A human rights approach to the policing of football fans

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Abstract

This ethnographic study utilises quasi-participant observations of football policing operations to further inquiry to discover the role human rights plays in practice. The aim of the study is to reveal aspects of the operative decision-making processes, the communication of decisions, and the justification for decisions taken to ascertain the role human rights considerations play, and if the tactics deployed met the legal standards as determined by domestic courts and the European Court of Human Rights (ECtHR). Following this socio-legal inquiry, I will assess whether the force delivers a human rights approach to the policing of football fans or whether other motives dominate these operations. This includes exploration of the parameters of what a human rights approach consists of, consider the benefits of a human rights approach and identification of the structural and operational limits to delivering such an approach.

Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Copyright Statement

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For M and M.

CHAPTER 1 : INTRODUCTION

A. Development of the research questions

On the first weekend of October 2016,[1] 722,990 people travelled to a stadium in England to watch a regulated[2] football match. This meant that roughly 0.13% of the English population were subject to a specific legal regime as they engaged in an activity that Parliament has identified as requiring legislative intervention and differential regulation to other social activities, such as being a sectator at other sports. A significant number of those matches were also subject to a dedicated football policing operation, including all matches in the elite two divisions and a portion of those in the lower divisions. Within the police force area observed for this study, up to six matches a day could take place with a police presence,[3] with the movements of fans in urban centres being the focus of a public order policing operation from early morning to the late in the evening when a decision was made that "normality"[4] had resumed. Football policing operations can cover a vast geographic area, particularly in the case of edge-of-town stadia. For most weekends during the football season, a significant proportion of an urban police force's active resources are deployed to maintain security and control of crowds attending football matches. On one regular Premier League match observed (that was not categorised as high-risk), a total of 124 officers were deployed on the football operation in contrast to only eight active officers on the divisional shift covering the night-time economy operation on a bank holiday Sunday.[5]

This factual and legal matrix poses a rich seam of enquiry for researchers interested in policing which has surprisingly remained largely untapped.[6] A disproportionate focus of legal research into public order

[1] The first weekend of observations for this thesis.
[2] The Football Spectators (Prescription) Order 2004 SI No.2409, as amended by the Football Spectators (Prescription)(Amendment) Order 2013 SI No. 1709.
[3] During my observations there were seven clubs in professional leagues in the force area regularly requiring policing operations, however not all teams would play at home at the same time.
[4] The phrase used by officers to describe when fans had dissipated in an urban centre and the local force division took over responsibility for policing the area from the dedicated public order operation.
[5] Observation, Bronze 2, Premier League Match 7, Phase 3 debrief.
[6] See Chapter 2, Literature Review

policing focuses on protest policing. Whilst studies had been carried out of the policing of football fans from the perspective of fans, notably from authors such as Pearson[7], those studies are limited as they do not provide insight into the questions of how and why police powers are used to control the movement and behaviour of fans, nor how human rights considerations affect such decision-making processes. This gap in the academic literature led to a proposed research theme being developed by the N8 Policing Research Partnership, a collaborative research partnership between universities and police forces in England. A summary evidence review identified that 'liaison-based' approach to facilitating the rights of crowds reduced the likelihood of use of force by police, and that recent case law mean that many widely-used tactics in football policing were of dubious legality.[8] Consequently, further research was needed to gain evidence of and evaluate how a "human rights approach" achieved the dual objectives of lowering the likelihood of uses of force, and encouraging the facilitation of human rights, particularly in respect of football crowds.[9] As explored further in the next section, there appeared to be no transformation to a liaison-based approach to football policing matching the transformation which had occurred in protest policing, and there appeared little outward indication of a human rights informing decisions within these operations.

Early engagement with a police force interested in exploring this research theme confirmed the N8 Policing Research Partnership's understanding that there was no context-specific research basis for the majority of that police force's interaction with football fans, where there was a research base it was loaned from the realm of protest policing. Furthermore, the force lacked certainty about the correctness of its approach to analysing the human rights of football fans and the implications for their policing operations – in part due to the heightened levels of scrutiny in connected areas of public order policing and in part due to recent human rights cases. Beyond that initial collaborative engagement outlining the

[7] G. Pearson, *An Ethnography of English football fans* (Manchester University Press, Manchester 2012).
[8] C. Stott and G. Pearson Public Order Evidence Review available at https://www.n8research.org.uk/media/PublicOrder_Evidence-Review.pdf accessed 1st June 2021, 3; H. Gorringe, C. Stott, M. Rosie 'Dialogue Police, Decision Making and the Management of Public Order During Protest Crowd Events' 9 Journal of Investigative Psychology and Offender Profiling (2) (2012) 111-125.
[9] C. Stott and G. Pearson, 3-4; J. Havelund, M. Jensen and ors, 'Event policing: Dialogue in the policing of mass events in Denmark' 4 European Police Science and Research Bulletin [2011], 4-7.

areas in which the force lacked detailed understanding, the police force did not contribute further to the development of research questions.

With the broad context identified, this study had a starting point for the development of appropriate research questions: to explore effective means to obtain a clear insight into this very significant - and relatively under-researched - area of interaction between the individual and the state. The main focus of enquiry started with what was presumed to be a relatively straightforward question: how are the human rights of fans protected during public order operations policing football matches? As the thesis progressed the complexity inherent within this question became apparent and in order to fully understand the role of human rights in football policing a number of supplementary questions required exploration. Accordingly, this thesis assesses both broader implications of the main focus of this study - such as the extent of positive obligations on police forces to facilitate assemblies, and the role of process-based review of policing decisions - along with discrete narrow lines of enquiry which include the following: What are the precise human rights of football fans? What are the precise obligations of the police in relation to those rights? How are those rights and obligations understood by the police? How are human rights considerations treated by the police in public order operations? In furthering these objectives, the overarching research questions can be addressed: does the force fulfil a human rights approach to policing football? And if not, how can a human rights approach be achieved? With those questions in mind it is important to set out how human rights are applicable to public order policing context.

B. Placing human rights into the public order policing context

The Human Rights Act 1998 (HRA) was intended to "bring rights home"[10] and promised a way for citizens to actively challenge executive action, as well as providing impetus for improving the standards of decision-making in all areas of state activity. There was widespread optimism that these

[10] J. Straw, P. Boateng, 'Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK Law' [1997] European Human Rights Law Review (1), 71-80.

benefits would bring about a progressive transformation in the regulation of public order policing,[11] with the policed citizen empowered to challenge decisions directly in domestic courts. Ashworth, for example, predicted that public order would be significantly impacted by the HRA,[12] and Mead hoped that the main effect of the HRA would be that police officers would exercise their duties and judgement on the basis of a "rights-based culture", as public decision-making would have to accord with the standards developed under the European Convention on Human Rights (ECHR).[13]

While the HRA "strengthened the position of protesters and expanded freedom of speech and assembly into areas previously denied to them"[14] there has been little jurisprudence or detailed commentary addressing how these rights apply specifically to football fans as an analogous group who participate in public assemblies and expression in a similar manner. Through policy reforms in the wake of the 2009 G20 protests, there was a reorientation of the policing of protests which prioritised dialogue, communication, and an overriding commitment to "facilitating" peaceful protest.[15] These reforms have been commended for improving officers' understanding of their human rights obligations in public order policing.[16] Yet, research concerning the policing of football identified a failure of these reforms to cross-pollinate into football policing which has not been subject of a specific policy review, and where there continues to be a lack of appreciation of how interactional dynamics can be effectively managed through respecting the human rights of fans.[17] These gaps need to be remedied by a greater understanding of how human rights (and particular the freedoms of

[11] Public Order Policing includes crowd management of events, with football policing and protest policing the two specified examples in the College of Policing, Authorised Professional Practice (APP), 'Public Order' (30th January 2020) < https://www.app.college.police.uk/app-content/public-order/> accessed 13th March 2020.
[12] A. Ashworth, 'The European Convention and criminal law', in J. Beatson (ed.) *The Human Rights Act and the criminal justice and regulatory process* (Hart, Oxford 1999), 37-44.
[13] D. Mead, 'The Likely Effect on the Human Rights Act on Everyday Policing Decisions in England and Wales (2000) 5 Journal of Criminal Law (5), 5.
[14] P. Waddington, 'Slippery slopes and civil libertarian pessimism,' (2005) 15 Policing and Society (3), 353-375, 361; D. Mead, *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010), 25.
[15] HMIC, *Adapting to Protest – Nurturing the British Model of Policing* (HMIC, London 2009), 39, 121.
[16] H. Orde, 'The British approach to policing protest', The Guardian <http://www.guardian.co.uk/commentisfree/2011/may/05/policing-british-protest>, accessed 1st October 2020.
[17] C. Stott, J. Hoggett, G. Pearson, 'Keeping the Peace': Social Identity, Procedural Justice and the Policing of Football Crowds' (2012) 52 British Journal of Criminology (2), 381-399; C. Stott, G. Pearson, O. West, 'Enabling and Evidence Based Approach to Policing Football in the UK' (2019) Policing: A Journal of Policy and Practice <https://doi.org/10.1093/police/pay102> accessed 1st October 2020.

assembly and expression) are specifically enjoyed by fans and what the implications are for the hundreds of football policing operations active each week.

The normalisation of coercive public order policing tactics at football matches sits alongside direct reactive governmental intervention manifesting as legislative strategies[18] and additional club security measures, creating a plethora of regulatory methods to exert control over football supporters.[19] Indeed football policing operations are a rare occasion when a member of a particular group is almost guaranteed to come into contact with a police officer and, despite the democratic underpinning of the British model of policing, there is usually no public information about what goes on during a football policing operation, no external oversight, or review of operations accessible to members of the public. The importance of scrutinising the human rights approach of police forces is enhanced when recalling the aim of the HRA: that public bodies have the primary responsibility to effectively guarantee the enjoyment of human rights in practice. Ensuring the incorporation of human rights considerations and standards as an integral part of the decision-making process would be much more effective at safeguarding fans' legal interests than relying solely upon the delayed post-hoc assessment achieved by bewigged lawyers and judges in a courtroom.[20] The research questions identified above seek to address these concerns and deliver insights that assist both the police and fans to better understand how appropriate human rights analysis provides benefits for all actors involved in football policing. The more embedded human rights are in police practice, the closer public order policing will be to achieving the transformational change envisaged by the HRA.[21]

[18] M. James, G. Pearson 'Regulating Anti-Social Behaviour and Disorder among Football Spectators' in S. Pickard (ed.) *Anti-Social Behaviour in Britain* (Palgrave Macmillan, London 2014) 296-307, 296-297; M. James, G. Pearson 'Public Order and the Rebalancing of football fans rights' [2015] Public Law (3), 458-475, 462.
[19] The essentially private commercial interest at the heart of a football policing operation should not be forgotten, as part of the costs of the policing operation will be covered by a Special Police Services agreement (see, *Leeds v West Yorkshire Police* [2012] EWHC 2113).
[20] P. Bourdieu *The Logic of Practice* (Stanford University Press, Stanford 1990), 81-82.
[21] D. Irvine *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart, Oxford 2003), 23; J. Gordon, 'A developing human rights culture in the UK? Case studies of policing' 6 European Human Rights Law Review [2010], 609-620, 612.

C. Structure of this Thesis

This research utilises observations of policing operations to further inquiry to discover the role human rights plays in practice. Observations were carried out with a single force between October 2016 and December 2019, but only a small percentage of the ethnographic data is represented in the research findings due to the breadth and scope of activities that take place during an operation. Published perspectives of policing are skewed towards operations typified by disorder,[22] whereas I was keen to cover themes which relate to the much more typical operations where serious problems occurred less frequently. The aim of my observations was to reveal aspects of the decision-making processes, the communication of decisions, and the justification for decisions taken to ascertain the role human rights considerations play, and if the tactics deployed met the legal standards as determined by domestic courts and the European Court of Human Rights (ECtHR). In this critical legal inquiry, I draw heavily on precedent and academic work concerning tactics in protest policing as a proxy for the policing of football fans[23] due the relative lack of appellate court, ECtHR, and academic scrutiny of the legal position specifically concerning football fans.[24]

This thesis will consider the lessons apparent from the existing academic literature in relevant areas such as public order policing, football policing, and human rights within policing generally (Chapter 1), before going on to explore the ethnographic methodology of this study (Chapter 2). The legal framework of the relevant core human rights will be considered in a sequence of chapters - Freedom of Assembly (Chapter 3), Freedom of Expression (Chapter 4), and the Right to Liberty (Chapter 5) - which contain jurisprudential analysis to identify the standards that apply to football policing operations, critical commentary of the differences between domestic and Strasbourg standards, and observational data which will explore how the force implemented – or not – human rights considerations in their decision-making

[22] P. Waddington *Liberty and Order: Policing Public Order in a Capital City* (UCL Press, London 1994), 208.
[23] H. Fenwick 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest' [2009] Public Law (4). 737-765; D. Feldman, 'Containment, deprivation of liberty and breach of the peace' (2009) 68 Cambridge Law Journal (2), 243–292; R. Glover, 'Uncertain blue line: police cordons and the common law' [2012] Criminal Law Review (4), 245-260.
[24] See further M. James, G. Pearson 'Public Order and the Rebalancing of football fans rights' [2015] Public Law (3), 458-475, 462.

and deployment of tactics. These chapters will develop positivist aspects of the negative and positive human rights obligations for football policing and introduce themes for analysis. In drawing the strands from these chapters together, a synoptic Analysis (Chapter 7) will explore the parameters of what a human rights approach consists of, assess how the force met the criteria to fulfil a human rights approach to football policing, and identify the structural and operational limits that prevented the force from fulfilling the human rights approach on a more regular basis. This study will make Conclusions (Chapter 8) and Recommendations to the Force (Annex 1).

This research will not consider in detail debates regarding the cost of policing, the role of sanctions such as football banning orders,[25] nor engage in a detailed discussion of the regulation of fan culture.[26] Originally, I intended to include a review of how Article 8 concerns in the compiling and use of intelligence assessments affected individual fans, but attempts to observe these processes were resisted. Some conversations with officers concerned these topics, and intelligence was an integral feature of core parts of the operations, including the assessment of risk from particular groups of fans. Accordingly, some matters concerning intelligence were reviewed incidentally. The research for this study was also carried out, and references, the policing of matches prior to the COVID-19 pandemic and therefore does not address the consequences of games being played "behind closed doors" as occurred during the 2019-2020 and 2020-2021 seasons. Although the circumstances of the pandemic restrictions raise interesting legal and operational questions for public order policing, these implications are also not within the scope of this thesis.

[25] M. James, G. Pearson, 'Football Banning Orders: Analysing their use in Court' (2006) 70 Journal of Criminal Law (6) 509-530.
[26] C. Stott, G. Pearson *Football 'Hooliganism', Policing and the War on the 'English Disease'* (Pennant, London 2007).

CHAPTER 2 : LITERATURE REVIEW

This literature review will consider three thematic areas in which academic writings have developed understanding relevant to the research questions outlined in Chapter 1. These thematic areas are: human rights and policing; public order policing; and the policing of football, which includes an overview of the legal regime specifically applied to football fans. The first two of these themes are so broad that it is not possible to conduct a thorough review of all relevant publications. Instead, I have set out a selection of the most relevant writings that can assist in building an understanding on which to basis analysis relevant to my research question which will appear in detail in later chapters. I will also engage with prominent authors even where they may stray into more general themes as a basis on which to launch further discussion of the suitability of the current law. The writings of these authors will help elaborate on the context and importance of my research questions seeking to identify the precise human rights framework applicable to forms of fan assemblies and expressions that are affected by public order policing operations.

The final thematic area of this literature review is more focused, and I have aimed to synthesize recent literature relating to the specific role of the police seeking to control various forms of fan behaviour. These readings will assist in building the relevant analysis to answer my overarching research question, whether the force deploys appropriate human rights considerations when policing football fans, and permit conclusions to be drawn about how a human rights approach to policing football match can be achieved. Developments relating specifically to both the domestic and international legal human rights framework, including case law, will be dealt with in greater detail in the respective chapters following this literature review.

A. Human Rights and Policing

The literature assessing the general commitment of the police to human rights take various forms, from sociological texts to doctrinal manuals and those critical appraisals of the failure of to fulfil the promised benefits of incorporating the HRA 1998.

A.1 Impact of the HRA on Policing

The introduction of the HRA was a seismic change in protection of individual rights in the United Kingdom which promised a transformation of the relationship with public bodies such that human rights would be at the forefront of decisions affecting the public.[1] The extent to which this has been achieved, the extent to which the HRA imposes obligations on police decision-making in practice and how officers understand human rights principles are three central reasons why the literature assessing incorporation of the HRA is fundamental for addressing my research questions about the relevant obligations for football policing.

Of the many works inspired by the opportunities offered by domestic incorporation of European Convention norms, Neyroud and Beckley[2] are among the most influential among policing scholars. These authors cast the HRA as a complementary set of concepts illuminated by the glow of ethics. As pre-existing concepts forming the very core of democratic policing, they are therefore inherent to existing police practice rather than an alien imposition, but which still challenge existing operational standards. Answers to meet the challenge of ensuring human rights-compliant practice are identified by the authors, who undertake a comprehensive standard-setting exercise, cautioning that enhancement of standards was required in three areas (decision-making, auditing, and mechanisms for ethical calculus) to concretely conclude that human rights impacted directly upon policing practice.

[1] D. Irvine *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart, Oxford 2003), 23; J. Gordon, 'A developing human rights culture in the UK? Case studies of policing' 6 European Human Rights Law Review [2010], 609-620 at 612.
[2] P. Neyroud, A. Beckley, *Policing, Ethics and Human Rights,* Policing and Society Series (Willan, Devon 2001).

The early focus on improvements in decision-making is notable and indicates an area of concern repeated by others more recently.[3] That this concern has continued to be identified in police practice has influenced a key part of this study which seeks to identify the precise procedural obligations and the correct level of scrutiny over decision-making processes required by human rights law.

