Public order and the rebalancing of football fans' rights: Legal problems with pre-emptive policing strategies and banning orders.

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Abstract

The policing of football supporters in the UK is resource-intensive and expensive, with football crowds seen by many forces as inherently prone to misbehaviour, disorder and violence. As a result they are regularly subjected to high-profile, heavy-handed and intrusive policing strategies that are often designed with the imposition of a civil "banning order" on supposed "risk supporters" in mind. This article analyses underlying assumptions about the nature and risk of football crowds and, drawing comparisons with the ways in which political protests are policed and applying jurisprudence from a series of high-profile protest cases, questions the legality of dominant policing approaches to football crowds under both English public law principles and the European Convention on Human Rights. It concludes by proposing how strategies could be developed in a way that both protects the public and the rights of supporters who may on occasion associate with those suspected of engaging in football-related disorder.

KEY WORDS: Football supporters, hooligan, football banning orders, civil preventive orders, disorder, crowds, public order, human rights, kettling

Introduction[*]

It is well established that there has been a "pre-emptive turn"[1] in criminal justice, with a changing emphasis towards security and the pro-active management of risk and away from the more traditional criminal law response to wrongdoing.[2] The impact of this on police

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[1] L. Zedner, "Fixing the future. The pre-emptive turn in criminal justice" in S. Bronnit, B. McSherry and A. Norrie (eds), *Regulating Deviance: The redirection of criminalisation and futures of criminal law*, (Oxford: Hart, 2009), Ch.3.

[2] See generally, D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, (Chicago: University of Chicago Press, 2002) and L. Zedner, *Security*, (London: Routledge, 2009).

strategies and tactics to manage protest groups has been discussed extensively, including in *Public Law*,[3] as has the introduction of civil preventive orders to control suspected terrorists and those engaging in "anti-social behaviour."[4] Conversely, mainstream legal and socio-legal research has generally not analysed the impact of this development upon those for whom the pre-emptive turn is a weekly reality.[5] Football supporters are amongst the most heavily policed social groups in the UK. Since the late 1960s, the policing of football crowds has evolved to include as a matter of routine restrictions on movement, the use of stop and search provisions, and various invasive intelligence-gathering techniques. It was also in the football context that the first civil preventive orders were developed. This article considers the ways in which football supporters are regulated and managed in England and Wales, analysing legislative, judicial and policing responses to the challenges posed by football crowds. In particular it questions whether routine public order policing strategies and applications for "Football Banning Orders" are compliant with the rights guaranteed under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA).

The routine nature of pre-emptive police interventions in football has been noted *obiter* by both the House of Lords and the Grand Chamber of the European Court of Human Rights (ECtHR) in cases related to UK public order interventions in the context of political protest:

> "[Members] of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as... attendance at a football match."[6]

The throwaway nature of judicial comments such as this indicates a lack of scrutiny where the policing of football crowds is concerned.[7] Where the curtailment of the fundamental rights of protesters has received considered judicial and academic attention, it is apparently *obvious* that football supporters both deserve and consent to similar restrictions. The apparent necessity of, or supporters' acquiescence to (as opposed to active consent to), these

[3] H. Fenwick, "Marginalising human rights, breach of the peace, 'kettling', the Human Rights Act and public protest" [2009] 4 P.L. 737.
[4] A. Ashworth and L. Zedner, "Prevention Orders: A problem of undercriminalisation?" in R. Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford: OUP, 2010), Ch.3.
[5] See for example, Ashworth and Zedner "Prevention Orders" where only passing reference is made to the existence of Football Banning Orders.
[6] *Austin and others v UK* (2012) 55 E.H.R.R. 14, para.59.
[7] See also *Austin v Commissioner of Police of the Metropolis* [2009] 1 A.C. 564, per Lords Hope, at 576, and Neuberger, at 586.

restrictions cannot, however, constitute sufficient reason for such police conduct to be held lawful.[8] In contrast to protest cases, pre-emptive police strategies to manage football crowds have not been challenged in the higher courts. The main problem is that although the Football Supporters Federation (FSF)[9] receives hundreds of complaints about policing each year, very few of these are acted upon by the alleged victim. A case worker for the FSF whose role is to deal with supporter complaints contends that:

> "In the majority of cases supporters may be completely unaware that they may be subjected to unlawful policing. There is a prevalent 'expect and accept' culture among fans in that they are so used to intrusive policing practices, they think they are the norm and part of the 'match day experience'. To a greater or lesser extent I'm sure the police rely on both compliance of supporters and their unwillingness to complain."[10]

Football supporters appear more likely to tolerate and normalise intrusive and sometimes aggressive public order responses as part of the "match day experience" whereas the use of similar policing tactics against political demonstrators is more likely to result in legal challenge.[11] Why this is the case is unclear: protesters may be more politically inclined to challenge the authorities than those assembling "merely" for socio-cultural reasons, or alternatively the historical regularity with which football fans have been subjected to confrontational policing may have led fans to normalise these tactics.

The methodological approach utilised for this article is a traditional legal analysis of reported political protest cases and the application of this jurisprudence to the practice of policing football crowds, contextualised by reference to the wealth of ethnographic, sociological and socio-legal research on football fan behaviour and the policing of fans,[12]

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[8] In an analogous situation, the ECtHR has gone as far as stating that, 'The right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention.' *de Wilde, Ooms and Versyp v Belgium* (1979-80) 1 E.C.H.R. 373 ECtHR at 65. See further on this point, D. Mead, "Of Kettles, cordons and crowd control – Austin v Commissioner of Police for the Metropolis and the meaning of 'deprivation of liberty'" (2009) 3 E.H.R. L.R. 376, at 390.

[9] The FSF was established in 2002 and is funded by the UK Home Office to provide support and advice for match-going fans and to act as a pressure group on issues affecting football spectators.

[10] Amanda Jacks (correspondence with authors, September 15, 2011).

[11] See for example, *Austin* [2009] 1 A.C. 564 (legality of kettles), *R. (Menghesa) v Commissioner of the Police for the Metropolis* [2013] EWHC 1695 (Admin) (legality of filming kettled protestors), *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (retention of personal data).

[12] G. Armstrong, *Football Hooligans: Knowing the Score*, (Oxford: Berg, 1998); R. Giulianotti, "Scotland's Tartan Army in Italy: the case for the carnivalesque" (1991) 39(3) *Sociological Review* 503; A. King, "Football fandom and post-national identity in new Europe", (2000) 51(3) *British Journal of Sociology* 419; J. Rookwood, *Fan Perspectives of Football Hooliganism: Defining, Analysing and Responding to the British Phenomenon,*

including that of the authors.[13] This enables a detailed picture of how football fans are regulated by the state to be constructed and demonstrates how the human rights of this sub-cultural community are affected.

