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Betts, G.

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The Impact of the Criminal Justice Act 2003 on Theft and the Custody Threshold

Gary Betts

Introduction

The enactment of the Criminal Justice Act 2003 signalled a change in penal policy. Academic literature initially claimed the Act brought about a profound shift away from desert towards a 'risk-based' regime, both in terms of protecting the public against serious violent and sexual offenders, and seeking to suppress persistent offending (Easton & Piper 2012: chapter 5; Thomas 2004; von Hirsch & Roberts 2004; Baker & Ashworth 2010). More recently, some have claimed the shift to have been more modest, with desert constraints continuing to play a central role in penal policy (Dingwall 2008).¹ Nevertheless, some uncertainty remains over the extent to which the 2003 Act's change in sentencing policy has resulted in a change in sentencing practice, at least when dealing with non-violent/sexual offenders.

The purpose of this article is to consider the likely impact of the Criminal Justice Act 2003 on the decision to imprison adult offenders convicted of theft. Using a sample of cases decided in the magistrates' and Crown Court under the preceding Criminal Justice Act 1991 regime, the article seeks to estimate the effects of the CJA 2003 on the use of imprisonment in theft cases. Some limitations to the study should be acknowledged. Although suspended sentences are regarded in law as custodial sentences, they are not included here. There has been a long-standing claim that suspended sentences may in fact be used routinely in cases which do not

cross the custody threshold. Certainly in the early days of the suspended sentence, there was a tendency of the courts to view the sentence as a non-custodial option, rather than as a custodial sentence as it was, and remains, intended (Bottoms 1981).

Young offenders are also excluded from the analysis; they fall subject to a different sentencing regime and there exists separate guidance for the sentencing of young offenders (Sentencing Guidelines Council 2009). Consequently, the cases considered here involve only adult theft offenders who have been sentenced to an immediate prison sentence. Before moving on to look at the study's sample of cases, it is useful to outline some of the main provisions of the Criminal Justice Act 2003 and to summarise the sentencing guidelines system in England and Wales.

The English sentencing guidelines system

Following the enactment of the Criminal Justice Act 2003, the Sentencing Guidelines Council (hereafter SGC) bore ultimate responsibility for formulating sentencing guidelines in England and Wales, following advice given to it from the Sentencing Advisory Panel (SAP). The system for producing guidelines was open to criticism for being unnecessarily bureaucratic whilst encouraging duplication of process (New Zealand Law Commission 2006: 28). In short, the SGC would notify the SAP of its intention to produce a guideline, the SAP would investigate the subject, perhaps commissioning empirical research into current sentencing practice, consult with the public and finally present to the SGC an advisory guideline. The SGC would then

consider this advice, produce a consultation guideline and, ultimately, a definitive guideline. The process was subsequently streamlined under the Coroners and Justice Act 2009 which abolished the SGC and SAP and replaced them both with a new single body: the Sentencing Council for England and Wales.² It is with this institution that responsibility for producing guidelines now rests. Since its creation, the Council has produced a number of sentencing guidelines of its own, whilst the SGC guidelines remain in force until the Sentencing Council issues its own guidelines to succeed them (Ashworth & Roberts 2013: 5). The 2003 Act required the courts to 'have regard to' any appropriate guidelines.³ Section 125 of the 2009 Act replaces this with a firmer obligation that the court 'must follow' any relevant guidelines unless 'satisfied that it would be contrary to the interests of justice to do so'. This raises a presumption that the relevant guidelines will be followed.⁴

The first guideline produced by the SGC considered the overarching principle of offence seriousness (Sentencing Guidelines Council 2004). In it the SGC made clear that all future guidelines would be formulated with primary consideration given to offence seriousness, and that the courts' sentencing discretion should be framed within a context of proportionality. The guideline states 'the sentencer must start by considering the seriousness of the offence' (SGC 2004: para. 1.3), the assessment of which will determine whether the custody threshold has been crossed, thereby indicating whether a sentence of imprisonment is the most appropriate outcome. Further, paragraph 1.4 provides that 'a court is *required* to pass a sentence that is commensurate with the seriousness of the offence'.⁵ As the Sentencing

