all and every other person and persons, of, for, or concerning the killing, maiming, or hurting of any such person or persons so unlawfully, riotously and tumultuously assembled, that shall happen to be so killed, maimed or hurt, as aforesaid'. The Riot Act 1714 was repealed by the Criminal Law Act 1967, s 10(2).

[9] See Peter Thornton, *Public Order Law* (1987) p 9.

[10] David Ormerod (ed), *Smith and Hogan Criminal Law* (2008, 12th edn) p 1065.

[11] Thornton, *Public Order Law*, p 9.

[12] *Woodrow* (1959) 43 Cr App R 105.

[13] *Jones* (1974) 59 Cr App R 120.

1.24 Riot can be committed in a private place (s 1(5)). In contrast with offences under ss 4 and 5 of the Act, 'private place' in the context of riot is not restricted in any way, for example, by excluding dwellings. However, given the large numbers required to form a riot, it is likely that those offences charged will be in a public place—but this is not an essential element.

Using or threatening unlawful violence

1.25 'Violence' under the Public Order Act 1986 has a deliberately wider definition than offences of violence in other parts of the criminal law, such as offences against the person. Section 8 in Part I of the Act explains the interpretation of the term:

> 'violence' means any violent conduct, so that—
> (a) except in the context of affray [see below], it includes violent conduct towards *property* as well as violent conduct towards persons, and
> (b) it is *not restricted to conduct causing or intended to cause injury or damage* but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

1.26 Firstly then, riot as a public order offence is distinguished from offences against the person in that it can be committed where the violent conduct is aimed at property. It encompasses the fear caused by scenes of disorder where missiles are thrown at police cars or shops are smashed up and ransacked. It perhaps obviates the need for separate charges of criminal damage.

1.27 Secondly, riot is distinguishable from offences against the person in that there is no need for the prosecution to establish that the violent conduct caused, or was even intended to cause, injury or damage. This is because the Act is concerned not with the victim of a violent assault, but with the impact of violent conduct on the hypothetical bystander—the 'person of reasonable firmness present at the scene' who would be caused to fear for their own personal safety (s 1(1)). Hence, violent conduct under s 8 of the 1986 Act also includes throwing missiles, brandishing weapons, and the punch that missed its target.

1.28 Equally, and for the same reason, the Act goes beyond the actual use of violence to encompass the threat of violence. The offence concerns twelve or more persons 'using or threatening' unlawful violence for a common purpose. Brandishing weapons, waving fists, and shouting threats could cause the bystander to fear for his personal safety just as much as the actual application of force.

1.29 However, for there to be a riot at least one of the twelve must actually use unlawful violence and only those actually using unlawful violence are guilty of the offence (s 1(1)). Thus, riot has a precondition of at least twelve persons using or threatening unlawful violence for a common purpose such as would cause a reasonable bystander to fear for his personal safety—but only those persons who actually use unlawful violence will be guilty of riot. That said, this raises interesting issues of secondary liability (see below the section on 'common purpose').

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1.30 The violence must be *unlawful* violence (see s 1(1)). This preserves the general defences of accident, self-defence,[14] defence of another, and the prevention of crime.[15] This was confirmed in *R v Rothwell and Barton*[16] and is now settled law. Thus, once a defence such as self-defence has been raised (the evidential burden), there can be no conviction unless the prosecution can disprove self-defence to the criminal standard of proof—ie so that the jury are sure it was not self-defence.

1.31 However, one can envisage problems in a case where the defendants assert that they were acting in pre-emptive self-defence—for example where twelve or more football supporters attacked a gang of rival supporters because they feared imminent attack. Yet, as with any defence of self-defence, the use of force must be reasonable and proportionate. It would be difficult to maintain such a defence where a pre-emptive strike to ward off attack developed into a sustained pitched battle.

For a common purpose

1.32 There is no definition of common purpose in the Act, nor any clear definition elsewhere. It was the element of 'common purpose' which prompted Lord Scarman to refer to the 'great forensic confusion' which prevailed when juries had the task of deciding whether this element of the common law offence of riot had been proved.[17] The 1986 Act retained the concept, but failed to provide any definition or clarification other than to say that 'common purpose may be inferred from conduct' (s 1(3)). That is statutory language for 'you know it when you see it'.