Neyroud and Beckley also present a sympathetic view of the difficult role faced by officers entrusted to guard the boundaries of rights contested by competing claims brought by different interest groups. This "complex framework of overlapping rights" is also "ambiguous and conflictual."[4] When particularised, their contribution is a structural guide to resolution of such conflict through a series of legal questions for the decision-maker that match the legal test applied by the courts;[5] whether it is legal, proportionate, and necessary in a democratic society and whether there is a remedy available to the citizen.[6]

Ralph Crawshaw, in his manual *Human Rights and the Police*[7] also engages with practitioners to encourage higher quality standards of training on human rights, setting out essential texts and cases for practitioners in a pedagogic style in an attempt to link human rights law to their operational practice. Crawshaw, also unusually, undertakes a quasi-comparative and inter-disciplinary study, to draw best practice from international standards exemplifying the necessity for adherence to both international and domestic interpretations of what rights mean in practice in a commendable attempt. A recurring conclusion stresses the need to balance a variety police functions[8] but the appropriate balance to devote to different objectives within public order policing is a contested theme in the literature.[9] The impact of doctrinal aspects of police training is also critiqued by Bullock and

[3] n.1 Irvine (2003); R. Martin, 'A Culture of Justification – Police Interpretation and Application of the Human Rights Act 1998' in J. Varuhas, S. Stark (eds.) *Frontiers of Public Law* (Hart, London 2020) 499-522.
[4] n.2 Neyroud and Beckley (2001), 61-63.
[5] H. Fenwick, 'Judicial Reasoning in Clashing Rights cases' in G. Phillipson and R. Masterman (eds.) *Judicial Reasoning under the Human Rights Act* (Cambridge University Press, Cambridge 2007).
[6] n.2 Neyroud and Beckley (2001), 61-68.
[7] R. Crawshaw, S. Cullen, T. Williamson, *Human Rights and Policing*, Raoul Wallenberg Institute Professional Guides to Human Rights Volume 5 (Brill Nijhoff, Leiden, 2nd edition 2006).
[8] n.7 Crawshaw et. al. (2006), 26-32.
[9] See e.g., P. Waddington *Liberty and Order: Policing Public Order in a Capital City* (UCL Press, London 1994).

Johnson[10] but given partial praise by Martin[11] who identified "mindful...savvy" commanders who addressed the ramifications of their decisions, but as both conclude that does not equate to mainstreaming of sufficient human rights knowledge to allow officers to fully understand how human rights principles apply in complex situations on the ground. This is important for my research into the extent to which officers understand the human rights framework governing the policing of football fans as there are clear concerns raised by authors undertaking three different studies, using three different methodologies that all raise concern about the appropriateness of police training at translating the difficult process of engaging in accurate human rights analysis.

Waddington in *Policing Citizens* focus on strengthening citizen's rights to restrain policing and force it to be more compliant with expected standards.[12] Citizen empowerment and participation was a key driver behind the legislative incorporation of human rights into the domestic legal system[13] and review of protest policing aimed introducing a dialogue-focused approach into public order operations. Taking these legal and policy shifts together with Waddington we can identify the rich opportunity human rights offers for engaging citizens: protection of fans' interests, and facilitation of fans' objectives both require a deep level of understanding in order for officer to engage appropriately in complex contextual decisions and meet high legal standards.

The difficulties facing officers engaging in complex decisions are not an excuse that can be relied upon to excuse a failure to meet human rights standards. As persuasively argued by Crawshaw, the international obligations apply in belligerent contexts and although the necessity of public order measures has to be assessed in the relevant context, the HRA reflects universal rights as the Patten Report reminded officers in Northern Ireland that the duty to protect the rights of their "*fellow* citizens" and respecting rights is an integral part of the qualities of being a police officer along with "integrity, impartiality, and dignity".[14] Thus, in finding a balance between fiercely competing political

[10] K. Bullock, P. Johnson, 'The impact of the Human Rights Act 1998 on policing in England and Wales' (2012) 52 British Journal of Criminology (3), 630-650, 637.
[11] n.3 Martin (2020), 521-522.
[12] P. Waddington, *Policing Citizens* (UCL Press, London 1999).
[13] J. Straw, *Rights Brought Home* (The Stationery Office, London, 1997), [1.17]-[1.19].
[14] Independent Commission on Policing for Northern Ireland, 'A New Beginning: Policing in Northern Ireland' ("The Patten Report") (HMSO, London 1999), [4.1].

rights of freedom of assembly or freedom of expression, the police have a responsibility in their roles both as officers and as citizens to maintain standards of protection.[15]

The optimism expressed by Waddington in Policing Citizens, and the positive structural developments derived from Northern Ireland will be contrasted with the more recent critical literature which sets out the failure, of the police in particular, to follow through with the promise of infusing every decision process with human rights considerations.[16] Assessing this is critical for locating which feature of the policing operation need to be reviewed in order to identify whether the force follows a human rights approach or not.

A.2 Embedding human rights within police practice

Analysing the extent to which embedding legal rules into an organisation such as the police often raises questions about the 'culture' of that organisation. The dual meaning of the term 'culture' frames the question posed in recent debates in policing. Rather than becoming part of the "ideas, customs, and social-behaviour"[17] of the collective policing practice, human rights appear to have been artificially transplanted into only a partially receptive environment in a manner that fails to connect with the reality of policing practice.[18] This disconnect means that human rights have had a limited subsequent effect on policing interactions with the public, unless the legislative change has been accompanied by further systematic review of policy, training needs, and structural aspects in isolated areas, such has occurred protest policing or in Northern Ireland.[19]

[15] M. Hamilton, N. Jarman, D. Bryan, 'Parades, Protests and Policing – A Human Rights Framework' (Northern Ireland Human Rights Commission, Belfast 2001).
[16] See section A.2 below.
[17] Oxford Dictionaries Online, 'culture (n)' <www.oed.com/view/Entry/45746> accessed 4th April 2017.
[18] J. Gordon, 'A developing human rights culture in the UK? Case studies of policing' [2010] European Human Rights Law Review (6) 609-620, 620.
[19] C. Stott, G. Pearson, O. West, 'Enabling and Evidence Based Approach to Policing Football in the UK' (2019) Policing: A Journal of Policy and Practice <https://doi.org/10.1093/police/pay102> accessed 1st October 2020, 15-16; n.3 Martin (2020), 521-522.

Bullock and Johnson offer the fullest critical retrospective analysis of this failure to embed human rights into the practice public order policing.[20] Their core conclusion is that bureaucratization of the HRA in policing prevents officers from regarding the Act as an instrument designed to drive forward real human rights concerns.[21] Harfield concurs that, legislated rights, while "generating increased activity" to focus on new substantive rules, do not necessarily nourish an environment that provides enhanced rights protection.[22]

Each of these authors positively characterise areas of the profession in which the HRA has had an impact: it has encouraged commanding officers to develop new tactics, and facilitated the process of officers justifying decisions, thus providing a crucial safety net in regards to providing accountability.[23] In a finding highly relevant to this study, Bullock and Johnson identified that the process of drafting operational orders and briefing officers about their contents has significantly changed post-HRA but this was still rather formalistic.[24] This demonstrates the shortcomings of the public order framework that is tailored to supress risk rather than respecting rights. Similar formalistic implementation of rights compliance will be assessed in this study which will also highlight area of practice such as tactical decisions, reflexive review, and the use of PLTs as all areas where human rights analysis appears to have led to positive changes.

It is common for theoretical criminologists to identify that the failure of the police to reform its practice to fully implement new legal rules to be the failure of the 'police culture'.[25] There is no agreed definition of culture, it can be analysed in vastly different ways with many academics seeking to define 'police culture' settling upon an unwieldy list of broad descriptive qualities or attributes[26] that does little to add clarity to any analytical point being made and which can be misleading. For example, authors who label 'police culture' as "conservative" or pessimistically assume that police

[20] n.10 Bullock and Johnson (2012).
[21] n.10 Bullock and Johnson (2012), 632.
[22] C. Harfield, 'Paradigm not procedure: current challenges to police cultural incorporation of human rights in England and Wales' [2009] Public Space (4), 91-101, 101.
[23] n.10 Bullock and Johnson (2012), 634; n.3 Martin (2020), 521-522.
[24] n.10 Bullock and Johnson (2012), 635.
[25] e.g., R. Ericson Rules in Policing, Five Perspectives (2007) 11 Theoretical Criminology (3) 367-401, 368-389.
[26] R. Reiner, The Politics of the Police (4th Edition, OUP, Oxford 2014), 119-132.

culture is not adaptable to new legal rules[27] conveniently ignore how much change and transformation the police experience in law, policy, and practical arrangements such as PACE, or indeed incorporation of progressively more intense human rights considerations in protest policing. As set out by Chan, those most resistant to change may well be individuals who do not share many of the features of an identified 'police culture'.[28]

Those who identify 'police culture' as blocking transformational changes are often slow to identify what is meant by the use of this concept.[29] For this reason, experienced ethnographic police researchers such as Pearson and Rowe identify the need to be cautious around the concept they describe as a "shorthand for a collection of ideas of problems" that conveniently explain away all failings in policing[30] and relegates the importance of legal or institutional rules and practices. Those who have examined the concept in detail in an attempt to arrive at definitive parameters of a more sophisticated understanding such as Chan and Dixon,[31] or Charman,[32] appreciate the diversity of police cultures, restraint is shown to avoid using 'culture' as a universal cause of police failings, and positive elements of culture are identified. However even these authors accept that notions of police culture are so broad as to potentially encompass everything officers do, as summarised by Charman, "culture embraces all that is general known but mostly unseen".[33] Chan identifies that to change culture requires a change to the informal rules, practices, values of officers, but also the economic, legal, and political conditions of policing.[34] Thus the problem of any identified 'police culture' blocking transformational change requires consideration of fields of expertise that take it beyond the aims of this study which is focused on only the legal considerations and practice of officers.

[27] D. Dixon 'Reform of Policing by Legal Regulation: International Experience in Criminal Investigations' (1996) 7 Current Issues in Criminal Justice (3) 287, 300; J. Chan, 'Changing Police Culture' (1996) 36 British Journal of Criminology (1) 109-134; n.25 Ericson (2007) 372-373.
[28] n.27 Chan (1996), 111; S. Charman *Police Socialisation, Identity and Culture: Being Blue* (Palgrave MacMillan, London 2017), 146-150.
[29] P. Ramshaw, 'On the Beat: Variations in the Patrolling Styles of the Police Officer' (2012) 1 Journal of Organizational Ethnography 213.
[30] G. Pearson, M. Rowe *Street Powers and Criminal Justice* (Hart, Oxford 2020), [20].
[31] J. Chan and D. Dixon, 'The politics of police reform' (2007) 7 Criminology and Criminal Justice (4) 443-468, 447-448
[32] n.28 Charman, 133-138, 157-159.
[33] n.28 Charman, 15.
[34] J. Chan *Changing Police Culture* (CUP, Melbourne 1997), 92.

There is no unified 'police culture', nationally, or even locally with both horizontal and vertical fragmentation among force areas and even police stations.[35] One reason for my study conducting multi-sited observations was to counter the inaccurate conclusions that would be obtained from studying just one police station, or operations at one stadium. For these reasons, I am in agreement with Pearson and Rowe in not finding the concept of 'police culture' a useful frame to aid understanding of how police officers assess and implement legal rules in practice.[36] Even if I arrived at useful, tightly worded definition of some 'police culture, that term would be understood different by each reader.

The focus of this research is on the practice engaged in by officers, how they understand and use legal rules is not an inherent part of culture but a product of their knowledge and experience. Cultural norms may limit how and when they express their understanding, and undoubtedly environmental factors of workplace performance[37] are relevant but a deeper engagement with an intangible concept like police culture is not necessary for an assessment of the application of a human rights framework, or identification of a human rights approach. Judicial oversight of police decisions rarely asks if it is reflective of an underlying culture, they assess the actions and justifications actually given for the intervention. I will take the same approach.

The only research question to which an examination of any culture may be relevant is the question of how the force can more consistently engage with a human rights approach. Here again, I will consider the practical elements that exist in the force's structural and operational elements that are observable and verifiable. Just as culture may be a barrier to change,[38] the search for an ever-elusive human rights culture may be the reason that a "culture of rights" has not been identified in police force post HRA.

Instead of repeating a search engage in by others, my research questions are directed at identifying the location of, and weight given to human rights in 'the practices, policies, and procedures' of the force.

[35] n.30 Pearson and Rowe (2020), [193]-[194].
[36] n.30 Pearson and Rowe (2020), [20]
[37] See e.g., n.9 Waddington (1994).
[38] Change would be easier to achieve if officer's views could be manipulated as one coherent whole, n.30 Pearson and Rowe (2020), [195].

As identified by the Patten Report, and HMIC Adapting to Protest, embedding the practice of human rights require more than officers knowing the legal rules, it requires an internalisation so that performance of the job becomes framed "in terms of the protection of rights".[39] This also appears to be the legal position reached following cases assessing the relevance of process-based review and *DB v PSNI*[40] and matches the original legislative intention of the HRA.[41]

The general failure to internalise the relevant human rights considerations has been identified by academics ranging from Bayley's comparative study of how embedded rights are globally, recognising the comparative success of the PSNI,[42] to Bullock and Johnsons in-depth interviews with officers demonstrating their lack of full understanding of the key human rights principles of 'necessity' and 'proportionality' which are conflated and mistakenly understood as duplicating the same analysis – findings that have been supported in more recent research on assessing the necessity of arrests.[43] The research questions of this study aim to study officer's knowledge and understanding of the correct application of human rights principles such as assessing the necessity and proportionality of an interference. This analysis underpins the doctrinal assessment and analysis of legality through Chapters 4-6. Others may draw conclusions about those findings for a 'police culture', for the purposes of this study I will assess whether the level of understanding and extent of embeddedness indicates the force if pursuing a human rights approach or not.

A.3 Scrutinising state justifications for limiting rights

The justification officers use to interfere with rights is a fruitful area of inquiry, revealing aspects of officer's legal knowledge, analytical ability in incorporating and balancing human rights considerations, and deliver research findings to address whether a human rights approach – an

[39] n.14 Patten Report, 21; HMIC Report *Adapting to Protest* (Central Office of Information, London 2009), 5.
[40] See discussion in n.3 Martin (2020), 508, 515-519.
[41] n.13 Straw (1997).
[42] D. Bayley, 'Human Rights in Policing: A Global Assessment' 25 Policing and Society [2015] 540, 542-542.
[43] G. Pearson, M Rowe, E Turner 'Policy, Practicalities, and PACE s.24: Police Understanding and Subsuming of Necessity in Decision-Making on Arrest', (2018) 45 Journal of Law and Society (2) 282-308.

approach that preserves the ability of officers to take enforcement action – can be identified. As explored by multiple authors, the HRA's incorporation and jurisprudential development has taken place in a time where states have enthusiastically encroached onto human rights justified by broad-based security concerns, with an identification of risk or fear of disorder commonly resorted to by police officers to take extensive measures that limit individual freedom[44] and which have an unclear legal basis, or where the basis of the justification is exaggerated so far that it is rendered meaningless.[45]

Gearty calls for a strident reading of the object and purpose of human rights, linking to their historic origins, to show how rights should continue to be protected to the greatest possible extent in the face of modern threats which, whilst potentially violent, are sporadic and can be dealt with without limiting rights of individuals not directly causing a threat.[46] Similarly, Mead highlights how protestors can be targeted by unsuitable legislative measures and broad, unclear justifications through which their fundamental rights are illegitimately limited.[47] Football fans face similar challenges; they are subject to a wide array of specific legislative restrictions from the moment at which they start to travel to a football fixture, based on perceptions of a generalised "risk" of heightened violence which very rarely occurs.[48] The acceptability of such assessments of "risk fans" under a human rights approach to policing football operations will be explored in later chapters in this study.

Bullock and Johnson also explored justifications for interfering with human rights in the public order context finding that officers were preoccupied by ability to manage identified or predicted risks.[49] Synthesising their findings, it seems that risk displaces rights considerations, as the language of risk

[44] C. Gearty, *Liberty and Security* (Polity, London 2013); C. Gearty, 'Neo-democracy: 'Useful Idiot' of Neo-Liberalism?' (2016) 56 British Journal of Criminology (6), 1087-1106; C. Gearty, 'Rethinking civil liberties in a counter-terrorism world' [2007] European Human Rights Law Review 2) 111-119, 111.
[45] N. Cheesman, 'Law and order as asymmetrical opposite to the rule of law' (2014) 6 Hague Journal of the Rule of Law (1) 96-114, 97-100; *D. Bayley Policing for the Future* (OUP, Oxford 1994), 30
[46] *c.f.* N. Melzer, 'The Paradigm of Law Enforcement' in N. Melzer *Targeted Killing in International Law* (OUP, Oxford 2008) 83-107.
[47] D. Mead, *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Oxford, Hart 2010); Joint Committee on Human Rights report, *Demonstrating Respect for Rights: a Human Rights Approach to Policing Protest* (JCHR 7th report session) 2008/9 HC 320-1, [87].
[48] See Chapter 4, Section A.4, B.2.
[49] n.10 Bullock and Johnson (2012), 639.

provides an easy justification for action – intervention is "necessary" to prevent a "greater harm". Officers also offered justifications of significant interference in individual rights in order to prevent *any* potential causal disruption with the rights of others, (i.e., the community). Thus, even where rights were considered as part of the decision-making process it was a caricature of the appropriate balancing assessment of competing rights.[50]

The role of human rights analysis in rebutting reliance on over-generalised threats to public order or public safety will be a key area in which this study will draw out answers to the research question of whether the force of adopted a human rights approach to decision-making in the policing of football matches. With the aim of securing freedoms effectively, both Gearty and Edwards have attempted to set out an approach to achieve maximal fulfilment of rights through the minimal interference principle.[51] In Gearty's words, legal rules and judicial decisions are not "not the whole story" when it comes to securing "effective enjoyment of rights" that answer lies in public authorities taking on an adopting the appropriate standards directly. Legal safeguards are required to prevent risk-based approaches becoming dominant as they disproportionately impact on the lives of citizens[52] but as stridently critiqued by Zedner, a rights-based approach is required to prevent risk-based approaches becoming dominant and causing public bodies to seek a departure from carefully calibrated legal regulation based on a form of exceptionalism.[53]

Human rights approaches to public order policing have been referred to by the Patten Report[54] and by HMIC's Adapting to Protest[55] as useful strategies for better protecting rights. However, neither set out in detail what that a human rights approach consists of in terms of substantive standards, or the implications for complex operational decision-making – a gap which will be remedied by this study addressing the research questions. The appropriate standard of review of decision-making will also be

[50] n.10 Bullock and Johnson (2012), 640-641.
[51] C. Gearty, *Can Human Rights Survive* (CUP, Cambridge, Hamlyn Lecture Series 2006), [4]; R. Edwards, 'Public order policing and the ECHR' (2009) 173 Criminal Law and Justice Weekly (18) 281-283.
[52] A. Amatrudo, L. Blake, *Human Rights and the Criminal Justice System* (Routledge, Oxford 2014), 11-13.
[53] L. Zedner, 'Neither Safe nor Sound? The Perils and Possibilities of Risk', 48 Canadian Journal of Criminology and Criminal Justice 3 (2006) 424-434, 423; L. Zedner, 'Citizenship Deprivation, Security and Human Rights' 18 European Journal of Migration and Law (2016) 222-242.
[54] n.14 Patten Report.
[55] HMIC Report *Adapting to Protest* (Central Office of Information, London 2009), 5.

discussed as part of my exploration of the question of the applicable legal framework along with demonstrating how a human rights approach preserves the police's ability to take effective action to counter real, identified threat.