Council has inherited these guidelines, the same underlying principle remains true today, despite the fact that the 2003 Act appeared to move away from a desert-based system to consider both offence seriousness and the need to reduce crime. The Act failed to provide a primary sentencing rationale, listing instead five purposes of sentencing: punishment, reduction of crime through deterrence, rehabilitation, public protection and reparation.⁶ The sentencing aims lean more toward a crime reduction model than a desert one. However, other provisions (see below) within the Act highlight the importance of desert, and it is this that the SGC adopted as the focus of its guidelines (SGC 2004). That said, the SGC recognises that the Act provides for these five (conflicting) purposes of sentencing, which may not each accord with principles of proportionality and desert, indicating that each purpose may be 'relevant to a greater or lesser degree in any individual case', but that 'the sentencer has the task of determining the manner in which they apply' (para. 1.2). Nevertheless, the guideline on the overarching principle of seriousness was clearly intended to explain to the courts how to deal with the apparently conflicting purposes listed in s.142. The Act has been the subject of considerable criticism, not least for its fundamental lack of clarity and failure to provide a coherent sentencing approach (Taylor et al 2004: chapter 10.2; von Hirsch & Roberts 2004: 642; Ashworth 200: 528). The Act's shortcomings are offset somewhat by the desert-based approach taken by the SGC which provides much needed certainty to the courts whilst reaffirming the role of judicial discretion in sentencing.

Proportionality under the Criminal Justice Act 2003

Whilst adopting various consequentialist aims, the Act maintains a desire to retain a desert framework with reference to offence seriousness in a number of its provisions. First, when determining the seriousness of an offence, the Act requires the court to 'consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.'⁷ Second, the Act retains custody and community-sentence thresholds; the sentencing court must not pass these sentences unless warranted by the seriousness of the offence. More specifically, s.152(2) provides that a custodial sentence can only be imposed if the offence 'was so serious that neither a fine alone nor a community sentence can be justified for the offence'. This is very similar in wording to its predecessor under s.1(2)(a) of the Criminal Justice Act 1991, save the word 'must' has substituted the word 'shall', and the final clause was formerly 'so serious that only [a custodial sentence] can be justified.' Neither version offers much guidance on when the threshold will be crossed (Thomas 1992: 235). The 'so serious' test leaves the drawing of the custody threshold largely to the sentencer in each case (Ashworth & von Hirsch 1997: 196). Where a custodial sentence is imposed, it must be for the shortest period the court believes to be commensurate with the seriousness of the offence.⁸ This in itself is interesting as it seems that when determining the length of imprisonment, the court should not impose an exemplary sentence aimed at deterring the offender away from subsequent offending or at protecting the public, despite both of these being listed in section 142(1) as legitimate sentencing aims.

By the end of 2008, the SGC had produced its final guideline on theft offences (Sentencing Guidelines Council 2008). This has been unchanged by the Sentencing Council and remains the definitive guideline today. The guideline provides separate guidance for four distinct types of theft: theft committed in breach of trust, theft from a dwelling, theft from a person and theft from a shop. For each form of the offence, a sentencing grid is provided (these are reproduced later in this article). Each type of theft is divided into three or four offence categories depending on the seriousness of the offence, and for each category the guideline provides a sentencing range and prescribed starting-point. As with other definitive guidelines, the theft guidelines are based on a first-time offender who is convicted following a contested trial. When taking into consideration previous convictions and a guilty plea, the court may depart from the guideline and impose a sentence which falls outside of the range prescribed (Sentencing Guidelines Council 2008: 8).

The remainder of this article considers a number of theft cases, often illustrative of a larger group, which were sentenced prior to the enactment of the CJA 2003 and the publication of the SGC's definitive theft guideline. It applies the guidelines to each case to consider the extent to which these align with the decision to imprison pre-2003. In total, 292 theft cases were randomly selected from files stored at a local CPS office. Of these, 78 involved adult offenders sentenced to immediate imprisonment; these are considered here. Sentence for each was passed between September 2004 and March 2005, the period shortly preceding the enactment of the sentencing provisions contained within the CJA 2003.

Theft in breach of trust

Table 1 shows the SGC's guideline on theft in breach of trust. According to this, breach of trust is regarded as one of the more serious forms of theft, deserving a custodial sentence where the offender enjoyed a high position of trust and stole significant sums. In this sense, the Council followed the rhetoric of earlier Court of Appeal guideline judgments handed down in *Barrick* (1985) 7 Cr App (R) S 142 and later amended in *Clarke* [1998] 2 Cr App R 137. Where the theft involves sums exceeding £20,000, or £2,000 by an offender in a high position of trust, the guideline's sentence range prescribes that only a custodial sentence should be imposed. For thefts involving lesser amounts, custody still features within the sentence ranges, but non-custodial sentences are also prescribed. Of course, the court may depart from these sentence ranges having had regard to any other aggravating and mitigating factors (including personal mitigation). The sentencing court may therefore be justified in imposing a non-custodial sentence in a case featuring (perhaps considerable) mitigation, despite the theft being of a particularly high value.