1.33 The concept of 'common purpose', together with the weight of numbers, is what distinguishes riot from violent disorder and other public order offences. The Law Commission rejected an earlier proposal that common purpose should be replaced by a concept of 'engaging in an unlawful course of conduct'. They said that common purpose more accurately reflected the idea of concerted action on the part of a number of people.[18] The Law Commission concluded:

> Persons who engage in acts of public disorder vary in the range of their conduct from those who, as we put it, incite or lead a riot to those whom we have described as casual participants. The latter include individuals who, observing that disorder is taking place, take the opportunity to add their own acts of aimless violence or disorder, without any particular purpose in mind. But the effect of omitting the element of common purpose in our Working Paper proposal was, we think, to cause the casual participant, the pure opportunist who has shared no purpose with anyone but has merely added his own act of violence to those of others, to be guilty of riot. There is, of course, no reason why an intention to achieve

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[14] The general defence of self-defence now has a statutory footing in the Criminal Justice and Immigration Act 2008, s 76—though this adds little or nothing to what had always been the law of self-defence.

[15] See the provisions of the Criminal Law Act 1967, s 3, and the discussion on defences in Ch 8.

[16] [1993] Crim LR 626—where it was held that the word 'unlawful' is intended to ensure that the general defences of self-defence, reasonable defence of a friend, or an attempt to stop a breach of the peace etc remain good defences to the statutory offences under the Public Order Act 1986. Had Parliament intended to exclude those defences, it would have done so expressly.

[17] Lord Scarman, *The Brixton Disorders* (1981) Cmnd 8427, para 7.39.

[18] Law Com 123, para 6.11.

> a common purpose, such as an attack on the police, may not be formed upon the instant of joining in: premeditation is no more required for such an intention than for an intent to do grievous bodily harm. If, however, the particular gravity of riot as an offence were to be based simply on committing an act of violence at the same time as other people commit similar acts, then the importance of the offence would lie, not in the common purpose of the defendant shared with others, but in the cumulative damage and injury caused by the common acts. In our present view, however, it is the possession of a common purpose by a number of people which constitutes the particular danger of riot. Of course, in many instances the course of conduct of the rioters taken as a whole will be strongly indicative of what the common purpose is; but the course of conduct must essentially remain no more than evidence, usually the strongest evidence, of what the conduct is aimed to achieve. We therefore conclude that the possession of a common purpose should be an integral part of any new offences of riot.

1.34 Common purpose is more than mere motive. There is no requirement that the twelve or more persons have come together pursuant to any agreement, or that each should have agreed with the other eleven. It is sufficient that they assembled by chance, one by one, but at the point at which violence is offered they are present together directing the violence for a common purpose. Moreover, that common purpose may be either lawful or unlawful, so long as the violence itself is unlawful and offered for a common purpose. In *Caird*[19] a group of students gathered outside a hotel in Cambridge where a Greek-themed dinner was being held for the great and good of the city in celebration of 'Greek week'. The common purpose of the students was to disrupt the dinner in protest of the policies of the then military, authoritarian Greek government. In order to gain entry to the hotel and wreck the dinner, they engaged in violence with the police and guests and damaged hotel property. The common purpose (to disrupt the dinner) was lawful. The violence used in pursuit of that common purpose was unlawful.

1.35 The definition of riot poses an interesting question of secondary liability. According to s 1(1) where twelve or more people with a common purpose threaten unlawful violence but only one actually uses it, there is a riot but only one principal rioter. The section states that only the person *using* unlawful violence is guilty of riot. However, since the remaining eleven or more are present together with a common purpose to threaten unlawful violence, they *may* be regarded as encouraging the principal. Thus they would be guilty as secondary parties.[20] Professor Ormerod asks us to suppose that all twelve had agreed—'Threats, yes, but actual violence, no.' If D, for the common purpose, then uses violence, D commits riot but the rest are not necessarily guilty of riot by their mere use of threats (unless they encouraged D). And if D goes beyond the scope of the concerted action and produces a weapon the rest did not know about, they will certainly not be guilty of riot.[21]

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[19] *R v Caird and others* (1970) 54 Cr App R 499.

[20] *Jefferson* [1994] 1 All ER 270 and see generally Ormerod (ed), *Smith and Hogan Criminal Law*. See also *Rahman* [2008] UKHL 45 on joint enterprise.

[21] Ormerod (ed), *Smith and Hogan Criminal Law*, p 1065.

A person of reasonable firmness present at the scene

1.36 The element of 'a person of reasonable firmness present at the scene' is common to the offences of riot, violent disorder, and affray. It is an important concept to understand. It is discussed fully in the section dealing with affray.[22]

Mental element (mens rea)

1.37 A person is guilty of riot only if he *intends to use violence* or *is aware that his conduct may be violent* (Public Order Act 1986, s 6(1)).

1.38 'Awareness' applies to riot, violent disorder, and affray but is a word rarely used elsewhere in the criminal law. The Act (on the recommendation of the Law Commission) sought to avoid the ambiguity and confusion caused by the term 'recklessness'. In effect, 'awareness' means a kind of recklessness. The defendant must foresee the risk that a particular kind of harm may be done or violence may occur and yet goes on and takes that risk. For example, he throws a bottle into a crowd of police officers not caring whether the missile fell short or not, but knowing there was some risk of harm.