The legal framework for policing football

Football crowds have long been seen as problematic in a way that crowds at other similar leisure or sporting events in the UK have not.[14] This is an historical development resulting from crowd disorder that was regularly reported from the 1960s onwards and became labelled "football hooliganism".[15] Following a number of high-profile incidents culminating in the 39 fatalities in the 1985 Heysel Stadium Disaster, legislative action was taken against behaviour deemed to cause or contribute to "hooliganism"; it became a criminal offence to be drunk entering a stadium, to smuggle alcohol into a stadium, consume alcohol on "football specials" or within sight of the pitch, to set off fireworks,[16] throw missiles, engage in "indecent" or "racialist" chanting in a stadium, to invade the pitch[17] or tout tickets.[18] Increased regulation of fan behaviour was assisted by powers introduced under the Public Order Act 1986,[19] Criminal Justice and Public Order Act 1994 s.60 stop and search powers, and Violent Crime Reduction Act 2006 s.27 directions to individuals representing a risk of alcohol-related disorder. Arrests made in the 2013/14 season demonstrate the wide powers available to the police to carry out arrests of football spectators:

Football-Related Arrests in England and Wales 2013/14
(UK Home Office Statistics)[20]

(Saarbrücken: VDM Publishing, 2009); J. Sugden, *Scum Airways: Inside Football's Underground Economy* (Edinburgh: Mainstream Publishing, 2002); J. Williams, E. Dunning, and P. Murphy, *Hooligans Abroad* (London: Routledge, 1989).

[13] In particular, G. Pearson, *An Ethnography of Football Fans: Cans, Cops and Carnivals*, (Manchester: MUP, 2012) and M. James and G. Pearson, "Football Banning Orders: Analysing their use in Court" (2006) 70(6) J.Crim.L. 509.

[14] A rare exception to this was the 2001 report into disorder at cricket matches, which concluded that cricket-specific legislation similar to that which exists for football was not necessary: Department of Culture, Media and Sport, *Report and Recommendations of the Cricket Disorder Review Group*, (London: DCMS, 2001).

[15] E. Dunning, P. Murphy, and J. Williams, *The Roots of Football Hooliganism* (London: Routledge, 1988); C. Stott and G. Pearson, *Football Hooliganism: Policing and the War on the English Disease* (London: Pennant, 2007).

[16] Sporting Events (Control of Alcohol etc.) Act 1985.

[17] Football (Offences) Act 1991 ss.2-4.

[18] Criminal Justice and Public Order Act 1994 s.166.

[19] Particularly ss.2-5.

[20] UK Home Office, *Statistics on Football-Related Arrests and Banning Orders: Season 2013/14*, available at: https://www.gov.uk/government/statistics/football-related-arrests-and-banning-orders-season-2013-to-2014

Violent Disorder	356
Public Disorder	705
Missile Throwing	57
Racist or Indecent chanting	21
Pitch Incursion	174
Alcohol Offences	572
Ticket touting	104
Possession of Offensive Weapon	13
Use/possession of fireworks/flares	188
Breach of Banning Order	42
Offences Against Property	41
TOTAL	**2,273**

Alongside these new offences and police powers, conduct regulation by civil preventive order was introduced for the first time by what is now called the Football Banning Order (FBO).[21] The aim of FBOs is to prevent "hooligans" from attending football matches and engaging in violence or disorder; breach of an FBO's conditions is a criminal offence that can lead to a custodial sentence. "Hybrid" orders[22] or "two step provisions",[23] have been mapped extensively and criticised for subverting the normal criminal process by criminalising the breach of the order rather than the original behaviour.[24] This is particularly problematic where the punishment for the breach is greater than that for the original crime.[25] The

(accessed October 6, 2014). Categories established by the Home Office: "Public Disorder" includes Public Order Act 1986 ss.3-5. Football is the only sport for which arrest figures are specifically collected.

[21] Public Order Act 1986 s.30 introduced "Exclusion Orders" to ban fans convicted of "football-related" offences from domestic matches and the Football Spectators Act 1989 introduced "Restriction Orders" banning convicted fans from travelling to matches abroad. These were renamed "Banning Orders" by the Football (Offences and Disorder) Act 1999 and amalgamated under the Football Spectators Act 1989 by the Football (Disorder) Act 2000.

[22] A. Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10(4) *International Journal of Evidence and Proof*, 241; R. Duff and S. Marshall, "How offensive can you be?" in A. Von Hirsch and A. Simester (eds.), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart, 2006) Ch.2; J. Gardiner et al. "Clause I – The Hybrid Law from Hell?" (1998) 31 C.J.M. 25; H. Wright and T. Sagar, "Out of Sight, Out of Mind" (2000) N.L.J. 1792.

[23] A. Von Hirsch and A. Simester, 'Regulating Offensive Conduct through Two-Step Prohibitions' in Von Hirsch and Simester (eds.), *Incivilities: Regulating Offensive Behaviour*, Ch.7.

[24] See for example, Ashworth and Zedner, "Prevention Orders" in *The Boundaries of Criminal Law* (2010) and A. Ashworth and M. Redmayne, *The Criminal Process*, 4th edn (Oxford: OUP, 2010) Ch.13.

[25] See *R v Duncan* (unreported), Preston Magistrates' Court, September 18, 2012, *Lancashire Evening Post* 19/9/12, available at: *http://www.lep.co.uk/news/local/football-fan-who-lied-so-he-could-go-to-euro-2012-jailed-1-4937509* (accessed July 30, 2014), where the defendant was sentenced to five months in jail for breaching a FBO that had been imposed for drinking alcohol in sight of a football pitch contrary to the Sporting

subversion occurs by using a two-step legal process: the civil application for the FBO followed by the criminal prosecution of its breach. On the face of it, both procedures are fair and, individually, appear to comply with the requirements of ECHR arts 6 and 7 as no punishment is imposed during the civil application.[26] Further, it is difficult to argue a breach of ECHR art.5 in light of the more extensive restrictions that can be imposed in terrorism control orders.[27] However, when examining the legality of civil preventive orders, the courts have often failed to examine fully the impact of their restrictions on the respondent.[28]

The power to grant FBOs and the breadth of the conditions included in them has extended significantly since 1986, making them a cornerstone of policing strategies for managing football crowds. More controversially, the Football (Disorder) Act 2000 [29] introduced a new "Banning Order on Complaint" into Football Spectators Act 1989 s.14B (FSA). This provides Magistrates with the power to impose FBOs following an application by the relevant Chief Constable where it is believed that, "the respondent has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere"[30] and that "the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches."[31] No charge for, or conviction of, a criminal offence is necessary and a ban lasts for between three and five years.[32] The wording and effect of the much-amended legislation has been severely criticised by the Court of Appeal,[33] whose own efforts to clarify matters in relation to the standard of proof in *Gough v Chief Constable of Derbyshire*[34] have caused further problems for the lower courts, including the admission of weak evidence, evidence of guilt by association, and plea bargaining through the threat of imposing costs on defendants.[35]

Events (Control of Alcohol etc) Act 1985 s.2(1)(a), for which the maximum sentence is three months imprisonment (s.8(b)).