[Insert Table 1 approximately here]

Breach of trust does not exist as a sub-type of theft at the charging stage, but it can arise in some forms of the offence, notably theft by an employee and theft of mail. It may also arise in other situations, perhaps where the offender has a fiduciary relationship with the victim.

Breach of trust arose in six of the sample's cases, all of which were thefts committed by employees. Three of these cases resulted in the imposition of an immediate custodial sentence, only one of which (case 292) was referred to the Crown Court. The offender in that case had been employed as a store manager. Over a fourteen-month period, he had authorised a number of refunds, for his own benefit, on purchases that were never made, appropriating in total a little over £27,600. The offender, who had a clean prior record, admitted the offences were motivated by greed and also entered a guilty plea for a separate charge of false accounting. He was sentenced to 12 months' imprisonment for theft and 12 months concurrently for false accounting. When applying the SGC's guideline to this case, the appropriate starting-point would be two years' imprisonment. Under the 1991 Act regime (as originally enacted prior to amendment by the CJA 1993), the offender would have been entitled to a sentence discount to reflect his clean record, although at the time of sentencing, changes introduced by the CJA 1993 had removed this discount. Similarly, the 2003 Act offers no such mitigation for a clean prior record, although the courts may still regard it as a source of mitigation.⁹ The court would be entitled to treat the long course of offending as an aggravating factor and increase the sentence to reflect this. The funds appropriated (£27,600) fall toward the lower end of the offence description and so the court may mitigate the sentence accordingly. The early guilty plea would entitle the offender to a one-third discount in accordance with the Reduction in Sentence for a Guilty Plea guideline (Sentencing Guidelines Council 2007). In short, it seems that the SGC guidelines would prescribe a custodial

sentence for this offence, yet the inability to treat a clean prior record as a source of mitigation may mean that a longer term of imprisonment would now be imposed.

Custodial sentences were also imposed in cases 060 and 061, both concerning the same offender with seven previous convictions, three of which were for theft. On the first day of her employment in a shop, the cash registers were down some £140. Two days later, on her next working day, the registers were again markedly short by £165. During a police search, the offender's purse was found to contain £155 at which point she fully admitted taking the money. The magistrates sentenced her to three months' imprisonment for each count ordered to run consecutively. Both offences would now fall within the lowest bracket of the SGC's guideline, which prescribes a community order as the starting-point and provides a sentence range from a fine to 26 weeks' imprisonment. The sentences imposed in these cases therefore lie toward the top end of the sentence range prescribed for such offending. Given that the offender had a prior record which included offences of a similar type, the sentence imposed does not appear to be unjust according to the SGC guideline since the court would now be required to treat each previous conviction as an aggravating factor.

Theft from the person and theft from a dwelling

Despite providing separate guideline entries for theft from the person and theft from a dwelling, the descriptions, starting-points, and sentence ranges are identical to one another and so can be dealt with together. The guidelines are reproduced in Table 2. They each provide

three types of theft based on the vulnerability of the victim and the presence and extent of any intimidation or force used. The most serious form of the offence, where the theft is committed against a vulnerable victim and involves intimidation or force, will always warrant a custodial sentence attracting a sentence range of 12 months to three years' imprisonment. Where the offence is committed against a non-vulnerable victim, the offender may escape a custodial sentence. In light of the prescribed starting-points and sentence ranges, the SGC guidelines appear to view theft from the person and in a dwelling as less serious than thefts committed in breach of trust, but more serious than thefts against retailers, which are considered later.

[Insert Table 2 approximately here]

The study's sample included five thefts from the person, two of which resulted in the imposition of an immediate custodial sentence. The offender in case 171 stole two bank cards from the victim's handbag. The victim was a customer in a cafe where the offender worked as a waitress. Realising her handbag had been moved and opened, the victim confronted the offender, who was found in possession. She entered a guilty plea but was otherwise uncooperative and was imprisoned for two months. The appropriate starting-point, according to the SGC guidelines, would now be a community order. Although some aggravating factors were present in the offence which might have, in the court's opinion, pushed the offence beyond the custody threshold, it is likely that the decision to imprison in this case was in fact

based on the offender's recent spate of offending. At the time of the immediate offence, the offender was subject to a community rehabilitation order, and her prior record included entries for breaching court orders. The decision to imprison might therefore also have been based on her previous failure to comply with community sentences. Whatever the justification, the two-month custodial sentence imposed still falls within the sentence range set by the guideline, and so similar cases today may still be met with imprisonment.