The rights contained in the ECHR contain explicit legal bases for their limitation providing the measure passes high thresholds of pursuing a legitimate objective, necessity, and proportionality.[56] But public order operations often rely on exceptional justifications falling outside of these explicit bases for interference and both domestic courts and the ECtHR have permitted states to use tactics such as preventative detention or kettling to achieve objectives not explicitly set out in the text of the ECHR.[57] Football fans are also targets of intrusive interferences without a clear legal basis such as enforcement cordons and preventative detention, which though critiqued in respect of protest policing have not yet been analysed in the context of football operations. The importance given to human rights considerations in the planning, preparation, and implementation of these tactics will clearly be a relevant inquiry revealing findings of wider application about the approach of the force.

Having considered the literature assessing the impact of the HRA's incorporation, the failure of human rights to be embedded in police practice and the reliance on justifications for coercive action based on threats that require internal safeguards and legal scrutiny it is clear that the extent officer's knowledge of, and application of human rights considerations is a key area that needs to be assessed.

B. Public Order Policing

Moving from general considerations of the impact of human rights on policing I will now consider three relevant debates that will be instructive for exploration of football policing, arising out of public order policing. The following sections will consider an overview of the development of specialist public order units, regulation of discretion in the use of coercive measures and finally a synthesis of

[56] H. Fenwick *Civil Liberties and Human Rights* (Routledge, Abingdon 2007), 794-797.
[57] See *e.g., Austin v United Kingdom* App. No. 39692/09 15th March 2012.

the official reports and academic commentary that introduced rights-based approaches into protest policing.

B.1 Development of football policing within public order policing

Public order policing is one of the clearest manifestations of active state interference into the lives of citizens. Public order events may be "planned or spontaneous" or so categorised based on a risk that they "may result in public disorder".[58] They are such regular occurrences that metropolitan forces have specialised departments to oversee them accompanied by distinct training regimes and resource allocation. Football policing operations sit within these specialised units. Therefore, it is expected that there will be crossover between football and other public order operations in terms of personnel, operational and legal frameworks and rules pertaining to general public order will generally be applicable to football policing.[59]

Maintaining public order has been a police function since Peel.[60] In 1965 the Metropolitan Police developed the Special Patrol Group[61] to provide a readily available mobile team of resources to carry out specialised tasks relating to maintenance of public order.[62] The Special Patrol Group were deployed during the 1966 World Cup, but specialised policing operations at regular football matches only started to be implemented from 1968, following concerns about the growing problem of hooliganism.[63] The Special Police Group were deployed for the specific purpose of "control" at football matches from 1974[64] and the concept spread to other cities such as the Tactical Aid Group in Manchester, operational from 1977.[65] Tactics such as containments and filter cordons were deployed

[58] College of Policing, Authorised Professional Practice (APP), 'Public Order' (30th January 2020) < https://www.app.college.police.uk/app-content/public-order/> accessed 13th March 2020.
[59] n.58 APP 'Public Order', which lists only one thematic sub-section covering 'policing football'.
[60] n.39 *Adapting to Protest*, 12; D. Ascoli, *The Queen's Peace: The Origins and Developments of the Metropolitan Police 1829-1979* (Hamilton, London 1979), 137
[61] Report of the Commission of Police of the Metropolis 1966 (HMSO, London 1966); Hansard, 29th November 1967 Vol 287 Col 110.
[62] T. Moore, Policing Serious Public Disorder: The Search for Principles, Policies, and Operational Lessons' (Thesis, University of Southampton 1992), 165.
[63] P. Laurie, *Scotland Yard: A study of the metropolitan police* (Holt, New York 1970).
[64] Report of the Commissioner of the Metropolis 1974 (HMSO, London 1974), 48.
[65] B. Jeffrey, W. Tufail, W. Jackson, 'Reproduction of Local Social Order' (2015) 6 Journal on European History of Law (1), 118-128; Operational Order Manchester United v Tottenham Hotspur 10th March 1979 (unpublished).

as pre-emptive management strategies for ensuring segregation of rival fans, rather than as reactive tactics to identified disorder or criminality.[66] Over time court decisions legitimatised these crowd-management strategies, and football supporters appear to have normalised such "intrusive" public order responses as part of the matchday experience.[67]

The tendency of specialised public order units to specialise in delivering a "forceful response" combined with the lack of effective planning in operations was critiqued by the Scarman Inquiry into the 1974 Red Lion Square Disorders.[68] Waddington later concluded that the militarised character identified by others amounted to an exception to the British police's traditional velvet glove, with specialist public order units professionalised to some degree.[69]

Public order policing operations are now governed by a legal framework and structured policy[70] that is cascaded nationwide through the College of Policing and the UK Football Policing Unit.[71] Academics have assessed that the framework leads commanders to treat football operations as planned major incidents,[72] which provides conditions to allow for operations to be effective at maintaining public order.[73]

B.2 Legal regulation of decision-making in public order policing

As this thesis focuses on the legal framework of human rights, it is necessary to explore how others have assessed the legal framework regulating the decision to use coercive tactics in public order situations.

[66] n.9 Waddington (1994), 62-63.
[67] M. James, G. Pearson 'Public Order and the Rebalancing of football fans rights' [2015] Public Law 458-475, 460.
[68] L. Scarman, 'The Red Lion Square Disorders of 15 June 1974' (HMSO, London 1975) Cmnd 5919, 95.
[69] n.9 Waddington (1994), 16.
[70] n.57 *Austin v United Kingdom*, [67].
[71] n.58 APP 'Policing Football', 2.5.
[72] M. O'Neill *Policing Football, Social Interaction and Negotiated Disorder* (Palgrave Macmillan, London 2005), 152.
[73] n.9 Waddington (1994), 126-127.

Writing contemporaneously in a systematic doctrinal analysis, Bonner and Stone raised concerned about the exercise of police powers Public Order Act 1986[74] that are wholly dependent upon the discretion of the officer, with few safeguards outside of a time-consuming and unreliable remedy through later judicial intervention.[75] There is evidence that over-reliance on the use of discretion by police officers can lead to unjust results in public order situations due to the role played by subjective assessments of behaviour poorly understood by officers.[76] A number of policing scholars conducting ethnographic research have identified the significant role discretion places in actual the selection, use, and review of police powers, and that decisions supposedly required by law can sometimes collapse into pragmatic consideration of practical pressures affecting the officer at that moment.[77]

As other authors have noted surveying similar interactions with the public, the "limits of legalism" result in officers finding means to avoid legal rules designed to control their behaviour.[78] These have also been raised about the centrality of discretion to the use of the a "bewilderingly ambiguous" [79] common law power to prevent a breach of the peace, with concerns for legality easily subjugated to a focus on the effectiveness of a tactic which marginalises human rights considerations.[80]

The incremental use of discretion to augment statutory powers has been identified in the use of minor public order offences - such as s.5 Public Order Act 1986 which was originally intended to prevent "hooligans on housing estates" from causing harassment, alarm, and distress – being used cumulatively to form the basis of a Football Banning Order (FBO).[81] However discretion remains available to officers who may also use discretion to delineate the difference between harassment, alarm, and distress in the context of a residential area and a packed football stadium.[82] This form of

[74] D. Bonner, R. Stone, 'The Public Order Act 1986: steps in the wrong direction?' Public Law (1987) 202-230, 203, 224-226.
[75] n.74 Bonner and R. Stone [1987], 224-226.
[76] n.72 O'Neill; R. Reiner, 'Policing and the Police' in M. Maguire, R Morgan, R. Reiner (eds.) *The Oxford Handbook of Criminology* (OUP, Oxford 1994), 742.
[77] n.30 Pearson and Rowe (2019), 139-140
[78] D. Dixon, Law in Policing (Clarendon, Oxford 1997), 303-304; n.12 Waddington (1999), 136.
[79] R. Stone, 'Breach of the Peace: The Case for Abolition' 2 Web Journal of Current Legal Issues 2 (2001).
[80] H. Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest' Public Law [2009] 737-765.
[81] *DDP v Beaumont* [2008] EWHC 523.
[82] G. Pearson, *An Ethnography of English football fans* (Manchester University Press, Manchester 2012), 62-74.

contextualisation is required by many police decisions and is inherent in public order policing[83] and as drawn out by Mead in his comprehensive review of protest laws, the capability and potential that overly broad discretion has for misuse is a concern that requires systematic analysis to remedy the police's lack of full understanding of how their powers are limited human rights law.[84]

How a human rights approach can restrain the use of broad discretion in policing football fans will be analysed in subsequent chapters, but for present purposes this debate can be applied to one commonly used power, the management of assemblies which can be limited through conditions under s.12 Public Order Act 1986 or on a common law basis[85] where the interests of the community are deemed to be significantly affected.[86] The imposition of this power requires multiple assessments of competing claims to a 'right' by different groups in society, along with the claimed harm to both community interests, and the human rights of those assembled to gather and express themselves. Added to this is the challenge of recognising and identifying the various forms that fan assemblies take[87] and the challenge facing officers making discretionary judgments is clear. Accordingly, the different factors that affect police decision-making in finely balanced assessments such as limiting fan assemblies is critical for analysing whether the force takes a human rights approach, or promotes through the use of discretion, other objectives.

Though the subject of some analysis by policing scholars,[88] analysis of decision-making in the context of football is limited, with O'Neill's ethnographic observations of the social processes during football operations[89] informative about the research field but ultimately lacking in findings that are highly relevant to consideration of the appropriate role for human rights to play in an officer's decision-

[83] n.47 Mead (2010), 20.
[84] n.47 Mead (2010), 413-414.
[85] A power to which the government expressly intended to be applied to assemblies of football fans, D. Williams, 'Processions, assemblies and the freedom of the individual' Criminal Law Review [1987] 167-179, 174.
[86] s.12 Public Order Act 1986; R. Masterman, S. Wheatle, 'A common law resurgence in rights protection?' 1 European Human Rights Law Review [2015], 57-65.
[87] n.82 Pearson (2012), 3-5.
[88] n.10 Bullock and Johnson (2012)
[89] O'Neill (2005), 18.

making process. Consequently, this study will assess this important question throughout the subsequent chapters.

B.3 Reviewing public order policing

The final relevant debate in public order policing concerns the extent to which official policy reviews, academic critique, or judicial oversight have bolstered recognition of the role of human rights in public order policing and what is the appropriate weight to give to human rights in making operational decisions.

B.3.1 Human rights to the fore in official policy review?

ACPO's first comprehensive policy on policing of football-specific operations was issued in 1990.[90] Framed as a manual for suppressing disorder,[91] its approach was subject to wide-ranging criticism.[92] Public Order policing came to suffer a "new crisis of legitimacy"[93] through high-profile breaches of human rights in full view of the public eye.[94] Public scrutiny of tactics deployed at the April 2009 G20 Protests precipitated a review of public order policing in order to bring policies in line with the HRA[95] in the face of what HMIC perceived to be the "new world of protest".[96] These reports, along

[90] ACPO, 'Manual of Guidance on Policing Football Events' (ACPO, Bramshill 2002).
[91] P. Waddington, 'Both Arms of the Law: Institutionalised Protest and the Policing of Public Order' in J. Vagg, T. Newburn (eds.) *British Criminology Conferences: Selected Proceedings Volume 1 Emerging Themes in Criminology* (British Society of Criminology, Loughborough 1995).
[92] See e.g., C. Stott, J. Hoggett, G. Pearson, 'Keeping the Peace': Social Identity, Procedural Justice and the Policing of Football Crowds 52 British Journal of Criminology (2) (2012) 381-399.
[93] J. Gilmore, 'This is not a Riot: Regulation of Public Protest and the Impact of the Human Rights Act 1998,' (Phd, University of Manchester 2013), 26-29.
[94] C. Greer, E. McLaughlin 'Public Order Policing, New Media Environment and the Rise of the Citizen Journalist' (2010) 50 British Journal of Criminology 1041-1059, 1052-1054.
[95] n.39 *Adapting to Protest* (Nov 2009), 121.
[96] n.39 *Adapting to Protest* (July 2009), 27-28.

with the Human Rights Joint Committee Report, *Demonstrating Respect for Rights*[97] were a catalyst for greater scrutiny about the choice of tactics in public order operations and sought to introduce more human rights considerations into the decision-making process to redress a perceived imbalance in the previous quick resort to forceful measures. The HMIC report found that public order operations focused upon disparate aims disproportionately, and that strategies focused upon facilitation, communication, and dialogue were not adequately integrated into operational plans. The report relied heavily upon the reported success of dialogue-based approaches developed in the academic work on the Elaborated Social Identity Model (ESIM) of crowds,[98] and the Swedish experiment with dialogue policing.[99]

In setting out these principles of communication, facilitation, and dialogue alongside the relevant human rights framework, *Adapting to Protest* asserts the police' positive obligation to tolerate assemblies even if they cause substantial obstruction and disruption in order to realise human right in practice.[100] Subsequently there has been a reinforcement of human rights considerations as underpinning strategic decision-making, and a focus on intelligence-led policing in protest policing – but which is lacking full integration into the policies governing the policing of football fans.[101] While there are empirical studies of introducing dialogue tactics to football policing to help forces comply with human rights law, there has been no similar comprehensive policy review setting out a high-level rights-based approach to policing football, a critical missing element that this study intends to fulfil. The full extent of the positive obligation on the police to facilitate assemblies of fans will be analysed in Chapter 4 to add further detail to those studies that reference the obligation but fail to add detailed analysis.[102]

[97] Joint Committee on Human Rights, *Demonstrating Respect for Rights? A human rights approach to policing protest (seventh report)* (2008-9, HL 47-I, HC 320-I).
[98] See *e.g*., S. Reicher, C. Stott et. al. 'An integrated approach to crowd psychology and public order policing' 27 Policing 4 (2004) 558–572.
[99] See *e.g*. S. Holgersson, J. Knutsson, 'Dialogue policing—A means for less collective violence?' in T. Madensen, J. Knutsson (eds.) *Crime prevention studies: Preventing collective violence* (Willan, Cullompton 2010).
[100] n.39 *Adapting to Protest* (2009), 5.
[101] n.67 James and Pearson [2015].
[102] n.19 Stott, Pearson and West (2019).

In the absence of a comprehensive public inquiry relating to football policing one other source of policy is relevant. In 2010 ACPO developed a new manual Keeping the Peace[103] which evolved into the College of Policing's Authorised Professional Practice (APP) providing commanders with "a framework for managing operations and deploying resources" in an impartial and proportionate manner.[104] Guidance on Policing Football is a subsection of the Public Order APP but lacks explicit reference to human rights obligations, and no further contextualised guidance is given as to how the rights of fans can be balanced with the rights of the wider community.[105] The basis for a facilitative approach is present in the APP[106] however guidance on forms of engagement is generalised; "officers can engage with supporters on match days" and focused on minimising the influence of risk fans[107] rather than on facilitating the enjoyment of rights by all fans. Thus, the APP preserves features of the dichotomy between negotiated management and escalated force and does not fully embrace the concept of a rights-based approach to policing of football matches such as through focusing on "reducing conflict through communication". [108] The benefits of dialogue and liaison-based tactics will be discussed further in the next section. The official reviews covered here indicate that the facilitation of fans through liaison is beneficial for respecting their human rights, the contribution of facilitation to a human rights approach will be addressed in more detail in each substantive chapter through the lens of the positive obligations contained in the ECHR.

B.3.2 Evidence-based reviews of liaison tactics

A number of evidence-based reviews of public order policing identify compliance with human rights standards as a relevant aspect for analysis. Two of the academics that influenced the official policy reviews assessed above, Gorringe and Stott, built on their findings to explore how dialogue-based

[103] ACPO *Keeping the Peace* (ACPO, London 2010), 7, foreword by CC Meredydd Hughes.
[104] College of Policing, website https://www.app.college.police.uk/faq-page/, accessed 26th March 2018; n.67 James and Pearson [2015], 475.
[105] A gap that should be remedied.
[106] n.58 APP 'Policing Football', [1.1]-[1.2].
[107] n.58 APP 'Policing Football' [1.2].
[108] n.39 *Adapting to Protest* (Nov 2009), 42; n.67 James and Pearson [2015], 475.

approaches were critical to commanding officers' successful ability to conduct dynamic risk assessments based on information that could be obtained to better inform their perception of the unfolding situations.[109] These findings are supported by other academics indicating a generalisability of replicable findings which makes these concepts a useful analytical tool whether it be applied to protests[110] or football crowds.[111] Detailed empirical studies of the work of Police Liaison Teams (PLT) offer the most insightful analysis of the benefit to the decision-making process. In particular the locus of their activity and the network created through liaison allows for decisions about escalation, de-escalation, and appropriate use of force to be made by commanding officers with the fullest possible "live intelligence".[112] Given the contextualisation required for many of the discretionary decisions in public order policing, as detailed above, the benefit of having the best possible intelligence about the context and impact of decisions is clear.