[26] *Clingham v Royal Borough of Kensington and Chelsea; R (on the application of McCann) v Manchester Crown Court* [2002] UKHL 45. For the application of the same reasoning to FBOs see, *Gough & Anor v Chief Constable of Derbyshire* [2002] EWCA Civ 351.

[27] *JJ v Secretary of State for the Home Department* [2007] UKHL 45.

[28] A. Ashworth, "Social control and 'anti-social behaviour': the subversion of human rights?" (2004) 120 L.Q.R. 263.

[29] For more discussion on the legislation and arguments that it was introduced on a false premise, James and Pearson, "Football Banning Orders" and C. Stott and G. Pearson, "Football banning orders, proportionality and public order" (2006) 45(3) Howard J.Crim.Just. 241.

[30] FSA s.14B(2).

[31] FSA s.14B(4)(b).

[32] Where an FBO follows a conviction that leads to a custodial sentence, the maximum duration is ten years, FSA s.14(F).

[33] See *R. v Boggild & Ors* [2011] EWCA Crim 1928; *R. v Doyle & Ors* [2012] EWCA Crim 995.

[34] *Gough* [2002] EWCA Civ 351.

[35] For a detailed discussion of these issues see, James and Pearson, "Football Banning Orders".

Despite variations across forces, most FBOs contain a number of standard conditions. A banned individual is prevented from attending all regulated matches,[36] excluded from a one-mile zone around their home team's stadium for 24-hours on a match-day and must surrender their passport for a five-day "control period" before their club or national team plays abroad. If the individual supports a club that is successful in European competition, and there is an international tournament played that season, this can mean that the individual's passport is held at their local police station for approximately 80 days a year.[37] Many FBOs also impose a 24-hour match-day exclusion zone around the main train station or town centre of the home team's locality. At their most severe, conditions include a two-mile exclusion zone around every UK football stadium on days when regulated matches are played, banning the respondent from an area of roughly 320 square miles in any given week, and bans from entire towns or boroughs.[38] Where an FBO has been imposed under s.14B, these serious restrictions are imposed on individuals who have not been convicted of a football-related offence and following a civil procedure that fails to provide the evidential and procedural safeguards that would be found following the imposition of a punishment after a criminal trial.[39] In 2013/14, there were 2,273 banning orders in operation, with 678 new orders imposed.[40]

Preventive orders available to the courts, particularly ASBOs, have been criticised extensively, and by implication and analogy many of the same criticisms can be made of FBOs.[41] Although held not to be punishments,[42] the courts have accepted that the 'serious consequences' of being the subject of a FBO means that the applicant must discharge a higher standard of proof, approaching that applicable in a criminal trial, than would normally be required in a civil application.[43] However this does not change the nature of the

[36] Football Spectators Prescription Order (2004/2409).
[37] Calculations based upon eight away European club matches, three national team away matches and a four week international tournament. The amended Football Spectators Prescription Order (2004/2409) art.4(2)(c) means that fans of a national team that was involved in the competition's qualification stage will be banned from attending the Finals Tournament even if their team failed to qualify. Youth tournaments also activate the banning order regime: the Football Spectators (2007 European Under-21 Championship Control Period) Order 2007/1411).
[38] *Commissioner of the Police for the Metropolis v Melody*, unreported July 9, 2012, Tower Bridge Magistrates Court. Based on each of the 92 league clubs and 68 non-league clubs covered by the banning order regime playing at home once a week. An additional 12 League of Wales clubs and 42 Scottish Professional Football League Clubs are also included, as are all matches in the English FA Cup competition (Football Spectators (Prescription) Order 2004 (SI 2004/2409).
[39] *Gough* [2002] EWCA Civ 351.
[40] Home Office, "Statistics on football-related arrests: 2013/14".
[41] See in particular, Ashworth and Zedner, "Prevention Orders"; A. Ashworth, "Social control" (2004) 120 L.Q.R. 263 and P. Ramsay, "What is anti-social behaviour?" [2004] Crim.L.R. 908, at p.921.
[42] *Gough* [2002] EWCA Civ 351.
[43] *Gough* [2002] EWCA Civ 351, para.90.

proceedings from civil to criminal. Instead, the court is empowered to create a personalised criminal law for the respondent,[44] by delegating wide rule-making discretion to the courts through the imposition of conditions contained in the FBO.[45] These extensive prohibitions often extend well beyond the behaviour used to justify the imposition of the Order (for example, domestic exclusion zones and international travel bans for isolated incidents of verbal abuse, pitch invasions or drinking alcohol in sight of the pitch) and criminalises what in other circumstances would not automatically be criminal conduct. Thus, the effect of the imposition of a FBO is that the respondent owes duties to the state that are not owed by the general population. Further, breach of this individualised criminal law is strict;[46] entering an exclusion zone to go shopping or travelling abroad to go on holiday are just as much a breach of the order as is attending football matches to engage in violence or disorder. It is the procedure as a whole, including the impact of the FBO on the respondent, that calls into question whether or not ECHR arts 6 and 7 are engaged.

Fan culture and definitions of "risk supporter"

The above legal framework enables the police to identify, prosecute and/or seek a FBO against any individual who has been, or is suspected of being, involved in football-related disorder. However, both pre-emptive policing tactics and FBO applications are often made on the basis of generalisations and assumptions about how a person will act because of their age and gender, how they dress, the songs they sing, the company they keep, and their alcohol consumption, rather than on intelligence of actual engagement in violence or disorder.[47] The original intention of the FBO framework was to identify and exclude hooligan "ringleaders",[48] but generalisations based on wider characteristics indicate a failure by the police to understand fan culture, which can in turn lead to the indiscriminate use of their powers against groups of otherwise orderly fans.[49] Interventions based on a subjective assessment of a group's characteristics instead of an individualised assessment of the actual

[44] D. Tausz and J. Smith, "Anti-social behaviour order: whether proceedings civil or criminal in nature" [2003] Crim.L.R. 269, at p.271.
[45] Ashworth and Redmayne, *The Criminal Process*, p.407 et seq.
[46] Ramsay, "What is anti-social behaviour?", at p.921.
[47] James and Pearson, "Football Banning Orders".
[48] See for example comments of the Parliamentary Under-Secretary of State for the Home Department (House of Commons Standing Committee D Debate on the Football (Offences and Disorder) Bill; May 5, 1999, SC Deb (D)).
[49] This is in contrast to the Core Principles of impartiality and proportionality that underpin the Authorised Professional Practice Framework guidance on public order policing: College of Policing, *Core principles and legislation*, (Internet, 2014) available at: *http://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/* (accessed July 30, 2014).

risk posed has the potential to engage art.14, where such generalisations limit a person's access to other Convention rights[50] and may in turn result in subsequent restrictions on liberty being found to be arbitrary, as discussed below.