The other theft from the person to result in a custodial sentence was case 141. The offender stole a purse which had been left in an ambulance by a paramedic whilst she escorted a patient into hospital. The offender had 27 previous convictions, 13 of which were for theft, and received a four-month custodial sentence. As with case 171 above, the appropriate starting-point would now be a community sentence, but targeting a member of the emergency services may have been regarded by the court as an aggravating factor, sufficient to justify a custodial sentence. Under the 2003 Act, the offender's previous convictions would also be treated as aggravating factors which may justify imposing a custodial sentence close to the top of the prescribed sentence range.

Furthermore, three cases led to convictions for thefts of mobile telephones which – dependent on the facts - might be regarded as a form of theft from the person. All three thefts resulted in immediate custodial sentences. Cases 290 and 291 concerned the same offender, aged 18, who stole two mobile phones on the same day. On the first count, the offender had enticed

the victim into parkland and asked to borrow his mobile phone. Once the victim had agreed, the offender refused to return the property and made threats toward the victim that he was carrying a knife. On the same day, the offender had entered a take-away restaurant, the workplace of the second victim, noticed that the mobile telephone had been left unattended, took it and ran away making good his escape. He was subsequently arrested and, following not guilty pleas, was sentenced by the Crown Court to a total of three months' imprisonment. It is suggested that case 290 is the more serious offence given that it included direct contact between the offender and victim, intimidation and threats of violence. This offence is therefore likely to have played a greater role in determining the overall sentence. The SGC guideline on theft from a person primarily categorises offences by reference to the vulnerability of the victim. Very little information on the victim was available in this case. It is therefore difficult to establish the appropriate starting-point on the guideline. Regardless of the vulnerability of the victim, the guideline prescribes custody within the sentence ranges for all three categories of theft from the person.

Theft from a shop

The guideline for theft from a shop is reproduced in Table 3. Retail theft is the only form of theft for which the SGC guideline prescribes a conditional discharge within the sentence range at the lower end of the offending scale. At the same time, custodial sentences remain an important feature of the guideline, albeit only in the more serious categories of the offence.

Where the offence is committed by an organised gang and involves intimidation, threats or force, but where the offence falls short of robbery, the guideline prescribes a starting-point of 12 months and a sentence range of 36 weeks to four years' imprisonment. Below this, for offences involving significant levels of threats or intimidation, or use of force resulting in minor injury, or very highly planned offences, or thefts which involve significant related damage, the appropriate starting-point is six weeks' imprisonment. The guideline prescribes a sentence ranging from a community order to a 36 week term of imprisonment. Custody is not prescribed for thefts from shops which fall within the lower two categories of the offence where the level of planning, intimidation and/or damage is less.

[Insert Table 3 approximately here]

Theft from a shop was the most commonly occurring offence within the study's sample of cases, accounting for 222 of the study's 292 cases. Of those 222 cases, 55 (24.8 per cent) resulted in an immediate prison term, only seven of which would now fall within the two higher category ranges (that is, types of shop thefts involving significant intimidation or threats for which the guidelines prescribe custody within the sentence ranges). In all but one of these seven cases, the threat or force was dealt with as a separate offence. By way of example, case 220 involved an offender who head-butted a security guard having been detained following a £30 shoplifting. The court imposed a three-month prison term for common assault with a consecutive one-month term imposed for the theft. With a longer sentence imposed for

assault than that for the theft, the court viewed the violent conduct as more serious than the theft. The sentence may have been determined principally in relation to the assault, with the theft being dealt with as a 'bolt-on' offence. One-month imprisonment seems disproportionately severe for the theft, but since the court clearly believed that the assault justified a custodial sentence, this restricted the options available in dealing with the theft. The offender's incarceration for assault would prevent the court from imposing a community sentence or a fine; the offender would not be available to undertake work or supervision in the community whilst simultaneously incarcerated. Therefore, unless willing to impose a discharge for the theft, which would no doubt have been too lenient, the court had little choice but to pass a custodial sentence, although the court could have imposed 'no separate penalty' for the theft. This type of case could now prove problematic under the Council's guidelines: the use of force, if significant enough, would place the offence squarely within the top offence category, thereby warranting a custodial sentence. However, if the violence is dealt with as a separate offence, it should not also be treated as an aggravating factor of the theft; to do otherwise would be to double-count, punishing the offender twice for the violence.