Less clear is the basis for the authors' identification of the advantage of the turn to PLTs that they help to positively facilitate the rights guaranteed in Article 10 and 11 ECHR in ensuring individual and group freedom of assembly and expression in contested situations.[113] Later studies have more convincingly made the link by drawing a contrast with the failure of PSU officers who, without specialist training to engage fans, are not strategically focused on the facilitation and maintenance of protestors or fans enjoyment of their assembly and expression.[114] A gap remains in the literature which will be addressed by this study by demonstrating how precisely liaison tactics help the force in practice fulfil a human rights approach with reference to the specific rights in each respective chapter

[109] H. Gorringe, C. Stott, M. Rosie, 'Dialogue Police, Decision Making and the Management of Public Order During Protest Crowd Events' 9 Journal of Investigative Psychology and Offender Profiling [2012] 111-125, 118-120; C. Stott, M. Scothern, H. Gorringe, 'Advances in Liaison Based Public Order Policing in England: Human Rights and Negotiating the Management of Protest?' 7 Policing (2) (2013) 212-226.
[110] K. McSeveny, D. Waddington, 'Up close and personal : the interplay between information technology and human agency in the policing of the 2011 Sheffield Anti-Lib Dem protests' in B. Akhgar, S. Yates (eds.) *Intelligence management : knowledge driven frameworks for combating terrorism and organized crime* (Springer, New York City 2011).
[111] n.19 Stott, Pearson and West (2019).
[112] C. Stott, H. Gorringe, 'From Sir Robert Peel to PLTs: Adapting to Liaison Based Public Order Policing in England and Wales' in J. Brown (ed.) *The Future of Policing* (Routledge, London 2013).
[113] n.109 Stott, Scothern and Gorringe (2013), 214.
[114] n.19 Stott, Pearson and West (2019), n.109 Gorringe, Stott and Rosie [2012], 123.

below. This aspect of the enquiry will thereby also address the question of how football policing can achieve a human rights approach.

B.3.3 Critical analysis of other public order tactics

Other academics focus on more common tactics implemented by PSU to manage crowds such as the heavily scrutinised tactics of cordoning and preventative detention. Two dedicated studies by Glover and Mead use the controversial decision in Austin as a launchpad for broader critique about the lack of a clear legal basis and the inability of judicial scrutiny to ensure a human rights approach to the use of these tactics.

Glover sets out a very useful typology of various types of cordons, ranging from a loose filter line to a double-manned coercive containment.[115] Both Glover and Mead sustain convincingly the criticism that cordons are often used indiscriminately, based on a "nebulous motive" desiring control over the crowd, resulting in groups being arbitrarily contained without proper justifications or safeguards to minimise interference with their rights.[116] This is supported by Pearson and James who identify the likelihood of pre-emptive kettling of football fans without any immediate threat to public order being identified.[117] More fundamentally according to Glover, the presumed legality of such an intrusive, coercive and common police tactic by officers does not hold up to strict legal scrutiny, as the common law power often cited as the legal basis for cordoning was intended originally to be used only in the furtherance of investigations.[118] and reliance on common law powers to prevent a breach of the peace requires a high threshold of imminence – according to Bingham - in order for this intrusive power to meet the standard required for legal certainty.[119] A more flexible standard is supported by Glover and

[115] R. Glover, 'The uncertain blue line — police cordons and the common law' 4 Criminal Law Review [2012] 245-260.
[116] D. Mead, 'Of Kettles, Cordons and Crowd Control: *Austin v Commissioner of Police for the Metropolis* and the Meaning of Deprivation of Liberty' European Human Rights Law Review [2009] 376-394, 394.
[117] n.67 James and Pearson [2015], 469-470; C. Stott, J. Hoggett and G. Pearson, "Keeping the Peace: Social identity, procedural justice and the policing of football crowds" (2012) 52 British Journal of Criminology (2) 381.
[118] n.115 Glover [2012], 249.
[119] T. Bingham *The Rule of Law* (Allen Lane, London 2010), 61-64.

Ashworth who stress that imminence should be contextual assessment, but this discretionary assessment still needs legal safeguards to prevent the maintenance public order as an overly-broad justificatory trump card to interfere with individual rights.[120]

Academic consensus indicates that coercive public order tactics lacking a clear legal basis can lack legitimacy and provoke conflict with affronted members of the public,[121] findings supported by ESIM scholars[122] and policing scholars.[123] Therefore, the decision to deploy a cordon of any sort needs an appreciation of the aims, objectives and social identity of the target group. The tactical use of cordons in a football-specific context has not yet been analysed in detail and this study will identify the factors that affect the decision to deploy (and cease the deployment of) cordons in football operations. Analysis of whether action to prevent a breach of the peace is sufficiently concretised basis for the imposition of pre-emptive or restrictive cordons on football fans will be discussed in-depth in Chapter 6.

Criticisms regarding the lawful, rights-compliant use of the cordon tactic is mirrored by the critical analysis of the decision in *Austin*[124] which appeared to undermine a strict rights-based approach. Leading academics specialising in protest rights such as Fenwick and Mead condemned the House of Lords reasoning with persuasive arguments that insufficient weight was given to the importance of the rights of individuals detained for multiple hours due to the high degree of deference given to the police assessment of the threat posed by ongoing disorder and the practical difficulties of reviewing individual situations.[125]

Mead identifies a sound policy reason for rejecting the leap made by the House of Lords – that the focus on the public body's justifications at an early stage reduces the relevance of the requirement to specify a legal basis for intervention in an individual's liberty under ECHR Article 5(1)(a)-(f) and the

[120] n.115 Glover [2012], 260; n.143 Ashworth [2014], 327-329.
[121] n.115 Glover [2012], 258.
[122] n.109 Stott et. al (2012)
[123] n.67 James and Pearson [2015], 469-470.
[124] *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5.
[125] n.56 Fenwick (2007), 796.

delicate balance of competing rights required by the human rights legal framework.[126] Both Mead and Fenwick urged future consideration of the appropriate deference to the police determinations of public order threats to the frame the debate as focused on realising the rights to freedom of expression and assembly to the fullest possible extent.[127] These debates indicate that the courts sometimes do not take a human rights approach to determining legal issues. Accordingly, judicial decisions may need to be critiqued and re-analysed within the framework of a more assiduous, structured form of human rights-based decision-making along the lines proposed by Mead and Fenwick. Chapters 5 and 6 in particular will engage in critical analysis of decisions appear to limit the impact of human rights on the use of cordons and preventative detention as part of public order policing operations.

A final shared conclusion from Glover and Mead calls for a new public order code, framework, or statutory guarantee to create a shared understanding between police and the public about the content of their rights, and to focus officer's analysis of interferences on the situation of the individual in their particular context.[128] Of even greater persuasive value are conclusions that go beyond positivist elements and seek mechanisms for properly embedding human rights practices in local force policies and procedures as part of a transformational institutional shift[129] that would be required in order to adopt a human rights approach. The lack of clarity regarding the legal framework and acceptable forms of human rights decision-making assessed by these authors also supports the focus of this research on precisely identifying the police's obligations in the context of football operations. Each substantive chapter will start by answering the question, what are the precise obligations before turning to assess how those obligations are understood.

[126] n.47 Mead (2009), 394.
[127] n.56 Fenwick (2007), 796; n.145 Mead (2009), 394.
[128] n.115 Glover [2012], 259; n.57 Mead (2010), 414, 417-418.
[129] n.3 Martin (2020), 522.

C. Policing of football fans

This final part of the literature review will consider academic commentary focused on the policing of football fans, analysis of the legitimacy of police interventions into fan behaviour and consideration of how the police analyse the risks posed by fans. Previous studies in these areas are highly relevant for understanding the context of policing football fans and reveal insights into the priorities of officers during operations which will be the basis for my specific analysis of the human rights implications of the force's strategy and tactics.

C. 1 Understanding the football crowd – towards dialogue-based approaches

The crowd that attends a football match is not a homogeneous group; there is no one way of describing the typical group that makes up a football crowd. Of those academics who conducted in-depth ethnographic research into football crowds, a common conclusion is that the crowd actually consists of many different subcultures.[130] This directly contradicts the historic focus on the binary distinction between 'hooligan' fans and 'normal' fans that was influenced by sociological causal analysis of class and societal conflicts originating outside of the football context.[131]

As introduced above, ESIM scholars led the challenge to this inaccurate reading of the football crowd, with academics like Drury and Stott publishing prolifically in the last 20-years combatting entrenched misconceptions about the causes of disorder, seeking to persuade police forces of the benefits of the ESIM model of crowd behaviour.[132] This has been complemented by the socio-legal approach of those

[130] G. Pearson 'Ethnography and the Study of Football Fan Cultures' Foreword in M. Buchowski, G. Kowalska, A. Schwell, N. Szogs, (eds.), *New Ethnographic Perspectives on Football in Europe* (Palgrave MacMillan 2016); n.82 Pearson (2012).
[131] See e.g., N. Elias and E. Dunning *Quest for Excitement: Sport and Leisure in the Civilising Process* (Dublin, UCD 2008)
[132] J. Drury, S. Reicher, 'Collection action and psychological change: the emergence of new social identities' [2000] 39 *British Journal of Psychology* 579; C. Stott, O. Adang, A. Livingstone and M. Schreiber, 'Tackling football hooliganism: A quantitative study of public order, policing and crowd psychology', (2008) 14 *Psychology, Public Policy, and Law* (2), 115-141.

who have conducted ethnographic observations of football policing,[133] with a key juncture demonstrating the benefits of application of dialogue-based approaches to football policing that reveal a deeper level of understanding of the crowd in a dialogue model tested at major international football tournaments from Portugal 2004, Germany 2006 and onwards.[134] Nevertheless the police retain the practice of grouping crowds into simplistic categories of perceived risk, and over-rely on generalised or standing intelligence reports to determine appropriate tactics which risk the negative consequences of pre-emptive coercive action.[135]

The benefits of the dialogue tactics have been identified by empirical studies similar to this methodology as disarming tension through interaction, trust building, and achieving a recognisable order in a potential chaotic situation.[136] Adang's comparative observational study on dialogue in protest and football events highlighted how effective dialogue policing can eliminate the necessity for such coercive tactics such as cordons or barricades completely.[137] Similarly, Stott, Hoggett, and Pearson applied ESIM through an ethnographic study of Cardiff City football fans, identify the way fans perceive the legitimacy of how they are policed is influenced by type and extent of the coercive tactics used.[138] Accordingly, dialogue-based approaches were understood as legitimate engagement by the police, and a change in approach was appreciated by fans.[139]

The literature provides an in-depth assessment of the impact of dialogue tactics on fans but only a partial picture of the considerations of officers concerning when and how dialogue tactics are implemented, or whether they are analysed as helping achieve operational objectives to deliver a legally compliant operation. The most thorough empirical studies of the use of PLTs in domestic

[133] See *e.g*., C. Stott, G. Pearson, *Football Hooliganism, Policing football and the War on the English Disease* (Pennant, London 2007); M. James, G. Pearson, 'Football Banning Orders: Analysing their Use in Court' 70 Journal of Criminal Law 6 (2006) 509-530.
[134] n.133 Stott and Pearson (2007).
[135] n.57 James and Pearson [2015], 469-470.
[136] I. Hylander, K.Granstrom, 'Organizing for a Peaceful Crowd: An Example of a Football Match' 11 Forum: Qualitative Social Research 2 (2010).
[137] O. Adang, 'Initiation and Escalation of Collective Violence: A Comparative Observational Study of Protest and Football Events' in T. Madensen and J. Knutsson (eds.) *Preventing Crowd Violence* (Criminal Justice Press, New York, 2010).
[138] n.92 Stott, Hodgett, and Pearson [2012], 386-388.
[139] n.92 Stott, Hodgett, and Pearson [2012], 392-393.

fixtures clearly indicate the beneficial role in realising some of the operations' core strategic goals of preventing disorder through "problem-solving" and engaging with various groups within a pub perceived as containing 'risk' fans.[140] A key conclusion of the authors is that simply having teams embedded in an operational order does not remedy broader strategic deficiencies – such as a lack of explicit reference to facilitation of peaceful assembly, and a lack of planning of operational objectives so as to incorporate the liaison-based approach.[141]

The ultimate consequence of a dialogue-based approach to the policing of football fans has the ultimate consequence of realising a more reflexive and responsive policing operation across the match-day footprint than the more commonly deployed 'security first' or 'crowd control' approaches. Whether this matches onto a human rights approach requires more than simply selecting PLTs as a tactical option, but the operation of dialogue within the football policing operation will be a fruitful area of enquiry that will be analysed in Chapters 4 and 5 in relation to facilitating the freedoms of assembly and expression.

According to academics assessing the impact of police tactics on fans, the degree of legitimacy with which the is viewed will depend in part on how officers understand the subcultures present within a football crowd and whether they can avoid grouping all individuals into the same collective. A number of academics have developed more nuanced typologies of football fans subcultures going beyond the inaccurate dichotomy of 'normal' and 'risk' fans. Drawing inspiration from different societal contexts authors have identified, among others, fans that religiously attend every game have been termed "obsessive" or "anoraks", and those that are boisterous, drink heavily and engage in collective expressions of fandom; "carnival".[142]

As detailed by Pearson in a longitudinal, part-covert ethnography, the distinction between sub-cultures is not always clear to the police or even to all participants. Millward and King explored how

[140] n.19, Stott, Pearson and West (2019).
C. Stott, O. West, M. Radburn 'Policing football 'risk'? A participant action research case study of a liaison-based approach to 'public order'' 28 *Policing and Society* (1)(2018) 1-16, 11.
[142] n.82 Pearson (2012), 3-5.

identities within sub-groups "oscillate" and may overlap depending on the context,[143] with specific symbolic features being particularly present amongst away fans.[144] Fluid subcultures were often located in the same place, wore similar clothing, travelled by the same transport, and had an overlap in membership. Nonetheless, through numerous observed and participatory examples, Pearson's firm conclusion is that the social identities of each subculture remained distinct unless treated as identical by the police, and in particular that "carnival fans" would attempt to maintain psychological and physical separation away from perceived trouble.[145]

From the existing literature we can conclude that an understanding of crowd psychology will help officers evaluate the impact of their facilitative or coercive tactics on fans, dialogue approaches can help particularise officer's knowledge of particular groups of fans, but the individual rights of fans cannot be protected or facilitated without a deeper knowledge and understanding of the identities and objectives of different fans groups. To supplement the literature, this study will demonstrate the need for officer's assessments of the risk posed by fans to be individualised and particularised to allow implementation of tactics that comply with the force's human rights obligations and how a human rights approach seeks maximal fulfilment of the rights of each different group of fans. This will be particularly relevant to the discussion in Chapter 5 concerning the freedom of fan expression.

C.2 Rights of Football Supporters

The existing literature is marked by the limited detailed discussion of fans rights, which standards in contrast to extensive examination of the specific legal regime applicable to fans. Contextual analysis of the benefits human rights offer fans appears to be missing (with notable exceptions) from the legislation and from academic discussions about rebalancing the position of fans facing punitive

[143] n.93 P. Millward Football Fandom, Mobilization and Herbert' (2014) 31 *Journal of Human Kinetics* (1) 1-22, 18.
[144] A. King, 'Football fandom and the post-national identity in the New Europe' 51 Sociology (3) (2000) 419-442, 420-421, 428.
[145] n.82 Pearson (2012), 102-109.

legislative and enforcement schemes. This section seeks to identify the relevant parts of the legislative and social control of fans to identify where and how a human rights approach can assist give the police a more structured means of assessing necessary interventions.

C.2.1 The limited discussion of fans' rights

Ethnographic accounts have been a popular way of understanding the nuances of fan conduct explored above, they have also provided the closest insight in the current literature to my research questions. Pearson's ethnography of football fans is one of the fullest and most considered pieces of writing on the subject, primarily because of the privileged position that the author was able to take, as a participant in three different football crowds over a number of years. Observations of English fans abroad come in other forms but not all have been analysed here as they often fail to reflect upon the legal framework in England and Wales.[146] The rights of football fans is a topic subject to more recent focus, most notably from Pearson and James,[147] who highlight that police officers are often quick to judge fan groups as "risk" or "anti-social" with a concordant negative impact on the human rights protection enjoyed by those fans relative to that which would be expected by any other citizen. Analysis of the police perspective is necessary to understand why this (pre)judgement occurs which this study will explore by analysis of the reasons for officers implementing certain tactics and whether they assess those tactics in terms of human rights considerations or not.

More widely in the realm of football fans, there has been a growth of political support for campaigns that empower football fans – ranging from petitions on, and public discussion of, rail-seating (commonly termed as "safe-standing"[148]) to a draft private members bill giving fans a greater say in changes to kick-off times and ticketing arrangements,[149] to a fan-led broader review of football.[150]

[146] See *e.g.*, R. Guilianotti, 'Scotland's tartan army in Italy: the case for the carnivalesque' 39 Sociological Review 3 (1991) 503-527; n. 163 Pearson (2016).
[147] n.57 James and Pearson [2015], 458-475.
[148] See e.g., the FSF's Safe Standing Campaign available https://thefsa.org.uk/petition/safe-standing/ accessed 27 October 2020.
[149] Football Supporters (Access) HC Bill (2016-17).
[150] Statement, Department for Digital, Culture, Media and Sport 22nd July 2021, https://www.gov.uk/government/publications/fan-led-review-of-football-governance-interim-findings-and-

None of these proposals seek to reassess the protection of fans' human rights and football supporters still lack the benefit of a comprehensive review of legal provisions that have existed since before this author was born. This study, through examination of the research questions, aims to allow reader to better understand how legislation and current policy fails to ensure appropriate attention is given to the rights of fans.