Football supporters rarely constitute an homogenous group, with many subtle and distinctly nuanced sub-cultures on display simultaneously.[51] These include the "hooligans"[52] that FBOs were designed to manage: usually defined by match-going fans and police as those who attend games intending to engage in violence and disorder with like-minded members of the opposition team's supporters. These can be contrasted with a wider group of regular match-goers, labelled as "lads"[53] or "carnival fans",[54] whose primary intention has been identified as creating an atmosphere of transgression from the norm (the non-football world) where collective gathering, chanting (including songs that could be interpreted as indecent, intimidatory and/or aggressive when taken out of the context of a football match), and social drinking are central. This much larger group regularly attracts the interest of the police because of an assumption that their behaviour can degenerate into violence and disorder. Further difficulties arise when trying to distinguish between these two sub-cultures, particularly when for practical reasons they may travel to matches on the same mode of transport or drink in the same public houses, often at the insistence of the police. The malleable boundaries between these different groups can make it particularly difficult for the police to determine whether or not individual fans are potential "hooligans" or simply engaging in behaviour that is normalised in the context of live football matches. Thus, the policing of football supporters as an homogenous group has the potential to infringe disproportionately the rights of "non-hooligan" fans.

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[50] Restrictions on human rights resulting from generalisations based on gender and age would clearly be protected by art.14. The prohibition on discriminatory treatment in accessing ECHR protections on the basis of, "a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other" (*Kjeldsen v Denmark* (1979-80) 1 E.H.R.R. 711, para 56) makes it unclear as to whether dress-sense or membership of a particular fan sub-culture could be included. O'Connell's view of ECtHR jurisprudence is that, "almost any distinction within the ambit of a Convention right can trigger an art.14 inquiry" (R. O'Connell, "Cinderella comes to the Ball: Art.14 and the right to non-discrimination in the ECHR" (2009) 29(3) L.S. 211, at p.222).

[51] A. King, *The End of the Terraces: The Transformation of English Football in the 1990s* (London: Leicester University Press, 2002); Pearson, *An Ethnography of Football Fans*; Rookwood, *Fan Perspectives on Football Hooliganism* (2009).

[52] The terms "hooligan" and "hooliganism" are not defined in law.

[53] King, *The End of the Terraces*.

[54] Pearson, *An Ethnography of Football Fans*.

This failure to differentiate different sub-cultures is reflected in the definition of "risk supporter",[55] an important phrase used by the police to determine which individuals or groups should be the focus of their policing and FBO application strategies. The classification of an individual as a "risk supporter" has serious implications for how they are treated on match-days and in any subsequent legal action. However the definition provides little assistance to officers on the ground when determining whether an individual falls under this category, opening up significant discretion to act against fans based on categorisations such as dress and demeanour as well as gender and age. According to the Association of Chief Police Officers (ACPO), a "risk supporter" is:

> "a person, known or not, who can be regarded as posing a possible risk to public order or anti-social behaviour, whether planned or spontaneous, at or in connection with a football event".[56]

The inclusion of "anti-social behaviour" means it is possible that any fan who engages in boisterous conduct at a match could be seen as a risk supporter, even though they pose no risk of disorder or violence. Here a potential problem arises when Football Intelligence Officers on the ground identify fans as risk supporters because they perceive they may engage in anti-social behaviour, but at a subsequent FBO application this label is used as evidence in court that an individual should be served with a s.14B FBO to prevent them from engaging in football-related violence and disorder.[57] Being classified as a risk supporter according to the ACPO definition is not a sufficient justification for imposing a FBO under FSA s.14B, nor for utilising intrusive and restrictive police methods.

Typically, Football Intelligence Officers use a narrower definition, focusing on the risk of disorder rather than of anti-social behaviour. However, the narrower definition often relies on generalisations, referring to "groups of males" wearing "designer clothing".[58] Problems remain even with this narrower definition; until a supporter actually engages in

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[55] A similarly vague definition of "domestic extremist" is used by the police to inform the strategies used against a number of protest organisations.

[56] College of Policing, *Policing football*, (Internet: 2013), available at: *http://www.app.college.police.uk/app-content/public-order/policing-football/* (accessed July 30, 2014).

[57] *Chief Constable of West Yorkshire v Nye*, unreported June 21, 2010, Leeds Magistrates Court; *Chief Constable of Greater Manchester v Messer*, unreported December 16, 2012 Manchester City Magistrates Court; *Chief Constable of Greater Manchester v Oldland*, unreported December 17, 2012, Manchester City Magistrates Court.

[58] Statement on the nature of "risk supporters" from applicant bundle: *Chief Constable of West Yorkshire Police v Ford and others*, unreported June 21, 2010, Leeds Magistrates Court.

disorder, they are merely a suspect, and one often identified by their gender, clothing and the company they keep rather than by the criminality of their actions. This is in stark contrast to the definition of "reasonable suspicion" contained in PACE which excludes "generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity" and emphasises the importance of "intelligence" and the "specific behaviour of the person concerned".[59] By analogy, and in particular because of the use of stop and search powers against football fans, a similar evidence-based approach would appear to be appropriate because the categorisation of a fan as a risk supporter can have severe implications for how they are managed both on a match-day and afterwards.

Domestic and ECtHR jurisprudence in protest cases consistently acknowledges the legitimacy of pre-emptive police powers to prevent "imminent" public order breaches. However, where similar interventions in football are the result of either vague and highly subjective assessments based primarily on association or (lawful) expression, or where they are influenced by gender or age, serious questions about their legality are raised. In *Laporte*, Lords Carswell and Mance were both clear that the presence of allegedly violent individuals travelling to a protest was not sufficient for the police to label all those on the coach as posing a risk of violence, and emphasised the importance, where operationally possible, of discriminating between individuals within that group.[60] Despite this judicial warning, categorisation as a risk supporter, or having a supposed risk supporter within your social group, results in very different treatment of the group by match-day police. Further, the fluidity of the definition of "risk" can result in rowdy or "carnivalesque" behaviour being reclassified as anti-social and potentially disorderly conduct, leading to the use of inappropriate and potentially unlawful policing strategies.

Restrictions on movement – kettles, bubbles and hold-backs

Police forces perceive that the highest risk of disorder arises when groups of rival risk supporters (by the narrower definition) come into contact with each other. The strategy of segregating fans of rival teams inside the stadium has been in existence since the late 1960s and became more rigorously enforced following the Safety at Sports Grounds Act 1975. This Act provided police and local authorities with the power to insist upon segregation inside

[59] Home Office, *Police and Criminal Evidence Act 1984 Code A*, (London: HMSO, 2010) para.2.2.