In the study's sample of cases, immediate custody was routinely imposed for offences which would now fall within the lower two categories of the offence, for which custody is no longer prescribed. Even before the Council's guidelines came into effect, custody in these cases was not justified on the basis of the seriousness of the theft itself but instead was imposed for some other reason. First, where the offender was sentenced for another offence, a custodial

sentence may be imposed for theft either due to the seriousness of the associated offence or on the basis of totality. As demonstrated above, where an offender turned to violence, or at least threatened violent behaviour, during the course of a theft, it was usual for him to be charged with and sentenced for a separate violent or public order offence. Where he has committed multiple offences for which he is to be sentenced at the same hearing, the court should impose an overall sentence which reflects the seriousness of the offending overall (Sentencing Council 2012: 5). The mere fact that an offender stands to be sentenced for multiple offences may therefore lead the court to impose a custodial sentence, despite the fact that the theft itself does not warrant such a sentence.

Second, where an offence is committed in breach of a previously-imposed court order, the Sentencing Council now prescribes that the sentencing court should ordinarily revoke the original court order and sentence afresh for the original and the new offence (Sentencing Council 2012: 14). This occurred in cases 031 and 032 in which the same offender was sentenced for two low-value shop thefts committed whilst she was subject to a community rehabilitation order. The order was revoked and she was resentenced to three months' imprisonment for the original offence, with one month terms imposed for each later theft ordered to run concurrently. Third, and similarly, a subgroup of cases involved offences committed after the offender had been released from prison on temporary licence. These cases inevitably resulted in the offender being recalled to prison, and it was his status as a licensee which drove the sentencing decision. No doubt such cases would continue to attract

custodial sentences, regardless of whether or not the guidelines prescribe a prison term for the particular offence.

Fourth, where the offender has failed to express his willingness to comply with a community order, the court is not prevented from imposing a custodial sentence.¹⁰ Such an example can be seen in case 021 where the offender had refused help at the police station from a member of the drug referral team following his arrest for a typical shoplifting of goods valued £17. The offender, who had 35 previous convictions; around half of which were for theft, was imprisoned for two months. A custodial sentence clearly was not justified on the basis of the gravity of the offence; the decision to imprison was based on the offender's unwillingness to comply with a community sentence targeting his drug addiction.

Finally, immediate prison terms were imposed on prolific offenders, notwithstanding the relative non-seriousness of their offences. The offender in cases 094 and 095 was sentenced to serve seven-day concurrent prison terms for two low-value shopliftings (£11 and £6 respectively). The decision to imprison was unlikely to be based on offence seriousness – a fine would have been a more proportionate response – but it seems the court was influenced by the offender's prolific recent offending, which included nine convictions (five of which were for similar shop thefts) in the preceding 12 months. A custodial sentence may still be imposed on this offender were he sentenced under the Council's guidelines: the guidelines apply to first time offenders who are convicted after a contested trial, and each previous conviction must

ordinarily be treated as an aggravating factor by virtue of s.143(2) of the CJA 2003. Furthermore, the guidelines specify that the existence of previous convictions which aggravate the seriousness of the offence may lead to the imposition of a sentence beyond the range prescribed. Indeed, the guideline on thefts from shops states that, 'where an offender demonstrates a level of "persistent" or "seriously persistent" offending, the community and custody thresholds may be crossed even though the other characteristics of the offence would otherwise warrant a lesser sentence' (Sentencing Guidelines Council 2008: 16). Thus, under the sentencing guidelines, prolific minor offenders may still be met with custodial sanctions.

Interestingly, no first-time offenders were imprisoned for shoplifting offences, a practice which is likely to continue under the Council's guidelines for typical shop thefts which lack aggravation, given that the guidelines do not prescribe custody for low-level thefts from shops committed by those with a clean prior record.