A raft of primary and secondary legislation is directed specifically at controlling the behaviour of fans attending football matches forming a distinct legal regime applying to fans across a matchday from when they leave the house. Notably, a number of authors writing about football from the sociological and criminological perspectives give a brief overview of legislation that impacts upon fans,[151] and gives the police a wide range of powers to select from depending on the situation faced.[152] For this tailored legislation, relevant offences the conduct must take place in connection with a "designated fixture" pursuant to regularly updated statutory instruments[153] which extend designation via secondary legislation beyond the Premier and Football leagues, to lower leagues down to the 7th Tier Northern Premier League and the League of Wales.[154]

The Football (Offences) Act 1991 purports to criminalise, amongst other things, the throwing of missiles (s.2); indecent or racist chanting (s.3); and presence on the playing area or any area adjacent that is not normally accessible without lawful authority or excuse (s.4). As highlighted by James, all of these actions could easily fall within other offences of the general criminal law of England and Wales such as the law on non-fatal offences, public order offences, or aggravated trespass under s.68 Criminal Justice and Public Order Act 1994.[155] In the view of academics critical of the punitive structure, this superfluous legislation is not innocuous, but part of a response by the legal system that

recommendations#:~:text=This%20Independent%20Review%2C%20announced%20by,building%20on%20the%20strengths%20and accessed 22nd July 2021.

[151] M. Watson, 'The Dark Heart of Eastern Europe: Applying the British Model to Football-Related Violence and Racism [2013] Emory Law Review 1057-1104.
[152] n.72 O'Neill (2005), 51-55.
[153] i.e., The Safety of Sports Grounds (Designation) Order 2015 No. 661.
[154] The Football (Offences) (Designation of Football Matches) Order 2004, SI 2004/2410.
[155] M. James, *Sports Law* (Palgrave Macmillan, Basingstoke 2nd edition 2013), 221-222.

permits easier conviction of football-related offences.[156] The effectiveness of this legislative scheme should be questioned, but the pernicious impact of overly regulating unruly conduct and police enforcement against lawful, and subjectively important behaviour is more concerning.

C.2.2 Social control of fan behaviour

Football policing academics identify the over-regulation of behaviour is identified as 'risky' or indicating the qualities of 'risk fans'. Tsoukala, in a series of exemplary comparative studies expertly threads together the regulatory turn[157] towards promoting policies that restrict the actions of 'hooligans'[158] based on the premise that control of perceived "deviant" behaviour is an institutionalised form of social control, arising out of risk-management policies that emphasise impersonal group-based profiling at the expense of individual-based intelligence.[159] Whilst it is worthy to control the violent behaviour of the tiny minority of football supporters, Tsoukala persuasively analyses how this legislative and policy framework across Europe has resulted in formal direct punishment of deviant behaviours outside of the criminal justice system with punitive effects ranging from criminal sanction, to an array of lesser-known yet important social penalties that affect fans' personal lives.[160]

Similar over-regulation of previously lawful conduct has been identified by authors in the prohibition of subjectively important, individual and collective expressive fan behaviour such as pyrotechnics which constitutes banned conduct inside the stadium – or alcohol – which is clearly prohibited "in view of the pitch" in the Sporting Events (Control of Alcohol, etc.) Act 1985. [161]

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[156] n.155 James (2013), 221-222.
[157] A. Ashworth, 'Four threats to the presumption of innocence' 10 International Journal of Evidence and Proof [2006] 241-279, 270-273.
[158] A. Tsoukala, 'Controlling football-related violence in France: law and order versus the rule of law' 16 Sport in Society 2 (2013), 140-150.
[159] n.158 Tsoukala (2013), 141; n.157 Ashworth [2006], 270-273.
[160] n.158 Tsoukala (2013), 144.
[161] A. King, *The European Ritual: Football in the New Europe* (Ashgate, Aldershot 2003); P. Millward, 'We've all got the bug for Euro aways' 41 International Review for the Sociology of Sport 3 (2006) 357-75, 358-359; n.82 Pearson (2012), 137-142 n.b. except for those in Corporate Hospitality who unfathomably are not prosecuted for this offence

Police officers are conditioned to seek control of behaviour due to the enactment of the rule and their perceived duty to uphold it in that situation. Discretion does play a part in the enforcement of social control, but control is regularly applied in respect of fans deemed to be "anti-social" for simply engaging in collective expressive behaviour[162] in contrast with how supporters of other sports are viewed good-natured revellers.[163] Pearson and Sale draw out these contrasts in "On the Lash"[164] challenging assumption that "football hooliganism" is linked to levels of alcohol consumption by crowds of football supporters in assessing the effectiveness of control policies on supporters using a mix of ethnographic research and interviews with officers in the UK and Italy. An interesting conclusion underlines the under-enforcement of certain parts of the legislation so as to practically dis-apply the ban on entering stadia whilst drunk.[165] This demonstrates that even in a tightly regulated area, police discretion in enforcement of legal rules is still a crucial tool that shows where considerations concerning subjectively important fan expression may be located, or alternatively, operate in future.

As addressed by Tsoukala and Pearson, the convergence of legal and political tools designed to manage football crowds was not planned, but inherent in the intentionally adopted security-centric approach, which incidentally threatens the fundamental human rights of those subject to disproportionate infringement.[166] In concluding their comprehensive study of frameworks across Europe, the authors identify the rights of fans should be at the forefront of considerations of both policy makers and the police charged with implementing coercive tactics or punitive sanctions.[167] Surprisingly, this argument is not regularly made elsewhere, neither is the question of how this can be brought about developed. This thesis seeks to address that question by examining the prioritisation of

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[162] M. Evans, 'Football fans to be breathalysed before matches', *The Telegraph* (1st May 2015) <http://www.telegraph.co.uk/sport/football/news/11578118/Football-fans-to-be-breathalysed-before-matches.html> accessed 19th March 2017.
[163] A. Jacks 'Alcohol restrictions: football fans must be seen as equals' (*Football Supporters' Federation blog*, 11th October 2016) <http://www.fsf.org.uk/blog/view/Alcohol-restrictions-football-fans-must-be-seen-as-equals> accessed 20th March 2017.
[164] G. Pearson, A. Sale, 'On the Lash' 21 Policing and Society 1 (2011) 1-17.
[165] n.225 Pearson and Sale (2011), 14-15.
[166] A. Tsoukala, G. Pearson, P. Cohen 'Legal Responses to Football "Hooliganism" in Europe' (TMC Asser, Springer Den Haag 2016), 175.
[167] n.166 Tsoukala, Pearson and Cohen (2016), 176.

human rights considerations in the development of force policy, operational objectives, and in practice when implemented tactics through use of legitimate police powers.

C.2.3 Over-regulation of lawful behaviour: rebalancing with a human rights approach

Authors such as Waiton identify such legislative responses as "oppressive" and as an intentional response to exaggerated concerns about the moral nature of football fan behaviour[168] which can have a suppressive effect on a socially important element of part of society – an analysis which is supported by Redhead.[169] Critiquing from a different angle, Pearson concludes that the wide-ranging measures have failed in their purported aim to prevent continuing football-related disorder and their uneven enforcement has unintended consequences such as undermining public trust in the promise of law and the rule of law.[170]

It is notable that offences specifically targeting sectarian chants at Scottish football matches was repealed precisely due to the duplicity and the risk of discriminatory or punitive enforcement of primary legislation.[171] It is also notable how few of the accounts defending fan behaviour directly engage in analysis of what behaviour qualifies as part of the protected elements of the right to a freedom of expression, the right to freedom of assembly, or the right of liberty. This study will build on the critiques of the legislative regime by identifying how the structure of human rights law, in particular the requirement for interventions to be legally and rationally justified, provide the

[168] S. Waiton, 'Football Fans in an Age of Intolerance' in M. Hopkins and J. Treadwell (eds.) *Football Hooliganism, Fan Behaviour and Crime: Contemporary Issues* (Palgrave Macmillan, Basingstoke 2014), 201-221.
[169] S. Redhead, *Football and Accelerated culture* This Modern Sporting Life (Routledge, London 2016), 3, 12-15.
[170] G. Pearson, 'Legislation for the Football Hooligan: A Case for Reform' in S. Greenfield and G. Osborn (eds.) *Law and Sport in Contemporary Society* (Routledge, Oxford 2000), 194-197; See also G. Pearson, 'Legitimate Targets? The Civil Liberties of Football Fans' 4 Journal of Civil Liberties 1 (1999), 37-40.
[171] Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (repealed 2018); see further A. May, 'An 'Anti-Sectarian' Act? Examining the Importance of National Identity to the 'Offensive Behaviour at Football and threatening Communications (Scotland) Act' 20 Sociological Research Online (2) (2015), 14.

opportunity to rebalance the policing of fans away from a pre-occupation about risk towards greater respect for various forms of lawful if unruly behaviour. This is the ultimate objective of implementing a human rights approach, which seeks to individualise and particularise the assessment for intervention to ensure officers consider all relevant factors discussed above before taking action that impacts upon fundamental rights or even criminalises behaviour that would otherwise be tolerated outside of a football policing operation.

CHAPTER 3 : METHODOLOGY

This chapter sets out the methods deployed in the course of this study. In the first section I will outline the methodological approaches considered, before moving on to rationalise the choices I made at each step in selecting research methods and deployment of these methods during fieldwork. Finally, I will consider my approach to analysis of the qualitative data and the writing up of my account in a way that delivers rich insights despite the irreducibility of the empirical experience.[1]

A. Methodological outline

The first stage in developing the research methodology required me to understand the complex interaction between methods and techniques that form part of a coherent empirical approach, and to identify the approaches best suited at delivering sufficient data on which to base my analysis of the research questions.

A.1 Epistemological Position

Epistemologically, I rejected the hard dichotomy between naturalist and constructivist positions and adopted a pragmatic approach in formulating an orientation recognising that multiple perspectives can shine light on more parts of the data and contribute towards a greater understanding of the whole.[2] In empirical research, and particularly in the deployment of ethnographic methods, the role of the researcher is embedded within the methodology. This means the researcher seeks different perspectives and accounts for their own personal biases. The researcher also distils their participants'

[1] P. Willis, M. Trondman, 'Manifesto for Ethnography', 2 Cultural Studies (3) (2002), 394-402, 394.
[2] D. Erlandson, E. Harris, B. Skipper, S. Allen *Doing Naturalistic Inquiry: A Guide to Methods* (Sage Publications, California 1993), 14.

subjective experiences of the objective shared experience as part of an overall analysis that considers issues "holistically."[3] Qualitative researchers are not blind to critiques based upon the lack of rigour and have adopted a number of strategies that assist in retaining credibility including: careful purposive or theoretical sampling, prolonged engagement in the field, standardization of fieldnotes and triangulation of data.[4]

As the premise of an ethnographic approach shuns the idea of pre-determined hypotheses, the focus is on reflexive feedback to interpret data to shape the scientific findings.[5] This iterative-inductive process fits well with fieldwork that is a circular (rather than a linear) epistemological activity that allows more systematic data on conceptual issues to be obtained as the most relevant areas for inquiry are brought into sharper focus.[6] Reflexive iteration is key to sparking insight and developing meaning from repeated visits to the field, progressively leading to a refined understanding of observations over time.[7]

My epistemological stance is cognisant of the contextual means by which human knowledge is mediated.[8] The data I obtained through my fieldwork required interpreting in order to understand the approaches of different police units to decision-making when encountering the complexities of fan group interaction. The scale of matchday operations, made up of different units and ranks, meant that it was not possible to observe a single identity, or a single culture. What each group of officers could

[3] n.1 Willis and Trondman (2002), 397-402; K. O'Reilly *Ethnographic Research Methods* (Routledge, London 2005), 8-10.
[4] See D. Yannow and P. Schwartz-Shea (eds.) *Interpretation and Method Empirical Research Methods and the Interpretive Turn* (M.E. Sharpe, New York, 2006); L. Shepherd (ed.) *Critical Approaches to Security: An introduction to Theories and Methods* (Routledge, London 2015).
[5] J. Freidenberg, 'the Social Construction and Reconstruction of the Other: Fieldwork in El Barrio (1998) 71 Anthropological Quarterly (4) 168-185, 170; n.4 Shepherd (2015), 132-133.
[6] n.5 Freidenberg (1998), 183; J. Baldwin *Pre-Trial Justice* (Blackwell, Oxford 1985), 21.
[7] P. Srivastava, 'A Practical Iterative Framework for Qualitative Data Analysis' 8 International Journal of Qualitative Methods (1) (2009), 77-78.
[8] R. Rorty, 'Human Rights, Rationality and Sentimentality' in R. Rorty *Philosophical Papers* (Stanford University, California 1998), 172-173; M. McConville, A. Sanders, and R. Leng *The Case for the Prosecution* (Routledge, London 1991), 11, and 191.

reveal had to be understood discretely on their own terms.[9] Interpretation of the observed activities in the field, therefore closely matches the process of critical, reflexive examination.

Elements of positivism were also present in my application of a human rights framework to the observed conduct. This was not a purely doctrinal exercise; the subsequent chapters reflect - in part – a critical reading of some leading judgements which do not uphold a true human rights approach. Accordingly, when combined together, my approach approximately aligns with a critical realist position,[10] which calls for knowledge claims to be submitted to wide, reflexive, critical examination in order to achieve the best understanding.[11]

A.2 Methodological Approach

I entered this project with a proposed title and with funding secured on my behalf as part of a collaborative partnership between Universities and police forces which sought to engage in research. The funded project called upon me to apply ethnographic research methods in studying the policing of football matches, but this stipulation was still analysed to ensure it was capable of delivering the most informative results.

An ethnographic approach[12] is a common feature of socio-legal research of policing.[13] This choice was affirmed for a number of reasons. First, I wanted to engage with research methods that went beyond legal positivism and could better contextualise the reality experienced by the research

[9] D. Dixon *Law in Policing: Legal Regulation and Police Practices* (OUP, Oxford 1997), 16; J. Van Maanen 'On Watching the Watchers' in P. Manning and J. Van Maanen (eds.) *Policing* (Goodyear, California 1978) 309-349, 322.
[10] A. Losch, 'On the Origins of Critical Realism' 7 Theology and Science (1) (2009), 85-106 86.
[11] C. Wilkinson, 'Ethnographic Methods' in L. Shepherd (ed.) *Critical Approaches to Security: An introduction to Theories and Methods* (London, Routledge 2015), 141-144.
[12] *per* John Van Maanen, ethnography is both "a methodological approach to and an analytic perspective on social research" in J. Van Maanen, 'Ethnography as Work: Some Rules of Engagement' 48 *Journal of Management Studies* (1) (2010), 218–234, 218.
[13] B. Loftus *Police Culture in a Changing World* (OUP, Oxford 2009), M. Marks, Researching Police Transformation: The Ethnographic Imperative 44 British Journal of Criminology (6), 866-888 (2004).

participant[14] so that I (and others) would be better able to understand the reasons why football matches are policed in a particular way rather than just making a judgment about the legality of the participant's practices. The interpretive approach of ethnographic research allowed my findings to be more grounded and avoided the limited perspectives often found in studies restricted to the positivist approach.

More generally, ethnographic approaches are incredibly well-suited to this type of project, because of the particular strength in communicating the nuances of decision-making processes in organizations that are otherwise difficult to access such as the police to audiences.[15] Ethnographic research depends upon reflexivity, a critical skill that I developed in previous roles and wanted to apply to research as it encourages a curious, questioning attitude that can cut through conservative attitudes to change.[16]

It was also significant that a number of the early readings I undertook were compelling immersive ethnographies exploring the behaviour of football fans or the policing of football fans.[17] Unlike some researchers I had not worked previously in policing.[18] Therefore, I settled upon a combination of ethnographic methods allowing a sufficient level of access to the field, including empirical observations and interviews of key informants, as well as using an ethnographic approach for analysis and writing up the research. Each of these steps is discussed further below.

A.3 Empirical Legal Research

[14] B. Latour, *Reassembling the Social* (OUP Oxford, 2005), 15 ; M. Gluckman 'Introduction' in A. Epstein (ed.) *The Craft of Social Anthropology* (Tavistock, London 1967) [xi-xx].
[15] L. Westmarland, 'Taking the flak: operational policing, fear and violence' in G. Lee-Treweek, S. Linkogle (eds.) *Danger in the Field: Risk and Ethics in Social Research* (London, Routledge 2000), 36.
[16] n. 13 Marks (2003), 39.
[17] G. Armstrong, *Football Hooligans* (Bloomsbury, London 2003) ; G. Pearson, *An Ethnography of English Football Fans* (Manchester University Press, Manchester 2012); M. O'Neil, *Policing Football* (Palgrave MacMillan, London 2004).
[18] See e.g., S. Holdaway *Inside the British Police: A force at work* (Oxford, Blackwell 1982), 65-79; M. Young *An Inside Job: Policing and Police Culture* (OUP, Oxford 1991).

An ethnographic approach necessitates an empirical focus.[19] Yet, legal research is rarely empirical.[20] Empirical legal research also tends to manifest as quantitative analysis, despite the fact that a qualitative approach is closer to traditional doctrinal approaches to legal research, and is better suited to testing hypotheses requiring assessment of unquantifiable features such as value-based or ethical ideas.[21] Like any other intangible concept, the impact of law on a group in society can be studied by its effects.[22] Empirical research helps legal researchers to identify these effects and so consider how the law works in practice.[23] Therefore a qualitative, empirically-focused, approach permits the researcher to study the impact of law, through assessing the effect of that law on an institution such as a police force, on how police officers act, talk, react, and operate generally in their field of practice. This approach has already become established in policing studies and is the mainstay of so many of the socio-legal studies from which I drew inspiration.