[60] *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 All E.R. 529, paras 105 and 194. This can be distinguished from *The Queen (on the application of McClure and Moos) v Commissioner of Police* [2012] EWCA Civ 12 due to the availability of less restrictive alternatives for the police. On the problems caused by treating a crowd as a single homogenous group see Mead, "Kettles, cordons and crowd control" at pp.391-2.

stadia, supported by physical characteristics such as separate entrances and radial and perimeter fencing.[61] This containment can be legally problematic when fans are prevented from leaving the stadium. Holding back visiting supporters is a popular police tactic at matches considered to pose a high risk of disorder to allow for the dispersal of home fans, thereby reducing the risk of confrontation.

Other containment tactics are used to curtail the movement of supporters and keep rival groups apart outside the stadium. At high-risk matches, fans are often subjected to temporary restrictions on their free movement and assembly, utilising the common law power enabling police officers to take reasonable steps to prevent an "imminent" breach of the peace. Using these common law powers and the public order resources available at high-risk matches, the police regularly contain (or "kettle") groups of supporters (usually visiting supporters or "risk" home supporters). Following its use against political and environmental protesters, kettling has been the subject of considerable legal debate, culminating in *Austin*. However, this type of restriction has been used by police managing football crowds for many decades with little complaint from the affected supporters. From the relevant House of Lords and Grand Chamber *dicta*, it appears that the very fact that supporters do generally "expect and accept" these restrictions may in and of itself be mistaken for a sufficient justification for resorting to them:

> "As the judges in the Court of Appeal and House of Lords observed, members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as... attendance at a football match... The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of the circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as 'deprivations of liberty' within the meaning of art.5(1)."[62]

One might think from this that attending football matches was an activity that was inherently dangerous, with the real risk of serious harm continually in need of proactive management by the police; this is not a reality that is encountered by the millions of men, women and children

[61] Safety at Sports Grounds Act 1975 s.3.
[62] *Austin* (2012) 55 E.H.R.R. 14, para.59.

who attend games each season.[63] As the arrest statistics detailed above suggest, "serious injury or damage" is exceptionally rare at UK football matches. Further, there is no evidence that police containment strategies are instrumental in reducing the number of arrests, as opposed to providing additional opportunities to make arrests. Football-related disorder has historically been a phenomenon where self-policing has kept serious injury to a minimum;[64] indeed policing considered to be disproportionate in force has been implicated in many of the occasions where serious harm has occurred at football matches.[65] Police tactics of containment to enforce the strategy of segregation are occasionally necessary and the least restrictive alternative to incidents of disorder and violence, but the regularity with which such tactics are used, and the basis on which decisions about who should be corralled are taken, can be questioned.

Numerous forms of "kettle" are used in football policing. Police may prevent fans who have gathered in a public house from leaving for several hours, physically blocking exits with uniformed officers who threaten anyone wishing to leave until instructed with arrest. Alternatively or additionally they may place supporters into a police "escort" to the stadium; this usually involves surrounding the group with officers (often including mounted officers, police vans and dog handlers), closing off roads and then walking the group to the away enclosure, thus preventing any physical interaction between them and the wider fan-base attending the match. Fans are not usually permitted to leave the escort, its pace is dictated by the police and the route to the stadium is not always the most direct. Incidents of intimidation, swearing and even physical assault by officers can occur, but many fans have little objection to police escorts in principle and some even seek them out as a safe way to travel to the stadium and a good opportunity to express collective identity.[66]

Decisions to impose escorts and kettles are often made on the day and in response to intelligence gathered about the groups in question,[67] but for high-risk matches detailed plans to restrict the movement of visiting fans are made and communicated in advance. At some matches ticket access has been used as a way of ensuring that all visiting supporters gather in advance at a rendezvous point determined by the police;[68] supporters are then contained in

[63] 38 million people attended regulated football matches in 2013/14, Home Office, "Statistics on football-related arrests 2013/14".
[64] P. Marsh, *Aggro: The Illusion of Violence* (London: Dent, 1978).
[65] See Stott and Pearson, *Football Hooliganism.*
[66] Pearson, *An Ethnography of Football Fans*, pp.117-122.
[67] C. Stott, J. Hoggett and G. Pearson, "Keeping the Peace: Social identity, procedural justice and the policing of football crowds" (2012) 52(2) Brit.J.Criminol. 381, pp.388-389.
[68] An attempt to impose restrictions around a Huddersfield Town v Hull City match in 2013 led to a peer review of West Yorkshire Police's conduct, Northumbria Police, *Peer Review of Huddersfield v Hull City*, (Internet,

this area before being escorted directly to the away section in coach convoys. This form of well-organised, high-resource operation is often described by police as a "bubble", highlighting the apparently protective nature of the operation for the visiting fans and the fact that only those fans who chose to attend the match would have their movements restricted in this pre-ordained manner. Again, the 'acceptance' argument should not be overstated; ECtHR jurisprudence makes it clear that consent, or acceptance, cannot be seen as a justification for art.5 breaches and Mead argues that such a belief "smacks of benevolent authoritarianism".[69]

Moreover, the HRA places a duty on police forces to avoid tactics that infringe ECHR rights unless they are justified and proportionate. There is no precedent from the higher courts questioning containment tactics at football matches, but the protest cases provide guidance on whether supporters' rights are being infringed. Following *Austin,*[70] kettling (and by analogy other containment strategies such as "bubbling" and "hold-backs") is considered to be only a *temporary restriction on*, rather than a *deprivation of* liberty, meaning that EHCR art.5 is not engaged (provided that the decision to contain is not arbitrary).[71] However, the earlier decision in *Laporte*[72] makes it clear that police powers to prevent a breach of the peace need to be balanced against the rights to freedom of expression and association. The ruling in *Anderson v United Kingdom*[73] that art.11 did not apply to purely social gatherings lacking "organised assembly or association" was unclear as to whether regular gatherings of football supporters in specific locations would trigger human rights protections. This situation appears to have been clarified by the subsequent ECtHR decision in *Friend v United Kingdom* which considered whether gathering together to hunt foxes triggered arts 10 and 11:

> "[The] primary or original purpose of art.11 was and is to protect the right of peaceful demonstration and participation in the democratic process ... Nevertheless, it would,

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2013), available at: *http://www.westyorkshire-pcc.gov.uk/media/33164/peer_review_of_hudderfield_town_v_hull_city.pdf* (accessed July 30, 2014) and a subsequent apology to fans, "West Yorkshire Police Sorry for Ticket Sanctions" *http://www.bbc.co.uk/news/uk-england-leeds-24581709* (accessed July 30, 2014).

[69] Mead, "Kettles, cordons and crowd control" at p.390.

[70] See also *Laporte* [2007] 2 All E.R. 529.