Elsewhere in the sample, issues arise which are more difficult to reconcile with the Council's guidelines. For example, case 190 involved a male offender with 68 previous convictions, including 20 for theft, who received a four-month prison sentence for stealing mobile telephone top-up cards of a total value of £2000. Certainly his unenviable prior record may have led the court to impose a custodial sentence, indeed s.143(2) of the CJA 2003 on the aggravating effects of previous convictions may now justify a custodial sentence on the basis of persistence alone. The value of the property stolen might also have contributed to the decision

to imprison. The guidelines are surprisingly quiet on the matter of property value. Whilst they make reference to low-value thefts (when not accompanied by planning or sophistication), none of the four offence categories mention higher value thefts. However, the specific targeting of high value goods is expressed as an additional aggravating factor, although there is no guidance given as to the weighting of this. Nevertheless, in considering the guidelines, the sentencing court would first have to identify the most appropriate starting-point; not an easy task in a case such as case 190. It is submitted that this case would now fall within the third category (for offences involving low level intimidation, or some planning, or some related damage), if only by a process of elimination; rather than being the most appropriate, it is the least inappropriate starting-point.

Custody in lieu of fine payment

Within the study's sample there exists a particular group of cases which did not accord with the 1991 Criminal Justice Act custody threshold and are difficult to reconcile with the guidelines. In cases where the court determined a fine to be the appropriate sentence but the offender had little or no disposable income, the magistrates might offer the offender a choice to either pay a small fine or spend one day in prison in lieu of payment. According to this study, the practice of imposing a nominal custodial sentence in lieu of payment was limited to cases where (i) the court deemed a fine to be an appropriate sanction for the offence, (ii) the offender could not be expected to pay the fine due to his very limited financial means, and (iii) the offender had spent the previous night in custody. Consequently, the court did not expect

the offender to pay the fine; the sentence was passed with full expectation of the offender accepting the short custodial sentence since this had already been served. Ultimately, it is a custodial sentence rather than a financial penalty since the fine is not paid nor, more importantly, does the court expect it to be paid. By nature of the fact that the court recognises that the seriousness of the offence warrants only a fine, these cases do not cross the custody threshold on the basis of offence seriousness, rather it is the offender's circumstances which determine that a custodial sentence should be imposed. Indeed, the offences tended to be minor examples of shoplifting. The offender in case 119 had stolen goods valued at £12. The offence was quite typical of its type; he entered the shop, selected the goods from the shelf and attempted to leave without offering payment. He was detained at the scene, immediately admitted the offence and the property was recovered. The offender was ordered to pay a £150 fine or spend one day in custody (which had already been served). It was not uncommon for the offenders in 'custody in lieu' cases to have lengthy criminal histories. The offender's record in case 119 contained some 61 previous convictions, 25 of which were for theft. Prior to the immediate offence, he had appeared in court 12 times in as many months. Under the 2003 Act and the SGC's guidelines, the court could treat each previous conviction as an aggravating factor. Whilst this may warrant an upward departure from the guidelines, the imposition of a term of imprisonment cannot be justified because the courts accept that a financial penalty represents a proportionate response to the offence. The custody threshold under s.153(2) of the CJA 2003 would therefore not be satisfied.

Imposing periods of imprisonment (howsoever short) where the court recognises that a fine would be a proportionate response, may be seen as contravening the custody threshold under s.152(2) of the CJA 2003. However, an alternative and more liberal interpretation of s.152(2) might lead the court to conclude that a fine *is* a proportionate response, but is not appropriate in the circumstances, and thus a custodial sentence is justifiable. Such an interpretation might be regarded as running against the provision's purpose; the intention is that the custody threshold should be seen as restraining the courts' use of custodial sanctions (Padfield 2011: 598). That said, the custody threshold under the 2003 Act allows the court to impose custody in cases where a fine or community sentence has been considered but subsequently rejected, whereas the earlier threshold under the 1991 Act made custody a sentence of last resort (Taylor et al 2004: 186).

Conclusions

The purpose behind a custody threshold is 'that custodial sentences should be used sparingly' (Ashworth & von Hirsch 1997: 187) for offences which are so serious that some other (non-custodial) measure cannot be justified or, perhaps, as a sentence of last resort imposed against persistent minor offenders. The value of a custody threshold has been questioned, not least because it produces a sentence hierarchy in which any custodial sentence, howsoever short, is regarded as more punitive than all non-custodial sanctions, when in fact this may not be true: a tough community sentence may be regarded as more severe than a short period of

imprisonment (Padfield 2011: 611). Nevertheless, the decision to imprison remains one of the most fundamental tasks for the sentencing court (Wasik 2004: 262).