A.4 Socio-Legal

To accurately assess the impact of law on the participant being studied, the reader needs to understand the wider social, political, and economic factors affecting the implementation of law.[24] This knowledge is not presumed. Rather, with ethnographic methods, the researcher starts from a point of learning and enquiry into a field that they do not know everything about with the objective of identifying these contextual factors. The search for this subjective contextualisation is part of the

[19] T. Whitehead, 'Basic Classical Ethnographic Research Methods' Ethnographically Informed Community And Cultural Assessment Research Systems (Working Paper Series, University of Maryland 2005), 4.
[20] L. Epstein, A. Martin, *An Introduction to Empirical Legal Research* (OUP, Oxford 2014), 5; J. Flood, 'Socio-legal Ethnography' in R. Banaker, M. Travers (eds.) *Theory and Method in Socio-Legal Research* (Hart, London 2005), 44-47.
[21] A. Wulf, 'The Contribution of Empirical Research to Law' [2015] Jurisprudence 29-49, 41-42.
[22] R. Goodman, D. Jinks, 'Measuring the Effects of Human Rights Treaties' 14 European Journal of International Law 1 (2003) 171-183, 171-172.
[23] R. Kagan 'What Socio-Legal Scholars Should Do When There is Too Much Law to Study' 22 Socio-Legal Studies (1) (1995) 140-148, 143.
[24] n. 20 Flood (2005); S. McVie, 'Socio-Legal Empirical Research, Challenges in Socio-Legal Empirical Research Presentation, University of Edinburgh (2014) <http://www.create.ac.uk/methods/methodological-challenges/socio-legal-empirical-research/> accessed 28th May 2017.

open-ended and multi-textured aspects of ethnography.[25] Finally, the researcher needs to be located in the field, close to the participants, proximate to the actions and interactions from which the actual, not reported, impact of law can be ascertained. Undoubtedly, observations conducted by a researcher accompanying police officers on shift through the different phases of a football matchday operation would secure the opportunity for close analysis of the actual, contextualised impact of legal considerations in football policing.

For the above reasons, I have adopted a socio-legal approach. I view socio-legal as consisting of an interdisciplinary focus that integrates the internal doctrinal analysis of a trained lawyer (on a topic such as human rights), with the external perspective of sociological enquiry (how concepts such as human rights are used by the research participants).[26]

In seeking to uncover the reality of the influence of human rights law on football policing operations, I did not approach the data collection and analysis from a wholly uncritical perspective. One area that required a critical stance was in measuring the police's actions against the standards expected in human rights law, thus highlighting where they fell short. The benefit of socio-legal analysis is that it is flexible enough to allow a combination of empirical features and critical analysis.[27]

A.5 Not Quantitative

There are many variables inherent in legal decision-making that mean that it is difficult to conduct robust quantitative research because of the way that people behave in legal processes and because institutions often fail to conform to the kind of predictive models that quantitative scholars like to develop.[28] The major gap preventing quantitative research on the policing of football matches is a lack of data being recorded; as I found during my initial review, the only statistics about football policing

[25] n.20 Flood (2005), 33-40.
[26] C. McCrudden, 'Legal Research and the Social Sciences (2006) 122 Law Quarterly Review (632), 633.
[27] n.3 O'Reilly (2005), 8-10.
[28] n.24 McVie (2014).

regularly published concerned arrest statistics and numbers of FBOs,[29] or costs concerning the policing of matches.[30] Collection and computation of all of the variables could theoretically take place with large team and a project of structured data collection.[31] Yet the recognised weaknesses of quantitative analysis would apply; the metrics selected would be constructed and run the risk of being arbitrary or not significant, therefore not usefully producing findings that were persuasive.[32]

Well-implemented qualitative empirical research can mitigate these problems as it permits the researcher to see more of what is ascertain the reality of the participant's experience, there is spatial proximity, and also, critically, interpersonal proximity that means there is less interpretation of data through unreliable mediums.[33] As a lone researcher, I determined that an immersive qualitative study had a better chance at comprehending the variables present in the policing of football matches than a quantitative study.

B. Research Methods

Ethnography is an approach, or a family of methods rather than a singular research method.[34] Having identified that approach, I was guided towards evaluating commonly used ethnographic methods within the parameters set out above. However, I was also aware that not every empirical research method would be appropriate for obtaining relevant data from the police force, nor be suited to provide data of a sufficient quality to address the research questions. Two stood out as most useful to obtain relevant insights into the actions and decisions of officers to further the research questions:

[29] BBC News: 'Football-related Arrests Rise for the First time in three years' 24th November 2016 http://www.bbc.co.uk/news/uk-england-38090956 accessed 24th November 2016.
[30] ITV News: 'Policing top football matches in Manchester costs more than anywhere else' 10th August 2016 http://www.itv.com/news/granada/2016-08-10/policing-top-football-matches-in-manchester-costs-more-than-anywhere-else-in-uk/ accessed 24th November 2016.
[31] B. Glasner, 'All is Data' 6 Grounded Theory Review (2) (2007) 1-22, 2-3; C. Stott, O. Adang, A. Livingstone and M. Schreiber, 'Tackling football hooliganism: A quantitative study of public order, policing and crowd psychology', 14 *Psychology, Public Policy, and Law* (2)(2008), 115-141.
[32] n.24 McVie (2014).
[33] n.31 Glasner (2007), 6.
[34] n.1 Willis and Trondman (2002), 394.

participant-observation and interviews. Each of these are aimed at studying the human experience,[35] in a way which can contribute to the creation of a thorough, nuanced text,[36] and that allow the researcher to be located at the crossroads of contemporaneous debate in the area studied.[37] These methods are useful tools for accessing the complex ways in which decision-making and legal regulations are embedded in wider social processes.[38] In this way they produce situated knowledge, that can be analysed to create a "thick description",[39] or a "slice of life" account[40] that offer rich "explanatory insights"[41] and have the potential to add to academic knowledge of a field.

B. 1 Primary method: Observations

My primary research method was observations, conducted as a partial participant or an "unobtrusive participant".[42] This was a method I settled on after being dissatisfied that neither extreme of the mainstream dichotomy (See Section B.2 below) fully reflected the reality of my experience of observations.

Observations were directed to fulfilling ethnographic research's ultimate aim; to develop theory through its "capacity to depict the activities and perspectives"[43] of police officers and to ensure sufficient proximity in order to discern what Geertz conceptualised as the "intentionality which

[35] n.1 Willis and Trondman (2002), 399.
[36] J. Van Maanen, 'An End to Innocence' in J. Van Maanen (ed.) *Representation in Ethnography* (New York, Sage 1995); N. Denzin, *Interpretive Ethnography* (California, Sage 1997).
[37] S. Taylor, 'Researching the Social' in S. Taylor (ed.) *Ethnographic Research: A Reader* (Sage, London 2002), 2.
[38] J. Starr, M. Goodale, (eds.) *Practicing Ethnography in Law: New Dialogues, Enduring Models* (Palgrave McMillan, New York 2002), 2.
[39] C. Geertz, Thick Description: Toward an Interpretive Theory of Culture' in The Interpretation of Cultures: Selected Essays (New York, Basic Books 1973), 3-30 ; J. Vidich and M. Lyman, 'Qualitative methods: their history in sociology and anthropology' in (1998), 41.
[40] N. Denzin, Y. Lincoln *Strategies of Qualitative Inquiry* (California, Sage 1998), 15.
[41] P. Adler, P.A. Adler, *Membership in field research: Vol 6. Qualitative Research Methods*. (California, Sage Publications 1987), 17.
[42] C. Davies Reflexive Ethnography (Routledge, London 1999), 120-122; M. Lawlor, 'Beyond the unobtrusive observer: reflections on researcher-informant relationship in urban ethnography' 55 American Journal of Occupational Theory (2) (2001), 147-154.
[43] M. Hammersley, P. Atkinson *Ethnography: Principles in Practice* (London, Tavistock Publications 1983), 6-7.

distinguishes the wink from the twitch" in the group under study.[44] "Getting the feel of a society or social group in one's bones"[45] was Armstrong's reasons for selecting participant observations, a perspective that struck a chord with my position as an outsider researching the police force. While my implementation of ethnographic methods is significantly different from Armstrong's persuasive, immersive, covert ethnography, the benefits he identifies encapsulate the aims of my fieldwork: through prolonged exposure the subjects accept the researcher into their environment.[46] Finally, once accepted the observed group yield rich insights about the "background performance"[47] that contributes greatly to identifying the contextual factors necessary to understand the impact of human rights law on football to conduct observations from the very start of my research.

The schedule and form policing, and to progress towards answering the remaining research questions. As a consequence, I set out of observations were designed in conjunction with the participating force who granted access (see Section C.1 below). For the first tranche of observations, I accompanied officers on their shifts at the Force Headquarters ("HQ") which mostly took place in the Silver Control Room ("Silver Control"). Subsequent observations took place with Bronze Commanders and Serial Commanders around the football operation, at whichever command area they were allocated to. The observations were accordingly multi-sited.[48] Interviews with key participants followed once they had been identified during the observation period. I intended to observe police offices undertaking their roles in a naturalistic setting but could not avoid affecting the field by my presence and that impact has been accounted for reflexively.

Observation proved to be an unsurpassable method of accessing this field, especially as the policing of large crowds entails fast-moving events, full of complex interactions. The supremacy of observations in truly understanding the nuances of the crowd is clear from the long line of previous

[44] n. 39 Geertz (1973).
[45] n.17 Armstrong (2003), xii.
[46] n.17 Armstrong (2003), xii.
[47] This process is also described in detail by Loftus, n.13 Loftus (2009), 201-202.
[48] G. Marcus, 'Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography' 24 Annual Review of Anthropology [1995], 95-117.

studies of crowds that have embraced the method.[49] For Drury and Reicher, observations were necessary to obtain fine-grained and contemporaneous data. An advantage identified by the authors was the ability to analyse their key metric of "self-definition" at different times over the duration of the crowd event, meaning that they were not reliant upon participant recall after the event which would be necessarily "constructed" and the integrity of this key metric would be threatened by "inaccurate chronologies".[50] Though initially bewildering, my observation of the policing of football crowds was repeated over time and I was able to "absorb features" and "grasp motives, beliefs, concerns…" of those officers working in difficult roles across the operations.[51] Observations provided more than just rich insights, they allowed me to experience the (reflected) reality of the officers' experiences.[52] The intricacy of the steps taken by officers in response to what they perceived would not have been easy to reconstruct at a later date through interviews, and practically impossible if reliant upon documentary or post-hoc analysis.[53] Therefore I can conclude that observation of the policing of football matches has yielded deep insights that cut against a mainstream narrative in the same way as senior academics in the field.[54]

B.2 The Participatory Continuum

Examination of the concept of participant observation reveals differences in the levels of participation. Even amongst participant observers in public order policing there is a range of different

[49] See e.g.; n.17 Armstrong (2003); C. Stott, G. Pearson, *Football "Hooliganism", Policing and the War on the "English Disease"* (Pennant Books, London 2007).
[50] See e.g.; the "supremely opportunistic" participant observation of social identity change in crowds by J. Dury, S. Reicher, "Collection action and psychological change: the emergence of new social identities" 39 British journal of Psychology 579 [2000], 568.
[51] E. Guba, Y. Lincoln *Effective Evaluation* (Jossey Bass, California 1981), 193.
[52] n.3 O'Reilly (2005), 110.
[53] See. e.g., K. Bullock, P. Johnson, 'The impact of the Human Rights Act 1998 on policing in England and Wales' 52 British Journal of Criminology 3 (2012) 630-650 who make reference to the lack of clarity that can cloud interviews about past events but do not really critically analyse this weakness.
[54] n.49 Stott and Pearson (2007).

roles from engaging as a participant-protestor[55] or as a serving police officer.[56] Differential intensity of participation is conceptualised in line with the core/peripheral dichotomy.[57] True participation requires immersion with the research participant to the extent that values are shared,[58] in contrast to the distant detachment of non-participant observations.[59] Benefits of participatory observations of police work include allowing the observer proximity to assess police officer's perspectives about prioritisation and tasks, including how success is measured. [60] Participatory observation has also been identified as the crucial technique for fully understanding the minds of legal decision-makers.[61] These insights would have been extremely helpful for furthering my research questions, however full immersive participation was not an available option for this study.

For Bryman immersion was not required to achieve critical insights, it was sufficient participation to understand the viewpoint of the studied group and how that interacts with wider social processes. This appears to be O'Neill's approach in her participant observations of football policing though she failed to expand on her claim to be a "participant" whilst maintaining – as I did – an overt academic role during the observations, and not engaging in policing activities directly.[62] One informative comment is that O'Neill describes the key features of her study as observing interactions *with* the police,[63] and observing the interactions of fans and thereby engaging in exactly the same activities as other officers. The core observable features in my study were the decision-making processes and the operationalising of decisions in practice. In that respect of those processes, I did not participate in any decisions affecting the football policing operation. Recognising my presence was intermittent, peripheral and

[55] J. Gilmore, 'This is not a Riot: Regulation of Public Protest and the Impact of the Human Rights Act 1998,' (Phd, University of Manchester 2013), 20-33.
[56] n.41 Adler and Adler (1987).
[57] n.41 Adler and Adler (1987), 378-380.
[58] n.43 Hammersley and Atkinson (1983), 22-25.
[59] n.13 Loftus (2009), 202-212.
[60] J. Groenendaal, J. Helsloot, 'Toward More Insight into the Tension between Policy and Practice Regarding the Police Network Function of Community Police Officers in The Netherlands', 88 *The Police Journal: Theory, Practice and Principles* (2015), 42-44.
[61] S. Halliday, N. Burns, N. Hutton, F. McNeill, C. Tata, 'Shadow Writing and Participant Observation: A Study of Criminal Justice Social Work Around Sentencing' 35 Journal of Law and Society 2 (2008) 189-213.
[62] n.17 O'Neill (2005), 17-18.
[63] n.17 O'Neill (2005), 18.

solely due to academic inquiry, I could not therefore be regarded as a participant under the traditionally-framed view.

As the traditional dichotomy between participant/non-participant provided unsuitable extremes of choice between full immersion and distant detachment, I considered conceptualisations put forward by other authors, identifying the range of flexible positions that indicate a "continuum of participatory involvement."[64] Amongst this range - from the "complete participant" or "complete member"[65] that is aimed at capturing the practitioner-researcher whether opportunistic or the convert, to the "complete observer" - there is myriad potential levels of involvement or attachment.

My position during observations was not detached and distant like a non-participant observer. I played a very minor *participatory* role without being a substantial *participant*. For example, if asked direct questions about the unfolding events, I would not be evasive about what I was observing. Furthermore, throughout the whole shift I joined in general conversations which would inevitably include discussion about what is observably happening in the crowd during the course of the day, specific interactions with the public, as well as general police policy. Most relatable to my own role during observations is Gorman and Clayton's description of the "unobtrusive observer" that plays a largely passive role. In their conceptualisation, the researcher is present at the locus of, and interacts with, informants to a limited extent.[66] Simultaneously this type of observer aims at invisibility, whilst maintaining ubiquity.[67] The observer, not being a participant, is not equal to the informant, not vested in their interests, or values, and not reliant upon their conduct. The researcher can therefore remain completely detached from the group despite physical proximity. Unobtrusive observers tend to not ask questions or seek clarifications but seem to be dutiful note-takers.[68] This maps onto the parameters that I took as guidance in the performance of my observations.

[64] G. Gorman, P. Clayton *Qualitative Research for the Information Professional* (London, Facet, 2nd Edition, 2005), 106.
[65] n.41 Adler and Adler (1994), 377-392.
[66] n.64 Gorman and Clayton (2005).
[67] M. Pearsall, 'Participant observation as rote and method in behavioral research' in W. Filstead (ed.), *Qualitative methodology: First-hand involvement with the social world* (Chicago, Markham 1970), 340-352.
[68] R. Gold, 'Roles in Sociological Field Observations' 36 Social Forces (3) (1958) 217–223, 222.

The unobtrusive observer, in seeking flexibility, is not wedded to the doctrines of those diametrically opposed extremes. Instead, the researcher can seek "fidelity to the phenomena under study" and can pursue the development of theory in a way that "provides much more evidence of the plausibility of different lines of analysis".[69] Similar median positions have been taken by other researchers when prevented from taking an active role in the primary activity of the researcher group,[70] or in researching police officers.[71]

There are weaknesses to this unobtrusive position since I could not fully interact in the social behavioural processes of the police force. This limitation was hard-wired into the structure of this research project. For example, I entered the field without deep knowledge of all the linguistic or social cues, and accordingly the qualitative data will always be limited by an early lack of full understanding of the vernacular. However, my approach to this situation was to seek clarification to improve my own understanding through interaction with officers, even if this alerted them to my interest in a particular subject. This was justified due to the importance of these themes in furthering the research questions. Through the strategy of engaging in conversation, I was able to gain a greater foothold in the working environment and maintain my level of access.

My unobtrusive participation was further facilitated by my physical appearance, in that I did not stand out too much from the cadre of police officers. Guba and Lincoln identified that socio-cultural ties assist in the "enculturation" that leads to insightful observations;[72] similarly Bourdieu describes the "cultural competence" to participate with the specific gathering.[73] Like the majority of those officers I observed, I was a white male. I also took additional steps and wore clothing that was similar to that of the core uniform worn on public order operations, black boots, black cargo pants, and a black winter coat (when required). I had worked with police officers in a previous job and had experience working within the criminal justice system. These elements all aided my constructive engagement with

[69] n.43 Hammersley and Atkinson (1983), 6-7 and 20-24.
[70] L. Baker, P. Case, D. Policicchio, 'General health problems of inner-city sex workers: A pilot study' 91 Journal of the Medical Library Association 1 (2003), 67–71.
[71] n.13 Loftus (2009), 202-208.
[72] n.51 Guba and Lincoln (1985), 304.
[73] P. Bourdieu *Distinction A Social Critique of the Judgment of Taste* (Harvard University Press, Massachusetts 1984), 2.

officers[74] as noted by one officer who commented; "you look enough like a cop…".[75] On one occasion, during a midweek evening European fixture following an hour of general conversations and the matchday build-up along an officer asked me, "which force are you visiting from?"[76]

B.3 Non-Participant Observation

Non-participant observation describes a more detached approach that seeks to maintain a boundary that underlines impartiality of the researcher and ensures greater validity and reliability of data.[77] In this way the non-participant observer has been described as "a spectral presence".[78] It is a method that is used to benefit entry-level empirical researchers,[79] and used in environments where the public are likely to be self-conscious if they had the knowledge that they were being closely observed.[80] However as non-participant observation usually relies on the researcher being unknown to the studied group, this raises an ethical dilemma of participant consent which usually falls short of fully-informed consent.[81] There are other shortcomings in the non-participant method. Since the researcher cannot interact in the social behavioural processes, most data collected will be interpreted with a lack of insight into contextual data necessary to deliver the type of rich insights possible with other ethnographic methods.[82] For these reasons, in particular concerning consent, non-participation observation was not considered a suitable method for this study.