[71] Several persuasive arguments have been made that the ruling in this case weakens the principle of individual rights to liberty by giving undue deference to established public order policing strategies (see Fenwick, "Marginalising human rights"; R. Glover, "The uncertain blue line – police cordons and the common law" [2012] 4 Crim.L.R. 245 and Mead, "Kettles, cordons and crowd control". See also the minority opinion of the ECtHR, *Austin* (2012) 55 E.H.R.R. 14, paras O-I1-15). It should also be noted that even if this had been considered to fall under art.5, the later decision in the football-related case of O*stendorf v Germany* [2013] 34 B.H.R.C. 738 suggests that it may have been considered justifiable under either art.5(1)(b) or 5(1)(c). The UK has signed but not ratified protocol 4 of the Convention, which provides for liberty of movement within states.

[72] *Laporte* [2007] 2 AC 105.

[73] (1998) 25 ECHRR CD172. See also *Appleby v United Kingdom* (2003) 37 EHRR 38.

> in the Court's view, be an unacceptably narrow interpretation of that article to confine it only to that kind of assembly, just as it would be too narrow an interpretation of art.10 to restrict it to expressions of opinion of a political character … [the] Court is therefore prepared to assume that art.1 may extend to the protection of an assembly of an essentially social character" [74]

It therefore appears that gatherings of football supporters can trigger the arts 10 and 11 protections.

Following *Austin* and *McClure*,[75] kettles and other similar restrictions on assembly and expression should only be imposed by a senior police officer who reasonably believes that, based on the evidence available at the time, containment of the crowd is the least restrictive way of preventing an "imminent" breach of the peace.[76] One way in which such restrictions can be justified in football is where officers gain intelligence that a confrontation may be planned between groups of rival supporters, as in O*stendorf*.[77] In exceptional cases, this may come from phone surveillance or the activity of undercover police officers, informers, or Football Intelligence Officers who have observed a group of genuinely risk supporters gathering near to or moving in the direction of a similar rival group.[78] Here, a decision to kettle one or both of the groups clearly satisfies the common law test with regard to reasonable containment to prevent a breach of the peace and would be a proportionate and justifiable restriction of ECHR arts 10 and 11.[79] Similarly, stadium hold-backs are likely to be justifiable where the police consider there is a serious and immediate risk to visiting supporters from home supporters gathered directly around the exits of their enclosure. More problematic is when such decisions are influenced not by intelligence-led policing or obvious immediate threat, but by historical legacy of the fixture and/or the demographic composition or outward appearance of a crowd.[80] Here, police powers to manage football crowds start to diverge from those justified in the courts for managing protests.

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[74] (2010) 50 E.H.R.R. SE6, para 50.
[75] [2012] EWCA Civ 12.
[76] *McClure*, para.94.
[77] [2013] 34 B.H.R.C. 738.
[78] Sometimes this information is less reliable, coming from social media platforms monitored by the police. Previous incidents and court observations have shown that such intelligence may be no more than an anonymous post on an internet forum or social media platform from someone who may have no intention of becoming engaged in disorder, or no knowledge of whether disorder is likely to occur (e.g. *Ford*, unreported June 21 2010; *Etherington*, unreported October 6-7, 2010 Leeds Crown Court).
[79] Most clearly set out in this case by Lord Rodger in *Laporte* [2007] 2 A.C. 105, paras 59-91.
[80] Following *Leeds United FC v Chief Constable of West Yorkshire Police* [2012] EWHC 2113 (QB), where it was confirmed that the police were responsible for paying for football policing operations on land not owned by

Where violence or disorder has previously occurred, the pre-emptive kettling of groups of suspected risk supporters is likely even without any immediate threat to public order. Many decisions to kettle a group of visiting fans are made in the absence of any intelligence that they currently or potentially pose a threat, beyond a group containing suspected risk supporters.[81] Inevitably this results in fans who had no intention of engaging in disorder having their rights curtailed, often on the basis of inadvertent association (with suspected risk supporters), expression (because they are chanting similar songs to suspected risk supporters), wearing certain fashions, or presenting a negative "demeanour" towards the police.[82] Nevertheless, although decisions based on these factors raise issues under both the HRA and the Equality Act 2010, it is difficult to prove that an officer's belief that a risk of rival fans confronting each other was unreasonable where there is at least some evidence to justify the decision.[83]

The ACPO definition of a risk fan, combined with the fact that large numbers of public order trained officers were deployed to prevent potential disorder at a match, has been used as a legitimisation of the continued use of these tactics. However this is *not* sufficient to justify such restrictions under the ECHR even following the relatively free hand given to police by recent protest cases. The Grand Chamber's ruling in *Austin* placed great emphasis on the fact that the police kept their policy of containment under constant review and for the duration of it were looking for safe alternatives.[84] In *McClure*, the Court of Appeal identified, *inter alia*, the importance of an officer seeking and acting upon up-to-date information on the evolving situation. This is clearly at odds with police decision-making based upon the demographics or clothing of a certain group who have not previously been involved in disorder, or upon evidence that violence may have occurred previously at the same fixture (whether involving different individuals or not), and where containment strategies are not reviewed whilst the situation is evolving.

In contrast to many of the containments in the protest cases, it is rare in a football context for disorder to be ongoing and for interventions to be required to control it; disorder

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the club, there is also a risk that these containment strategies might become the norm if they are seen by individual forces as the cheapest and most cost effective means of policing football matches.

[81] Examples in James and Pearson, "Football Banning Orders".

[82] See M. O'Neill, *Policing Football: Social Interaction and Negotiated Disorder* (Houndmills: Palgrave MacMillan, 2005). Numerous studies on police discretion have shown an individual being in "contempt of cop" is more likely to have police action taken against them, e.g. D. Black, "The social organization of arrest" (1971) 23 *Stanford Law Review* 1087. Furthermore, individuals are far more likely to express negative attitudes towards a police force who they perceive as acting illegitimately.

[83] *McClure* [2012] EWCA Civ 12, para 94.

[84] (2012) 55 E.H.R.R. 14, particularly para.67.

is usually not only sporadic but brief.[85] Instead, containment tactics are typically employed pre-emptively,[86] even when there is history of rival supporters mixing peacefully, and in the knowledge that when disorder occurs, it is rarely sustained or leads to serious violence. Considerable confusion still exists around the concept of breach of the peace[87] and in particular judicial definitions of "imminence"[88] and its relation to "immediacy".[89] No doubt a police commander responsible for maintaining order outside a stadium would point to Lord Rodger's opinion in *Laporte* that there was no need for officers, "to wait until an opposing group hoves into sight before taking action".[90] However judicial opinion of contrasting emphasis from the judgment suggests that in many cases police are overstepping the mark in terms of legitimate containment. Lord Bingham notes that it is not enough that a breach of the peace is, "anticipated to be a real possibility",[91] and crowd dynamics around football matches do not invariably "build up" to a breach of the peace that would justify containment as per Lord Carswell.[92] Indeed, a series of studies have indicated that indiscriminate police interventions of the type used in *Austin* and *McClure* against football crowds may increase the likelihood of disorder taking place rather than reduce it.[93] Thus, it is contended that without clear and accurate intelligence of imminent planned violence, the containment of groups of fans is unlikely to be judged lawful against the duty of police to facilitate free expression and assembly or under common law police powers,[94] and could also trigger art.5 claims should a pre-determined decision to contain be considered arbitrary.