The SGC theft guidelines were drafted to reflect existing sentencing practice, so most cases could be expected to be dealt similarly to previous practice, perhaps unsurprisingly as the CJA 2003 was already in force prior to the creation of the SGC's theft guidelines. But changes brought in by the 2003 Act do not appear to have changed sentencing practice markedly from that under the 1991 Act regime, and the decision to imprison in this study's sample of cases would often be supported by the SGC's current guidelines on theft. Having reviewed a number of pre-2003 Act cases, it appears that the 2003 Act did not depart so greatly from the 1991 Act as might have initially seemed. To a great extent, this may be due to the SGC's *Overarching Principles* guideline on offence seriousness which exerted a major restraining influence over the practical impact of the 2003 Act. Sentencing guidelines are unlikely to succeed in the face of strong judicial opposition or resistance which would otherwise risk reducing compliance and undermine the guidelines (O'Malley 2013: 229). The SGC's overarching guideline reflects judicial concern over the recent proliferation in sentencing legislation and political interference in what has traditionally been regarded as a judicial matter (Ashworth 2013).

Elsewhere, the apparently modest impact of the 2003 Act may be explicable by reference to the fact that certain provisions of the Act reflect previous practice. In the study's sample of

cases, custody was only ever imposed in shoplifting cases where the offender had a prior record, usually of some length, and in a number of cases the decision to imprison seems to have been based on the record rather than on the basis of offence seriousness. The Act 2003 states that prior record can be a source of aggravation, so this practice of imposing custodial sentences for persistence is likely to continue, and is indeed legitimised by the Act. Additionally, for retail thefts, custody was routinely imposed for reasons other than offence seriousness, but most of these circumstances are dealt with in other guidelines or statute law. For example, where the offender fails to express a willingness to comply with a community order, s.152(3)(a) permits the court to impose a custodial sentence where a community order would otherwise be justifiable. Furthermore, whilst the wording of the custody threshold has changed under the 2003 Act, this appears to have had little or no obvious impact on sentencing practice. It appears that, despite the change in wording, the custody threshold continues to be interpreted largely in the same way, and catches the same cases as under the 1991 Act regime.

With all this in mind, it appears that comparable cases dealt with under the 2003 Act would not result in the imposition of radically different sentences to those imposed under the 1991 Act. Fundamentally, according to the custody threshold under the 2003 Act, the decision to impose a custodial sentence must still be made on the basis of offence seriousness, although the courts must also take the offender's previous convictions into consideration and may imprison on the basis of his unwillingness to comply with a non-custodial order.¹¹ Having

identified the appropriate sentence band, the court may then move to consider the desirability of seeking to, for example, reform the offender through the imposition of a drug rehabilitation or supervision requirement attached to a community sentence. To safeguard against the imposition of disproportionate sentencing, the menu of purposes provided by the 2003 Act should be a secondary consideration, taken into account only after the court has identified the sentence range as appropriate to the seriousness of the offence.

Under the Coroners and Justice Act 2009, a court's duty is to follow the applicable guidelines.¹² Accordingly, the court should first identify which offence category most closely resembles the offender's case, which then identifies the appropriate starting-point and sentence range. When taking into consideration all aggravating and mitigating factors, the court may be minded to move the case into a higher (or lower) band. Importantly, this does not constitute a departure: 'a departure occurs when a court imposes a sentence outside of the offence range, i.e. either below the floor of the lowest category-range or above the highest category-range indicated in the guideline' (Ashworth 2012: 81). This is significant as custodial sentences could now be imposed even where the sentence range for the appropriate offence category does not prescribe a custodial sentence, despite the fact that the 2009 Act requires the court to 'follow' rather than merely 'have regard to' the guidelines which 'is likely to create a heightened expectation that courts will impose a sentence consistent with the guidelines issued by the Sentencing Council' (Roberts 2011: 1011). This change in the definition of departure is perhaps inevitable given the enhanced role of previous convictions under the

2003 Act which, for particularly persistent low-level offending, might be deemed by the court to warrant a custodial sentence. It might also enable the courts to continue their practice of imposing short custodial sentences in lieu of fine payment, without having to justify departing from the guidelines. The guidelines continue to leave considerable leeway in the assessment of aggravation and mitigation, no doubt a result of trying to encourage consistency whilst maintaining judicial discretion (Ashworth 2006: 22).