1.39 The difference is that, unlike recklessness, there is no objective element. Awareness does not cover the situation in which it would be obvious to the reasonable man that there was a risk, but the defendant had not turned his mind to it. Awareness is a purely subjective concept. In reality, however, in the context of public order offences such as riot, this subtlety will rarely be of practical importance.

1.40 An additional mental element is that the person must also share a 'common purpose' with the other eleven or more participants. This additional element is one for which proof is required in respect not merely of the defendant but of the other eleven persons.[23] Again, this can be inferred from conduct.

1.41 A direction as to the mental element of the offence should normally be given to the jury, and care must be taken to distinguish between principal offenders and aiders and abettors in that direction.[24]

Intoxicated rioters

1.42 The Act makes special provision for the possibility of a plea of intoxication. Section 6(5) and (6) provide as follows:

> (5) For the purposes of this section a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment.
> (6) In subsection (5) 'intoxication' means any intoxication, whether caused by drink, drugs or other means, or by a combination of means.

1.43 Thus, as with other offences where the required mental element is recklessness, 'self-induced' intoxication provides no defence. He will be treated as unimpaired, as aware

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[22] See 1.108 et seq.
[23] See Public Order Act 1986, s 6(7) and also Law Com 123, para 6.28.
[24] *Blackwood* [2002] EWCA Crim 3102.

of that which he would have been aware of had he not been intoxicated.[25] Therefore, care should be taken in drafting the indictment, for if it alleges only that the defendant intended to use violence (rather than merely being aware that his conduct may be violent), this would be alleging a crime of specific intent to which a plea of self-induced intoxication may apply.

1.44 However, there is a curiosity here. In riot, unlike violent disorder and affray, there is an additional mental element of sharing a 'common purpose' with eleven or more others. That must be akin to specific intent—one cannot form a common purpose with others recklessly. Indeed, the Law Commission envisaged such a possibility:

> The element of common purpose in the proposed offence of riot, amounts in substance to a further mental element of intent. We would therefore expect that, if there was sufficient evidence to indicate that a defendant accused of riot was too intoxicated to have the common purpose, he could not be found guilty of riot. Nevertheless, if his intoxication was self-induced, he could be convicted as an alternative of violent disorder.[26]

1.45 There remains a defence of 'involuntary intoxication'—that is the rioter who had his drink 'spiked' or his intoxication was a side effect of prescription medication. Section 6(5) of the Act purports to place a reverse burden on the defendant—'shall be taken to be aware of that of which he would be aware if not intoxicated, *unless he shows* . . . that his intoxication was not self-induced'. However, since the advent of the Human Rights Act 1998, the courts have begun to 'read down' such reverse burdens,[27] where they apply to an essential element of the offence, such as *mens rea*. Accordingly, it is likely that the burden on the defendant is only to raise the issue (an evidential burden) rather than proving it to the balance of probabilities (a legal burden).[28]

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Sentencing

1.46 Riot is indictable only and punishable with a maximum of ten years' imprisonment, or an unlimited fine, or both: s 1(6) Public Order Act 1986.

1.47 Riot is a serious specified offence (Criminal Justice Act 2003, s 225(1)(a) and Schedule 15). As a result, the 'dangerous offenders' provisions of the Criminal Justice Act 2003 apply, as amended on 14 July 2008 by the Criminal and Immigration Act 2008. In short, it is open to the court to pass a sentence of imprisonment for public protection or an extended sentence.[29]

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[25] The general principle is defined in *DPP v Majewski*; *R v Majewski* [1977] AC 443.

[26] Law Com 123, para 6.28.

[27] Human Rights Act 1998, s 3.

[28] For the general principles of reverse burdens post-Human Rights Act 1998, see *Sheldrake v DPP* [2004] UKHL 43.

[29] A full examination of the complex provisions relating to dangerous offenders is beyond the scope of this work. A useful introductory guide is provided on the website of the Sentencing Guidelines Council: <http://www.sentencing-guidelines.gov.uk/docs/Dangerous%20Offenders%20–%20Guide%20for%20Sentencers%20and%20Practitioners.pdf>.