[74] n.15 Westmarland (2000), 36.
[75] Observation, Bronze TAC, Cup Match 5, Phase 2.
[76] Bronze Loggist European Fixtures December 2016.
[77] R. Rhodes (ed.) *Ethnographic Fieldwork and Interpretive Political Science* (OUP, Oxford 2017), 12.
[78] D. Zimmerman, D. Wieder, "The Diary Interview Method" 5 Urban Life (4) (1977), 479-499.
[79] F. Ostrower, 'Non-participation observation as an introduction to qualitative research' 26 Teaching Sociology 1 (1998), 57-61, 57; n.30 Flood (2005), 20.
[80] Hence its popularity as library studies, or in consumer research.
[81] D. Casey, Findings from non-participant observational data concerning health promoting nursing practice in the acute hospital setting focusing on generalist nurses, 16 Journal of Clinical Nursing [2005], 580-592, 583-585.
[82] n.79 Ostrower (1998), 57.

B.4 Interviews

Interviews are relevant and penetrative method into a closed organisation such as the police. Interviews are often viewed as a clean, clinical means of extracting research data,[83] but that is not to say that interviews are incompatible with an ethnographic approach; they can provide an insight into the area under investigation without transforming into judgmental naturalism ethnography.[84] Interviews also provide an opportunity to interrogate the decision-making process, however one weakness of this research method is the tendency for interviewees to rely on hindsight, and for the reality of experience to be modulated or framed by other biases. This has been assessed as a process of the interviewee managing impressions of themselves to "maintain their standing in the eyes of an interviewer".[85]

One way to mitigate this perceived weakness would be to interview prior to the events occurring, or whilst the events are occurring and then subsequently to check on and compare against expectations. However, this proposal does not go to the heart of the weakness and, further, adds to the problem of impacting the field as the pre-event interview would put the participant on-notice of the researcher's interests during the event itself.

As a result, accounts were not collected prior to the events observed. I did not intend to risk the distortion of results that would have arisen has the participants been aware of every theme of enquiry.[86] O'Reilly underlines the benefits to the researcher in eliciting more usable data from interviews when a greater chunk of time has been devoted to participant observations first.[87] It is also helpful to build on contacts obtained in the observations phase,[88] with insight gained from observed events inspiring targeted informed questions that engage the individual in their own experiences rather

[83] S. Coutin, 'Reconceptualizing Research: Ethnographic Fieldwork and Immigration Politics in Southern California', in J. Starr, M. Goodale (eds.) *Practicing Ethnography in Law: New Dialogues, Enduring Models* (Palgrave McMillan, New York 2002), 108-122.
[84] n.43 Hammersley and Atkinson (2007), 6-7.
[85] R. Lee, *Unobtrusive Methods in Social Research* (Open University Press, Buckingham 2000), 2-5.
[86] n.85 Lee (2000), 2-5.
[87] n.3 O'Reilly (2005), 101.
[88] n.60 Groenendaal and Helsloot, (2015), 36.

than general open questions that seek to reveal impressions of understanding.[89] Accordingly, I approached my interviews as an in-depth exercise of learning from a position of "experience and knowledge"[90] that was able to identify when hindsight was being applied, or a false impression account was being built to improve the standing of the force in the research.

My observations guided the topics to focus on during the interviews as well as who to select for an interview. I identified key stakeholders within the Force Events Unit early on in my research, but also sought individuals within the hierarchy that had "knowledge" that would be sufficiently informative.[91] Only a small number of informal, semi-structured interviews were undertaken, usually at the end of a shift or with the same officer during down-time at a later observation. Framed as clarificatory conversations based on broad topics or significant incidents, these were conducted once a relationship of trust had built up, which helped counter-act the suspicion that I was informing on an officer's conduct.[92] The aim of interviews was two-fold: triangulation for my principal method,[93] and secondly to cross-validate data that had not been fully captured, and to assist in targeting subsequent observations as I continued the ethnographic investigation furthering lines of enquiry into the intentions and motives of officer's actions during incidents I had previously observed.

C. Methodological challenges in Data Collection

When carrying out the fieldwork a number of methodological challenges arose which required particular attention to avoid distorting the data being collected. These are addressed in this section

[89] M. Humphreys, T. Watson, 'Ethnographic Practices: From 'Writing-up Ethnographic Research' in S. Ybema, D. Yanow et. al. (eds) *Organizational Ethnography: Studying the Complexities of Everyday Life* (Sage, London 2009) 40-55.
[90] M. Paget, 'Experience and Knowledge,' 6 Human Studies [1983] 67-90, 67.
[91] n.90 Paget [1983], 67, 78.
[92] n.13 Loftus (2009), 203.
[93]L. Maher, D. Dixon, 'Policing and public health: law enforcement and harm minimization in a street level drug market' in S. Taylor (ed.) *Ethnography: a Reader* (Sage, London 2002), 42.

which also shows how the deployment of research methods was fine-tuned during the fieldwork following a process of critical reflexivity.

C.1 Access

I benefitted from access pursuant to the pre-determined agreement for funding this project through the N8 Policing Research Partnership. Consequently, an initial meeting with the Football Lead was set up very quickly in the early planning stages of the project. This senior officer was the channel through which access to the wider network of officers working on football operations was controlled. Access is not just a simple initial step; it is an ongoing process that has to be continually secured. Van Maanen describes the process as a "continuous push and pull between fieldworker and informant,"[94] which certainly resonated with my experiences as my observations progressed. Throughout the process of planning observations, I used persuasive skills to build and protect the access obtained, establishing the "golden string" personal relationships that assist with an extended stay within an organisation – even where the key personnel changed on a regular basis.[95]

Access can be distinguished from cooperation as a distinct process.[96] Agreed access at the right level to obtain data for this study would have meant little without the cooperation of officers with direct influence over which exact data I would observe.[97] It was here in that the position varied among different sub-divisions of the Force Events Unit ("FES"). The FES operated like a separate division, delegated along geographic lines based around the different clubs. Each club had an assigned Designated Football Officer ("DFO"), and a usual rota of Silver Commanders each of whom would have some local knowledge. On the vast majority of occasions, the DFO accepted requests to host me

[94] J. Van Maanen, *Tales of the Field* (Chicago University Press, Chicago 1988), 144.
[95] Blogpost F. Heathcote-Marcz, 'Ontologically-cultured Access and Ethnography's "Golden String"' [undated] http://manchesterethnography.com/tales/ accessed 21st May 2017.
[96] C. Wanant, 'Getting past the Gate-Keepers. Differences between access and cooperation in Public School Research' 20 Field Methods 2, (2008), 191–208, 193.
[97] T. May 'Feeling Matter: Inverting the Hidden Equation' in T. May and D. Hobbs *Accounts of Ethnography* (Oxford, OUP 1993),

through the Football Lead once a general risk assessment had been carried out. However, some DFOs were slow to respond, hesitant or would otherwise seek to put obstacles in the path of observations.

Two common justifications for refusing my requests were deployed: one, that the club did not want me to enter the premises (and specifically the match control room), and secondly, that the allocated cars did not have enough room to carry me. Those understandable justifications aside, there was no structural problem with access or cooperation through the first phase of observations, and DFOs were willing to assign me to my requested observations though one referred to the institutional support from the Football Lead as a driver in securing that cooperation. The process of arranging my presence at fixtures was helped by my characteristics, my behaviour during observations, and my overall approach that looked to engage positively with officers and not just "scribble away". Fears of critical appraisal are always difficult to overcome for the lay observer[98] and one intermediate gatekeeper DFO refused to arrange an observation because the Bronze Commander allocated to that fixture was policing his first fixture.

Overall, I built upon the good initial foundation with the police force, and when personnel changes in the role of Football Lead occurred, I was able to fall back on other established personal relationships with the relevant DFO's in order to arrange observations directly with them without reference to more senior officers who didn't have the same level of buy-in to the academic partnership.

C.2 Conduct of Observations

Observation is a research method that is that allows the researcher to engage with the subjects being studied, with their knowledge, but without any active impact upon the situation under scrutiny.[99] Carrying this out in practice can be a fine balancing act. Observation is sometimes criticized on the

[98] n.13 Loftus (2009), 46-48.
[99] P. Rock, 'Participant Observation' in A. Bryman, P. Burgess (eds.) *Qualitative Research* Volume II (Sage, London 1999) 3-39.

grounds that the very fact of being observed may lead research participants to behave differently, thus altering the data obtained which in extreme cases may lead to invalidation of the data collected. To address this risk directly several tactics were deployed reflexively during the planning and conduct of observations. First, I sought out a sufficiently large sample size to accommodate any clear outliers, I adopted several strategies to blend-in to the officer's work environment, in analysing data I was alert to those occasions where officers constructed data for my benefit and finally in writing up my observations, I accounted for these and my own biases in the field.

C.2.1 Extent of observations

A key strength of ethnographic methods is their facilitation of long periods of time spent in the field. Persistent observation is a characteristic of prolonged engagement that builds upon prior observations for a foundation of ever deeper insights.[100] This allows the researcher to explore different roles and gain "a comfortable degree of rapport"[101] with research participants. As an overt researcher, not embedded in the group, a small number of observations would have resulted in insecure participants. Accordingly, I sought to maximise my exposure in the field and requested a large number of observations in the first year. I continued observations in the second year of fieldwork, but over time, targeted certain fixtures of interest as well as to ensure a broad spectrum of observed fixtures. Overall, I conducted 53 observations amounting to around 340 hours in the field. Over the course of repeated observations, I became a known face around the main police stations. I received regular welcomes of "you're with us again", or "you never seem to leave this place" and - at the peak intensity of observations: "you're doing more overtime than we are this week". The quantity of observations, and the strength of the rapport built up account for the wealth of data that I obtained. Finally, the temporal span was also a fundamental part of the process of iterative analysis.

[100] J. Parke, 'Participant and Non-participant observation in gambling environments' (2008) 1 *ENQURIE* (1) 4-5.
[101] D Jorgensen, 'Participant Observation: A methodology for human studies' (California, Sage Publications, 1989), 21.

The geographic extent of observations, at seven different clubs across seven different force divisions is also a relevant factor in the depth and reliability of data. The observations were multi-sited,[102] like a number of similar ethnographic studies of the police.[103] This reflects the reality of the officers who are either tasked, or volunteer, to work at matches outside of their division or shift pattern on a very regular basis.[104] There was a high-degree of cross-over of personnel at matches, particular those covered by smaller force divisions but each division policed its club in a slightly different way. It was important for my study to reflect football policing across the whole. First, to identify if there were varied approaches within the same force, and secondly to ensure that the phenomena studied were not localised in particular places but could instead be identified and tracked across different field sites. Thus my data reliably reflects observed behaviour of a number of different Commanders in different divisions so as to be representative of force policy, and the force-wide structures concerning football policing.

C.2.2 Blending in

Not being a serving police officer, it would be a criminal offence to pass myself off as one by wearing the uniform and actively deploying on duty. In the field I was in spatial proximity with the officers for the entire length of their shifts. As an operation-specific public order team and not an everyday unit, officers would be thrown together in different combinations. I was just another person that was part of the ad hoc, temporary team for that specific operation, and this allowed me a degree of latitude when analysing how best to blend in.[105]

The appropriate clothing to wear was entirely within my discretion. For the first group of observations conducted in Silver Command at Force Headquarters, I dressed in a suit without a tie in a formal

[102] n.48 Marcus [1995], 95-117.
[103] n.17 O'Neill (2005); n.13 Loftus (2009).
[104] V. Hey, '"Not as nice as she was supposed to be": schoolgirls' friendships' in S. Taylor (ed.) *Ethnography: A Reader* (London, SAGE 2002), 71-72.
[105] n.17 O'Neill (2005), 17-18.

appearance that would put me on the same level as the white-shirted [uniform] of the police staff. Yet I remained a visible outsider, a status which was accentuated by the requirement of entry to Force HQ that I wore a purple lanyard visibly presenting the words “Visitors Pass”. After the first few observations, I learned to take this off when in the Silver control room, and to more closely match the postures of those working in the control room. A more subtle identification query arose from those around the Silver Commander. Whereas the Silver commander was briefed on my presence, commonly following prior direct contact with myself, the Tactical Advisers (TAC) were often briefed late, if at all, about my presence, role, purpose, or the research being conducted. TAC advisers being highly-trained public order officers were quick to query my identity and intention in their work environment. My approach in these situations was to respond to their queries using the formulation that I had develop for my University Ethical Approval application and consent form, adding in references to the benefits to the force of the research project that I had picked up from the initial meeting with the Football Lead. This explanation rarely required clarification, but on one occasion after hearing a concern from a TAC that I would be “in the way”, I developed a phrasing that put the TACs at ease; “I’m focusing on the decisions made by the commander, my aim is to sit on your shoulder and if I have any queries, I’ll wait for a quiet period before asking.”

Away from the Silver control room I physically shadowed the officers being observed, walking alongside them or following at close proximity. I tried to stay as inconspicuous as possible, sitting in the back seat of the car, or standing behind the officer I was observing. I was rarely given permission to listen to a police radio, as observations progressed, I learnt to ask the Silver or Bronze Loggist to repeat any relevant information that was coming through radio traffic. I focused on the Loggist for such communications as they were already recording key themes such as deployment changes and observed intelligence. In doing this, I was avoiding burdening the TAC advisors, who at crucial moments would be noticeably engaged in probing the Commander, questioning his position and formulating advice on how to react to critical pieces of information.

Fortunately for the purposes of this study, the vast majority of police officers observed were sociable, chatty and willing to initiate conversations which included me as an equal participant. In the main,

these would centre around police working-life, stories of dealing with previous football incidents, and occasionally they would focus their curiosity on the research project. I opted for a stance that promoted the positive collaborative features of the research, particularly when trying to build rapport. I would gently praise some positive aspects of the operation and if pressed for critical comments I would offer vague remarks about the need to look at the development of good tactics in other situations. Aside from substantive comments I engaged, where appropriate, in conversation about daily life, making jokes, suggesting places for lunch. In these activities I made sure that I never took over directing the discussion – I simply participated in human interaction natural to officers and as identified by other researchers as a socialisation process to help blend-in with the research participants which can yield richer and more reliable insight.[106]

C.2.3 Accounting for Altered Data

The vast majority of qualitative research involves human interpreting the actions of other humans.[107] The human element is a fallible part of the research environment which need to be accounted for. A further benefit of an extended period of participant observation is that, by getting to know the behaviours of the observed group, the researcher can identify when those behaviours are being used to manage impressions. On a small number of occasions, I discovered that I was intentionally placed with an officer charged with responsibility over a minor, quiet part of the operation. On my first observation of the Police Liaison Teams, I was placed with officers receiving fans at the train station despite the vast majority of fans having already arrived and congregating in the city centre. After a few hours with little to observe, I requested that I shifted Liaison Teams to be able to undertake observations of the events near the "fan reception area"[108] in a move that allowed me to also compare

[106] n.17 O'Neill (2005), 18.
[107] n.79 F. Ostrower (1998), 57.
[108] Commonly known as a "fan zone" but a term not used willingly by officers observed.

the different uses of the Police Liaison Tactic which became a revealing insight for the research questions.

On other occasions, I became aware that officers were presenting an impression of what they thought I wanted to hear. A regular occurrence was stories about how decisions have to be made according to the "National Decision Model".[109] This was presented as the most relevant tool for structuring Commanders' decisions. The observed reality was different, and as explored in later analysis, there was little consistent structure to Commanders' decisions. Upon review I concluded that officers referred to the National Decision Model because it contained the concepts related to human rights analysis: decisions must be "proportionate" and "necessary". Accordingly the claims of those officers were able to be scrutinised due to the extent and breadth of observations could be largely discounted.

Officers would also make justificatory remarks after making decisions. In part this reflects the discursive aspect of the Silver or Bronze Command Team, whereby the commander very regularly checks with the TAC and Loggist before and after making decisions. Indeed, sometimes these comments were voiced in conversations with the Loggist who was tasked with writing the justificatory remark down for a further write-up or in case a note was needed at debrief. However, these remarks were also voiced for my benefit, and particularly useful was the double justification where a shorthand was used for the Loggist, and then later explained to me. One example concerned the behaviour of a fan who had been arrested, when the Bronze Commander commented to the Loggist that, "he's been locked up for being a complete knob" before turning to me, and with fuller explanation "he's one who's been arrested for erm let's say… not being very compliant. It's better… its safer for him to be arrested now rather than let him enter the stadium, where he might cause more harm and be a danger to the rest of society in there." This attempt at justifying a preventative detention on the basis of perceived threat to the match-going public would not have been expressed in

[109] College of Policing, Authorised Professional Practice (APP), 'National Decision Model' (30th January 2020) https://www.app.college.police.uk/app-content/national-decision-model/the-national-decision-model/ accessed 24th October 2020.

those terms without my presence, the officer's pauses were periods where he was clearly trying to use rights-based terminology for my benefit.

I was wary of the police presenting a good case, not only of the force as a whole, but also within the relationships with their peers, superiors, and subordinates.[110] My heightened awareness of officers' attempts to present a particular image allowed me to check overt signs of them altering their behaviour and allowed me to make sense out of that data from their perspective.[111] In each of the cases, above, it was important for me to observe the way in which officers conducted themselves, seeing past the words used. In this sense it was a benefit that I was observing officers in their natural setting.[112] Ethnographic methods give the researcher the tools to validate presented behaviour, not least the immersive close connection to the subjects, which facilitates the triangulation of various methods, sources, and contexts.[113]

On a small number of occasions, I participated in activities in the field that distorted the data. I entered the field aware that I would need to avoid being an unconstructive presence. Following discussions about this with my supervisor, I also took the approach that if my skills could have the effect of facilitating access, or trust then this effect would not necessarily hinder the research. A recurring example was my skills of geographic orientation and local knowledge. Whilst this mostly involved giving members of the public directions, I also gave assistance to officers if they were in an area they did not know. On one occasion a "risk group" had been spotted in a pub that the Silver Commander and other staff in the room had not heard about. I had visited this pub previously and when the Commander asked around the room whether anybody had heard of it, and I gave brief details about adjacent roads. Geographic instructions were then relayed out to the Spotters to attend, a

[110] n.17 O'Neill (2005).
[111] D. Fetterman 'Ethnography in Education Research: the Dynamics of Diffusion, 11 Educational Researcher 3 (1982) 17-22, 17-18.
[112] N. Polsky *Hustlers, Beats and Others* (Lyons Press, Connecticut 1998), 116.
[113] M. Lindegaard, 'Method, actor and context triangulations: knowing what happened during criminal events and the motivations for getting involved' in W. Bernasco (ed.) *Offenders on Offending; Learning about Crime from Criminals* (Willan, Cullompton 2010) 109-129, 110-112, 126-127.

result that was always inevitable with my local knowledge only supplanting the need for a Google Maps search.