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Table 1: SGC Guideline on Theft in breach of trust

Theft in breach of trust Theft Act 1968 (section 1) Maximum penalty: 7 years imprisonment		
Type/nature of activity	Starting point	Sentence Range
Theft of £125,000 or more or theft of £20,000 or more in breach of a high degree of trust	3 years custody	2- 6 years custody
Theft of £20,000 or more but less than £125,000 or theft of £2,000 or more but less than £20,000 in breach of a high degree of trust	2 years custody	12 months – 3 years custody
Theft of £2,000 or more but less than £20,000 or theft of less than £2,000 in breach of a high degree of trust	18 weeks custody	Community Order (HIGH) – 12 months custody
Theft of less than £2,000	Community Order (MEDIUM)	Fine – 26 weeks custody
Additional aggravating factors:		
1. Long course of offending 2. Suspicion deliberately thrown on others 3. Offender motivated by intention to cause harm or out of revenge		

SOURCE: Sentencing Guidelines Council 2008: 11

Table 2: SGC Guideline on Theft in a dwelling and from the person

Theft in a dwelling/ from the person		
Theft Act 1968 (section 1) Maximum penalty: 7 years imprisonment		
Type/nature of activity	Starting point	Sentence Range
Theft from a vulnerable victim involving intimidation or the use or threat of force	18 months custody	12 months – 3 years
Theft from a vulnerable victim	18 weeks custody	Community Order (HIGH) – 12 months custody
Theft not involving a vulnerable victim	Community order (MEDIUM)	Fine – 18 weeks custody
Additional aggravating factors:		
<ol style="list-style-type: none"> 1. Offender motivated by intention to cause harm or out of revenge 2. Intimidation or face-to-face confrontation with the victim 3. Use of force, or threat of force, against victim 4. Use of deception (theft in dwelling only) 5. Offender takes steps to prevent the victim from reporting the crime or seeking help (theft in dwelling only) 6. High level of inconvenience caused to victim (theft from the person only) 		

SOURCE: Sentencing Guidelines Council 2008: 13

Table 3: SGC Guideline on Retail Theft

Theft from a shop Theft Act 1968 (section 1) Maximum penalty: 7 years imprisonment		
Type/nature of activity	Starting point	Sentence Range
Organised gang/group and intimidation or the use or threat of force (short of robbery)	12 months custody	36 weeks – 4 years custody
Significant intimidation or threats or use of force resulting in slight injury or very high level of planning or significant related damage	6 weeks custody	Community order (HIGH) – 36 weeks custody
Low level intimidation or threats or some planning e.g. a session of stealing on the same day or going equipped or some related damage	Community order (LOW)	Fine – Community order (MEDIUM)
Little or no planning or sophistication and goods stolen of low value	Fine	Conditional discharge – Community order (LOW)
Additional aggravating factors:		
<ol style="list-style-type: none"> 1. Child accompanying offender is involved in or aware of theft 2. Offender is subject to a banning order that includes the store targeted 3. Offender motivated by intention to cause harm or out of revenge 4. Professional offending 5. Victim particularly vulnerable (e.g. small independent shop) 6. Offender targeted high value goods 		

SOURCE: Sentencing Guidelines Council 2008: 17

¹ Von Hirsch and Roberts point out that ss.152(2) and 153(2) of the CJA 2003 ‘provide a significant restraining role for proportionality in deciding sentences.’ (2004: 644-5)

² Ss. 118-136 Coroners and Justice Act 2009

³ S.172 Criminal Justice Act 2003

⁴ For a review of the 2009 Act’s test for departing from sentencing guidelines, see Ashworth (2012)

⁵ Emphasis added

⁶ Section 142(1) Criminal Justice Act 2003

⁷ Section 143(1) Criminal Justice Act 2003

⁸ Section 153(2) Criminal Justice Act 2003

⁹ According to a series of interviews conducted with magistrates and judges as part of this study, sentencers admitted that a clean prior record can act as a significant source of mitigation, both before and since the enactment of the CJA 2003.

¹⁰ S. 79(3)(a) Powers of Criminal Courts (Sentencing) Act 2000. Now see s.152(3)(a) Criminal Justice Act 2003

¹¹ Despite the fact that the CJA 2003 appeared to alter significantly the approach taken to previous convictions at sentencing, Martin Wasik claims that the impression from everyday practice is that the 2003 Act has had very little impact on sentencing practice (2010: 164-5).

¹² S.125(1)