1.48 General guidance on the gravity of public order offences, including riot, is to be found in *Caird*[30] in which Sachs LJ said:

> Where there is wanton and vicious violence of gross degree the court is not concerned with whether it originates from gang rivalry or from political motives. It is the degree of mob violence that matters and the extent to which the public peace is being broken . . .
>
> In the view of this court, it is a wholly wrong approach to take the acts of any individual participator in isolation. They were not committed in isolation and, as already indicated, it is that very fact that constitutes the gravity of the offence.[31]

1.49 The guideline sentencing authority for cases of riot is *R v Najeeb and others*.[32] That case arose out of race riots in Bradford in 2001. A few weeks before there had been similar disturbances in Oldham and Burnley. In Bradford, the leader of the British National Party made a speech which caused such concern in the community that a World Inner City Festival scheduled to take place in the city had to be cancelled. Following the speech, supporters of the Anti-Nazi League gathered in the city square to confront a planned assembly of the National Front Party. The Asian community were concerned about the need to defend themselves against attack from right-wing extremists. Scuffles broke out and then developed into serious disorder between vast numbers of Asian and white groups. An Asian man was stabbed, which then sparked further widespread disorder throughout the city over a prolonged period. The police were the target of the violence. Barricades were built using stolen cars set alight. The police were attacked with missiles from stones to petrol bombs and from metal poles to a crossbow. Public houses, garages, and shops were looted and gutted by fire. In the result, two police officers were stabbed and over 300 officers were injured whilst the city sustained criminal damage estimated at £27 million.

1.50 Over a hundred defendants either pleaded guilty or were found guilty of riot and received sentences ranging from four to six and a half years' imprisonment. Juvenile defendants received between six and eighteen months' detention. One defendant convicted of throwing petrol bombs was sentenced to eight and a half years' imprisonment.

1.51 Giving guidance as to sentence in *Najeeb and others*, Lord Justice Rose outlined certain factors to be considered. Those included

- whether the riot was premeditated and planned or spontaneous;
- the local conditions involved;
- the numbers of people involved;
- the duration of the disorder;
- whether the police (or other public servants) were targeted;
- the extent of injuries sustained; and
- the extent and value of damage caused.

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[30] (1970) 54 Cr App R 499. But see also *Pilgrim* (1983) 5 Cr App R (S) 140 and *Muranyi* (1986) 8 Cr App R (S) 176.
[31] *Caird*, 506–8.
[32] [2003] 2 Cr App R (S) 69.

1.52 The Court of Appeal in *Najeeb and others* held that deterrent sentences were called for in such cases and the offender's previous good character and personal mitigation were of comparatively little weight. The Court then provided the following guideline sentences following conviction after a trial:

Circumstances	Guideline sentence
1. Ringleader	Sentence near maximum of 10 years after trial
2. Active and persistent participant (threw petrol bomb, used weapon, drove at police)	8–9 years after trial
3. Participation over lengthy period (threw missiles such as knives/poles/gas cylinders) or set fire to cars	6–7 years after trial
4. Present for a significant period and repeated throwing of missiles (bricks/stones)	5 years after trial

Compensation for Riot damage

1.53 The Riot (Damages) Act (RDA) 1886 provides for compensation to be paid out of the 'local police fund' for damage or loss relating to houses, shops, or buildings, or their contents, provided the damage was done by 'persons riotously and tumultuously assembled together'. Section 10(1) of the Public Order Act 1986 confirms that the term 'riotously' in the 1886 Act is to be construed in accordance with the definition of riot in s 1 of the 1986 Act.

1.54 The fact that compensation claims are paid out of the local police authority fund is clearly a source of concern to the police. In July 2003, the Home Office published a consultation paper[33] assessing the options of repealing or amending that legislation. The consultation paper stated that the nature of policing has changed in the 120 years since the Act and that most criminal damage to property is nowadays covered by insurance. It argued that it was unreasonable for the police to be burdened with liability for riot damage and the 1886 Act undermined public confidence in the police because its provisions implicitly assumed that riots are the product of a culpable failure to provide adequate policing.

1.55 Nevertheless, the Riot (Damages) Act 1886 remains on the statute books and continues to cause consternation to police authorities and their insurers. For a discussion of those issues (which are beyond the scope of this book) see the litigation which ensued as a result of rioting at the Yarl's Wood Detention Centre in February 2002.[34]

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[33] Home Office Consultation Paper, *Riot (Damages) Act 1886*: *Consultation on Options for Review* (July 2003).

[34] *Bedfordshire Police Authority v Constable* [2009] EWCA Civ 64; *Yarl's Wood Immigration Ltd*; *GSL UK Ltd*; *Creechurch Dedicated Ltd v Bedfordshire Police Authority* [2008] EWHC 2207 (Comm); *Bedfordshire Police Authority v David Constable* [2008] EWHC 1375 (Comm). Amongst the issues raised was whether the private company with public law powers to run an immigration detention centre could make a compensation claim under the RDA 1886 against a police authority. The High Court held that it did not qualify under the RDA 1886 and could not make a claim. Furthermore, the Court of Appeal held that a police authority was entitled to be indemnified by its excess insurers in respect of claims made under that Act.