Surveillance, cumulative guilt and guilt by association

Containment has also been used to enable intelligence gathering on football supporters. Criminal Justice and Public Order Act 1994 s.60 in particular is used to gather personal

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[85] Armstrong, *Football Hooligans*; Pearson, *An Ethnography of Football Fans.*
[86] For examples of such policing operations in football, see Stott, Hoggett and Pearson, "Keeping the Peace".
[87] H. Fenwick, *Civil Liberties and Human Rights* (Abingdon: Routledge-Cavendish, 2007), p.753; R. Glover, "The uncertain blue line", at p.247.
[88] Glover, "The uncertain blue line", pp.253-256.
[89] Definitions of imminence have caused problems for the courts but *Moss v McLachlan* [1985] I.R.L.R. 76 refers to "an imminent, immediate and not remote" breach at para.27.
[90] *Laporte* [2007] 2 AC 105, para.69.
[91] *Laporte*, para.47, further suggesting that "imminence" needs to be interpreted in the context of "immediacy".
[92] *Laporte*, para.102.
[93] J. Drury and S. Reicher, "Collective action and psychological change: The emergence of new social identities" (2000) 39 Brit.J.Soc.Psychol. 579; C. Stott and S. Reicher, S., "How conflict escalates: The inter-group dynamics of collective football crowd 'violence'" (1998) 32 *Sociology* 353; C. Stott, P. Hutchison and J. Drury "Hooligans abroad? Inter-group dynamics, social identity and participation in collective 'disorder' at the 1998 World Cup Finals" (2001) 40(3) Brit.J.Soc.Psychol. 359; Stott, Hoggett and Pearson, "Keeping the Peace".
[94] Particularly following Lord Bingham's clarification in *Laporte* at para.27 that, "public disturbance, without violence, was insufficient for a breach of the peace."

information and to determine whether a supporter has a valid ticket for the match in question;[95] evidence that a fan does not possess a ticket is often used to imply that s/he is more likely to be a 'risk supporter'.[96] This power should only be used for searching for weapons that might be used in outbreaks of serious disorder but, as with kettling, is often deployed against football supporters based on historical assumptions rather than current intelligence. Additionally, alcohol dispersal directions under Violent Crime Reduction Act 2006 s.27 provide the police with the power to disperse individuals they believe are committing or about to commit "alcohol-related" disorder.[97] These have also used to corral and then disperse groups of supporters engaged in communal drinking, even where the police themselves have contained fans in the pub in question or where no disorder has occurred.

Fans subjected to these powers, regardless of whether they are carrying prohibited items or have engaged in alcohol-related disorder, are routinely videoed and required to provide their names and addresses.[98] For those defined as "risk" by the police, this footage is then included in a profile that may be provided as evidence in a s.14B application; indeed, a s.60 stop is often the start of such a profile.[99] Again, there have been no high-profile football cases to provide guidance on the legality of this type of surveillance, but following *Mengesha*[100] we can assume that the containment of a crowd in order to gather intelligence on individuals within it, rather than to prevent an imminent breach of the peace or search for prohibited articles, is unlawful. Again, this is a practice that is commonly used against suspected risk supporters.[101] The protest cases of *Wood*[102] and *Catt*[103] also cast doubt on the legality of retaining information gained from this and more generic routine filming of football fans, except in cases where individuals are suspected of committing specific offences and the retention is necessary in the pursuit of a future criminal charge. Further, for the type of

[95] For example, West Yorkshire Police used s.60 powers in a football context 10 times in five years (FOI 2013127/2348).
[96] *Ford*, unreported June 21, 2010; *Etherington*, unreported October 6-7, 2010. There is no evidence to suggest this is the case and crowd observations indicate that fans may attend match events without tickets for valid reasons (Pearson, *An Ethnography of Football Fans*, p.38).
[97] Now superseded by the dispersal powers defined in the Anti-Social Behaviour, Crime and Policing Act 2014 Part 3. It is possible that similar problems will be seen with the use of these new powers as was the case with those available under s.27.
[98] *Ford*, unreported June 21, 2010; *Etherington*, unreported October 6-7, 2010
[99] James and Pearson, "Football Banning Orders".
[100] *Mengesha* [2013] EWHC 1695 (Admin).
[101] *Ford*, unreported June 21, 2010 and *Etherington*, unreported October 6-7, 2010.
[102] *Wood* [2009] EWCA Civ 414.
[103] *R (Catt) v ACPO* [2013] EWCA Civ 192.

typically low-level criminality that occurs around football matches, the retention of personal data would have to be particularly "compelling" to satisfy art.8.[104]

From the containment of football fans by use of the powers outlined in the preceding sections, coupled with the ubiquitous filming of those subjected to these containments, two phenomena are observable. First, evidence that a supporter has been contained, stopped and searched and/or dispersed is used cumulatively to demonstrate repeated presence at points of police intervention in s.14B FBO applications. This accumulation of indirect evidence can then be used to extrapolate involvement with football-related disorder from a series of unrelated interactions with the police.[105] The assumption appears to be that it is not possible to be this "unlucky" without being a legitimate suspect. This demonstrates a failure to understand dominant fan culture; fans are regularly grouped together by the police, particularly at away matches.[106] Thus, being part of a containment, search or dispersal operation without individual analysis of any involvement in alcohol-related or other disorder should not be used as evidence that an individual is likely to engage in football-related violence or disorder. Nevertheless, evidence collected during containment is routinely relied on in s.14B applications.[107] Typically this evidence shows only that respondents were stopped and searched in the vicinity of a football stadium (not requiring any reasonable suspicion that they are carrying offensive weapons or articles), that they were served with a s.27 dispersal direction (which itself may have been unlawfully directed by the failure to consider each person present individually)[108] or had been corralled for the purposes of preventing a breach of the peace (again requiring no evidence the individual has committed an offence or is about to). However once this police action takes place, and the individual's data is placed on file, it may be treated by courts as decisive in proving a propensity for engagement in violence or disorder. Ironically, the more sightings there are of an individual *not* engaging in violence or disorder on an individual basis, the greater the likelihood that the court will consider this to be evidence that the respondent is a risk supporter.[109]

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[104] *Wood* [2009] EWCA Civ 414, per Dyson LJ at para.86.
[105] James and Pearson, "Football Banning Orders".
[106] Pearson, *An Ethnography of Football Fans*, pp.114-122.
[107] E.g. *Ford*, unreported June 21, 2010; *Etherington*, unreported October 6-7, 2010
[108] In 2009, Stoke City supporters subjected to unlawful s.27 directions (Statement of Facts and Grounds of Claim: *R (on application of Lyndon) v Chief Constable of Greater Manchester Police*, November 15, 2008, Queen's Bench Division) were able to gain compensation from Greater Manchester Police (Consent Order, 9/7/09, Queen's Bench Division).
[109] James and Pearson, "Football Banning Orders".

Secondly, fans may be considered to be risk supporters as a result of inadvertent interaction with others previously identified as a "risk" by the police.[110] Even if it is assumed that association with genuine risk supporters should be proof enough that an FBO is required, there is a problem in determining what behaviour should be accepted as evidence of "association", which can be little more than being in the same pub or on the same coach or train as a risk supporter. At away matches in particular, this spatial proximity is very different from associating socially with a specific individual; transport options or safe and accessible pubs for away fans are often scarce, with police "designating" a specific pub for away fans. Moreover, as there is no register of those classified as risk supporters, it is difficult for fans to distance themselves from these individuals. Even where fans are genuinely and knowingly associating with risk supporters, there are still implications for the right of free assembly and association. Provided that those risk supporters are not engaging in or planning violence or disorder, or interfering with the rights of others (e.g. by expressing racial hatred),[111] the right to free assembly should allow others to socialise with them. Penalising individuals for talking to or drinking with those who the police consider "risk" (usually without sufficient evidence to charge or ban the individual) infringes this right. Further, by categorising a supporter as "risk", their own rights under ECHR art.11 are in turn infringed. The majority of human rights cases on free assembly result from police attempts to move on protesters who may be blocking a public highway,[112] but here there are no other immediate public interests being infringed; gatherings in public houses are often welcomed by the owner or manager. There is no evidence of ECHR art.11 arguments being raised in s.14B cases, even though HRA s.3(1) places a duty upon judges to take Convention rights into account when interpreting legislation such as the Football Spectators Act. However, following the ECtHR ruling in *Friend*,[113] the door may have opened for a challenge on this basis.

As with dispersal powers relating to "anti-social behaviour",[114] a constabulary-based approach to football-related disorder is leading to wide variations in the use of information gathered as a result of s.60 CJPOA and s.27 VCRA interventions. Further, there is a degree of confusion amongst both senior officers who are issuing the orders, and those on the ground using them, as to the limits to which these powers can be used. This confusion also extends to

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[110] *Chief Constable of Greater Manchester Police v Reilly*, unreported February 14, 2006, Trafford Magistrates Court.
[111] *Vona v Hungary*, ECHR July 9, 2013 No. 35943/10.
[112] For example, *DPP v Jones* [1999] 2 All ER 257.
[113] (2010) 50 E.H.R.R. SE6.
[114] See A. Crawford, 'Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation' (2008) 71(5) M.L.R. 753, at p.762

the Magistrates and District Judges before whom s.14B FBO applications are heard and who may not appreciate that the powers have been exceeded. The regional variations, and the more general inconsistency in these cases that is exacerbated by Football Intelligence Officers and Magistrates/District Judges interchangeably using the ACPO definition of risk supporter and the narrower definition focussing on the likelihood of engagement in violence or disorder in connection with a football match required by the legislation, mean that many non-violent supporters are being policed and dealt with by the courts as though they are potential "hooligans".[115]

Conclusions

At first blush, football supporters are subjected to the same crowd management strategies and tactics that have generally been held lawful by the appeal courts and the ECtHR in protest cases. However on closer inspection there are serious problems with both pre-emptive football crowd policing strategies and how the evidence gathered as a result of these tactics may subsequently be used to support s.14B Football Banning Order applications. These problems are most obvious where crowds of supporters who have not engaged in disorder are kettled, and where personal information is retained on file as part of a 'fishing expedition' for evidence to satisfy a s.14B FBO application, rather than in the investigation of a specific offence. If the jurisprudence from human rights protest cases is applied in many examples of football crowd management, the right of supporters to free assembly and association, free expression, the right to privacy and, in some cases liberty, are being infringed in a disproportionate and unjustifiable manner.

These human rights problems are exacerbated when evidence of containment or dispersal in this often unlawful manner is used to support a s.14B FBO application. Through the process of compiling profiles on suspected risk supporters, we start to see how a supporter who might quite innocently be caught up in mass s.27 VCRA dispersals (that are unlawful), or be part of a group that is kettled by police (possibly for its own protection), or be subjected to a s.60 CJPOA stop and search (requiring no reasonable or individualised grounds) could find themselves with a police profile that is used to obtain a s.14B FBO in the absence of any evidence indicating that the individual has actually engaged in any act of violence or disorder. The serious restrictions placed on liberty by FBO conditions make the combined effect of the

[115] Anna Fairclough, Legal Officer for Liberty (December 18, 2008) *http://www.liberty-human-rights.org.uk/media/press/2008/liberty-and-the-fsf-team-up-to-fight-for-human-rights-of-football-fans.php* (accessed July 30, 2014).

aforementioned human rights infringements exceptionally onerous on football supporters, who, additionally, appear to be significantly less likely than protesters to challenge them in the courts.

In the policing of protest, substantial changes have already been made to try and place the human rights of protesters at the forefront of the strategic and tactical decision-making process of police officers. In *Adapting to Protest*, the need to facilitate the positive rights of citizens under ECHR arts 10 and 11 to assemble and express themselves is emphasised over treating each assembly as a potential breach of the peace.[116] ECtHR jurisprudence suggests that football fans possess the same rights to assembly, association and expression as those engaging in political protest. It is therefore time that this change of emphasis is brought to the policing of football crowds.

Impartiality and proportionality are the key tenets of the College of Policing's Authorised Professional Practice Framework guidance for successful public order policing.[117] Education about fan sub-cultures, the reinforcement of human rights considerations as underpinning strategic decision-making, and a focus on intelligence-led policing need to be established as the norm. A concomitant move away from strategies influenced by assumptions based on the behaviour of previous crowds and guilt by association, to prosecution and the necessary pre-emptive banning of supporters about whom there is genuine intelligence that they pose a risk to public order, will ensure that these tenets are achieved. There is sufficient evidence that policing football crowds in this manner will not only reduce the likelihood of successful human rights challenges in the courts, but will also lead to better engagement by fans with the police and a reduction in the risk of widespread disorder. Consequently, the pressure on police forces to obtain s.14B banning orders on fans for whom there exists very little evidence of actual engagement in football-related violence or disorder and the need for resource-intensive policing strategies can be reduced, enabling the focus to return to the "hooligans" in line with Parliament's original intentions.

[116] Her Majesty's Chief Inspector of Constabulary, *Adapting to Protest*, (London: Central Office of Information, 2009) available at: *http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf* (accessed July 30, 2014), at p.10 and p.66.
[117] College of Policing, *Core principles and legislation.*