Another common occurrence concerned the use of foreign language which I discussed with an officer who was worried about communication issues. When, later, the Bronze Commander asked me to help an officer remove alcohol from the possession of fans I hesitated as that interaction verged onto relevant issues for the research. After a pause, in which the officer forcibly removed bottles from the prised lips of two visiting fans, causing a predictably testy reaction, I automatically commented in their language that drinking alcohol was prohibited in English stadiums. In my view, this did not alter the interaction significantly and both fans were keen on entering the stadium and had not physically resisted the bottles being seized. The incident in the end did not reveal a relevant issue that impacted the analysis. My brief participatory interactions also resulted in me being marginally more accepted by the participants I was observing on that shift, but any findings based on these incidents had to reflect the fact that I was not observing a sterile interaction.

C.2.4 Did I verge on "going native"?

A researcher engaging in ethnographic work is usually a positioned subject:[114] seeking to understand the phenomenon as a person involved with the topic and not detached from it. The process is inherently subjective and individual.[115] Just as the researcher affects the culture under investigation, so the researcher is affected by elements of that culture.[116] A critique of ethnographic researchers is

[114] R. Rosaldo, 'Tracking Global Flows' in R. Rosaldo and J. Inda, *The Anthropology of Globalization Reader* (2nd Edn, New York, Wiley-Blackwell 1999), 19.
[115] J. Clifford, G. Marcus *Writing Culture: The Poetics and Politics of Ethnography* (California, University of California Press 1986).
[116] Blogpost, A. Rodrigues-Junior, 'Ethnography and Complexity' accessible as https://blogs.aalto.fi/researchinart/files/2012/09/2210.pdf accessed on 28th May 2017.

whether their proximity and affinity leads to the researcher "over-identifying" or becoming and "uncritical celebrant" of the subculture.[117]

In the field, the policing researcher is inundated with impressive stories of officers participating in fabled operations, notable arrests or exciting car chases. To some degree, I was conditioned to this having previously worked with serving and retired officers engaged in various legal processes. I entered the field dispassionate with a lack of predisposition towards a particular team of subordinates or higher-ups but later realised that it is impossible for the positioned researcher to be completely objective and value-free.[118] On a small number of occasions I felt myself drawn into the police work I was observing. Once, when I was in a control room and officers were replaying footage to identify the culprit, I engaged in this activity wholeheartedly like a curious trainee, I even believe I spotted the correct individual before the officers and offered my suggestion. This was quietly ignored by the officers and eventually I remembered to observe what the officers were doing, rather than joining in with their activities.

Beyond brief incidents like this, I did not feel myself becoming part of the Force. I was assisted by the schedule of intermittent observations spread out over two football seasons. As others have found, the approach of dipping-in and out of the field can be inadvertently beneficial, in providing time for reflection: being visible to a cohort of officers, without being part of their everyday lives.[119]

C. 3 Recording Fieldnotes

Fieldnotes are broader, more analytical and more interpretative than a simple data log.[120] Fieldnotes can be loosely be split into observational (what I saw), methodological (noting what strategies I

[117] S. Thornton, 'The Social Logic of Subcultures' in K. Gelder and S. Thornton (eds.) *The Subcultures Reader* (London, Routledge 1997), 207 and 214.
[118] H. Becker, 'Whose side are we on?', 14 Social Problems (3) (1967), 239-247.
[119] n.112 Hey (2002), 71-72.
[120] D. Polit, B. Hungler, 'Nursing research: Principles and Methods (Philadelphia, Lippincott 3rd edition 1987), 271.

implemented), personal (my own reaction to observations), and theoretical (interpretative attempts to attach meaning to observations).[121] As ethnographic work is iterative-inductive, moving back and forth between foreshadowed problems and theory grounded in data, the focus of the research narrows towards the end of the project. As a result, fieldnotes are usually viewed as "unruly" and "messy".[122] Notes must cover broad themes, especially when made as part of early fieldwork. Whilst not every detail can be comprehensively recorded, it was important to not preclude key topics or censor data that might later become useful.[123] Other advice taken on board during the fieldwork included Malinowski's instruction to "stay aware of peculiarities" which make an impression but "that cease to be noticed when no longer novel".[124]

Relying solely upon mental notes would not be playing to my strengths. Early in the process I experimented with subtly recording notes on an out-of-sight dictaphone. This became my main method for note-taking, one which removed an interpretive step that would otherwise occur in deciphering handwritten notes. During shifts, trips to the toilet were good opportunities to record out of earshot of the officers. In and around the football stadia I continued to record short notes in snatches whenever alone. In situations where I was unable to make notes out-of-earshot I developed the skill of making notes in moving cars on blank pages in the operational order which was a common practice amongst officers. The progress from covert to overt note-taking has been noted by other researchers, and like them I interpreted as change accompanying increasing participant comfort with the researcher's presence.[125]

Fieldnotes of course only provided the starting point for my learning and understanding of my experiences.[126] However full, fieldnotes cannot explain the intellectual work or my own decision-making process in determining the relevant findings. Fieldnotes were simply the basis for

[121] n.120 Polit and Hungler (1987), 272-275.
[122] n. 48 Marcus (1995)
[123] n.99 Rock (2001), 35.
[124] B. Malinowski *Argonauts of the Western Pacific* (Routledge, London 1922), 21.
[125] n.3 O'Reilly (2005), 99.
[126] n.94 Van Maanen (1988), 109-15.

interpretation, out of which theoretical, methodological and substantive discussions were constructed for this study.[127]

D. Data Analysis

The final stage of the research methodology concerns the methods utilised to analyse and write-up the data collected. This analysis took place on an ongoing basis and overlapped temporarily and spatially with the fieldwork and data collection given the iterative framework of the ethnographic approach. Although analysis is addressed in detail in this separate section, that intimate connection to the field should be recalled throughout.

D.1 Approach to Analysing Data

Analysis of data involved interpretation of the meanings and functions of the actions of officers throughout the different phases of observations. According to O'Reilly, this analysis can be separated into the discrete elements of sorting, translating, organising, and communicating.[128] Analysis was not a standalone activity sequestered to the end of data collection, but an ongoing process that commenced in the immediate aftermath of my first observation through the innate selectivity of recording fieldnotes. Indeed, the very decision about whether a piece of information is relevant or not to the project is a result of the process of analysis. This continual process of analysis allowed me to assemble the raw materials and obtain an overview of key themes at an early stage which, in turn, aided the elucidation of additional data through further observations as my research questions

[127] R. Burgess, 'Keeping Fieldnotes' in R. Burgess (Ed.) *Field Research: A Source Book and Field Manual* (London, Allen & Urwin 1982), 193.
[128] n.3 O'Reilly (2005), 184; J. Ritchie, J. Lewis, 'Qualitative Research Practice: A Guide for Social Science Students and Researchers' (Sage, London 2003), Chapter 3 Framework Approach.

narrowed. Noting the need for careful examination, and creative insight,[129] I continued the process of analysis past the observation period, into the writing up phase. This was achieved by continuing to conduct observations, and even when these concluded by replaying of oral fieldnotes and re-reading of written fieldnotes in the search for ever deeper insights.

The method of analysis being inductive, I sought out trends and patterns prevailing in the data, occurring across the various groups[130] trying to be both curious and receptive.[131] In assessing each pattern of behaviour, I deployed a number of criteria to aid assessment including; relevance to the thematic issue under consideration in that particular chapter, academic probity, and significance. Having identified a relevant pattern in the data, I then developed an explanation for that pattern using hypotheses in a series of categories that captured key themes and processes that built a theory of approaching policing football matches from a human rights approach.[132] In respect of each of the hypotheses, I held in mind the need for the links between the data and the research objectives to be clear, transparent (able to be demonstrated to others), and defensible (justified given the objectives of the research).[133]

D.2 Validity and Reliability

Valid research is that which is "plausible, credible, trustworthy and therefore defensible."[134] Whilst some studies opt for multiple observers to add these qualities, through my solo observations I sought extended exposure, a balanced selection of different matchday operations, and triangulation from other data sources to ensure validity of the research findings.

[129] R. Kreuger *Focus Groups: A Practical Guide for Applied Research* (Sage, London 1994).
[130] n.129 Krueger (1994).
[131] n.99 Rock (2001), 35.
[132] W. Goddard, S. Melville, *Research Methodology: An Introduction* (Blackwell Publishing, London 2004); D. Thomas, 'A General Induct Approach for Qualitative Data Analysis' 27 American Journal of Evaluation (2) (2006), 237-246, 240.
[133] n.132 Thomas (2006), 238-240.
[134] R. Johnson, 'Examining the validity structure of qualitative research' 118 Education (2) (1997), 282-292, 282.

A balanced selection of matches ensured my observations reflected the reality of football policing across the force. I encountered 30 operations involving Premier League teams, of which 14 were European fixtures. On top of this I observed 17 operations covering teams from lower divisions, alongside 6 domestic cup fixtures. This was the primary category to sort the variety of games, but I also picked up the police's own method of categorising games based on risk. In total, I observed 12 Category C/C(IR) games, 27 Category B games, 12 Category A games, and 2 games that were categorised as "Spotters only" where no other policing resources were deployed. Although this selection might be seen as top-heavy, I experienced sufficient matches in the other categories to have seen the full range of fixtures. Any additional observations focusing on the lesser categories would simply be an exercise of repeating observations for the sake of quantitative balance. Despite the variety across the range, the fundamental features of each of the observed events were sufficiently similar to allow me to "systematically and repeatedly" conduct observations and ensure observational consistency.[135]

Another common approach to strengthening a study's reliability is to engage in triangulation of data through a variety of complementary means.[136] Triangulation can also help overcome the perceived exaggeration or "case presentation" on the part of the research participant, as weak source data can be rectified, or negated.[137] My conversations and interviews with Senior Commanders provided a necessary corrective for my own views in a number of significant ways. For example, an early finding was that low-risk fixture (Cat A) didn't need to be policed and my preliminary view that the presence of a significant deployment of officers could have a potentially chilling effect of the enjoyment of rights was persuasively rebutted as I had not addressed my mind to the high profile nature of the stadium as a target for a terrorist attack – a threat that unfortunately was realised in Paris during the period of my observations.

[135] n.41 Adler and Adler (1994), 381.
[136] n.100 Parke (2008); n.103 Maher and Dixon (2002), 42.
[137] n.113 Lindegaard (2010).

My analysis has also been complemented by discussions of the research findings with participants, supervisors, and colleagues,[138] in conversations that have aided me to make sense out of confusing or conflicting data.[139] The research participants were formally updated about the progress of the research at annual stages. Comments forthcoming about the topics chosen for analysis as well as their responses to findings were noted, with some aspects woven back into the research findings in a practice that retains fidelity to the aim of an ethnographic approach.[140]

A cogent criticism of the credibility of ethnographic studies is a lack of generalizability as the single case that is studied in-depth is not always able to be extrapolated to apply equally to other cases.[141] Where possible, I have set out to conduct observations in a way that moves this research one step upwards in the chain of relatable extractability, not limiting myself to one team within the police, or one stadium, but on a force-wide basis. Moreover, the findings of this study should be applicable in respect of any force that polices regulated football matches in a similar manner, based upon public order policing principles, with local variations depending on the regularity of matches requiring policing. It will be through repeated findings in similar forces that the validity and reliability of this study could be finally confirmed.

D.3 Writing up the Research

Writing-up ethnographic data amounts to a "the transformation of the field" in that the text is partly achieved "by means of the narrative construction of everyday life."[142] The "craft"[143] has been developed by ethnographic researchers use "to order the mess of material" to make it tell a story, but without pre-determining the structure or sequence of the story it tells.[144] For Geertz, doing

[138] n.3 O'Reilly (2005), 180.
[139] n.111 Fetterman (1982), 17-18.
[140] n.2 Erlandson et.al. (1993), 142.
[141] n.43 Hammersley and Atkinson (1983), 42-43; n.3 O'Reilly (2005), 225.
[142] n.43 Hammersley and Atkinson (1983), 250.
[143] n.98 Humphreys and Watston, 40.
[144] n.43 Hammersley and Atkinson (1983), 221.

ethnography is a matter of cultural interpretation based upon layers of "thick description".[145] Interpretation involves attaching meaning and significance to the analysis, explaining descriptive patterns, and looking for relationships and linkages among descriptive dimensions,[146] which are further mediated by writing and distorted in process of transmission. Other writers quote Bordieu stating that, "writing tears practice and discourse out of the flow of time".[147]

In writing up this ethnographic account I have concertedly attempted to avoid any more distortion than is necessary in the process of interpretation, analysis and translation into written English. This was important as I sought to reveal insights about what occurs in a relatively closed organisation that would otherwise produce relatively few traces observable from the outside which would allow the validity of my work to be checked.[148] I aimed to present myself as a credible witness through conveying accurate descriptions, by grounding the text in the data, and by not imposing features that did not reflect the observed reality.[149] Accordingly, I steered away from narrative, scene setting vignettes[150] and instead reported officer's direct speech or incorporated abridged fieldnotes to focus attention on key events or revealing interactions. The direct voices of officers, including the technical terminology and colloquialisms recognisable to officers permeate the text allowing the study to be accessible to the research participant, as well reflecting the reality of their experience.[151]

Overall, the incorporation of the ethnographic data was crafted in order to share the social reality of public order policing. Even if what is captured in these fieldnotes appears symbolic, it is reflective the underlying experience.[152] The written language itself is an analytical tool and there is no proscriptive single method for writing ethnography. An accessible text artfully reports carefully interwoven events and findings in plain understandable English.[153] That objective has proven difficult to achieve. The

[145] n.39 Geertz (1973), 3-30.
[146] n.139 Krueger (1994)
[147] P. Bourdieu *The Logic of Practice* (Stanford University Press, Stanford 1990), 261.
[148] A. Glaeser 'Ontology for Ethnographic Analysis of Social Processes' 49 Manchester School: Practice and Ethnographic Praxis in Anthropology (3) (2005) 16-45, 36-37.
[149] n.43 Hammersley and Atkinson (1983), 240.
[150] n. 94 Van Maanen (1988), 136.
[151] n.17 Armstrong (2003), xiii.
[152] n.98 Humphreys and Watson (2009), 45.
[153] n.98 Humphreys and Watson (2009), 48; n.40 Denzin (1997), 3, 287.

unique skills of writing an engaging ethnographic work requires training and practice. Just as with the observations, it felt as though I was still "flying by the seat of my pants" when it came to writing this thesis.[154] Nevertheless, I have attempted to create a readable ethnographic work – particularly in the sections focusing on observations.

Every ethnographic work is unfinished and extra analysis could always be carried out[155] but boundaries are drawn to limit unfocussed exploration of potentially open-ended assessment of interactions and effects.[156] As transmitting hundreds of hours of observations is impossible, I have distilled the analysis into two iterative findings about what constitutes the human rights approach to football policing according to the best practice of the force. This is supplemented by analysis of the four aspects of the public order policing operations that limit the full implementation of the human rights approach to football policing, alongside legal analysis of the parameters and importance of considering the human rights approach. Each of these findings were indicated during the period of observations but became clearer only through repeated analysis of my fieldnotes.

These features of ethnographic data analysis and writing up confirmed my prior methodological choices. The ethnographic approach was vital, in uncovering the reality of how the police deployed human rights in the decision-making processes, and how that applied to the football policing operations. The insights contained in the following chapters could not have been delivered without empirical methods and iterative analysis.

[154] n. 94 Van Maanen (1988), 120.
[155] n.17 Armstrong (2003), xiii.
[156] M. Gluckman, E. Devons, 'Conclusion: Modes and Consequences of Limiting a Field of Study, in M. Gluckman (ed.) *Closed Systems and Open Minds: The Limits of Naivety in Social* Anthropology (Aldine, Chicago 1964) 158-261.

CHAPTER 4 : FACILITATING THE FREEDOM OF ASSEMBLY

A. The human rights framework

The first human right analysed in this study is the right to a freedom of assembly as contained in Article 11 ECHR. The right is often referred to as 'the right to protest' but protest is only one part of a broader concept of assembly that has legal, political, and social implications, such as providing the means through which other fundamental rights can be secured.[1] A system which respects various forms of assembly, and facilitates individual and collective enjoyment of the freedom of assembly is therefore a signifier of a truly democratic country that respects human rights to the highest possible extent.[2]

In this chapter I will first set out the content of the right, establishing how football fans enjoy the right through their social assemblies. Although the content of the freedom of assembly has been studied in detail in respect of policing protests, application of that legal framework has not yet been subject to detailed examination in the specific context of assemblies formed by football fans. It is an important feature of this study to address how the rights apply beyond the limited understanding of the right restricted solely to a political frame. As part of this aim, I will also explore the legal and policy justifications that underpin the police's obligation to facilitate fan assemblies and assess how the positive obligation requires facilitation of social assemblies. Following this I will assess how the policing operations I observed engaged fans' freedom of assembly explicitly or implicitly, including identifying how certain operations facilitated different forms of fan assemblies during different types of fixtures and analyse the features of these operations that indicate whether or not the force fulfilled a human rights approach on a consistent basis.

[1] J. Rawls, *A Theory of Justice* (Harvard University Press, Cambridge 1971), 53.
[2] R. Crawshaw, L. Holmstrom, *Essential cases on human rights for the police: reviews and summaries of international cases* (Martinus Nijhoff, Leiden 2006), 487.

A.1 The varied forms of assembly

Article 11 ECHR codifies a multi-layered right, with a number of discrete elements including a connected freedom of association that guarantees a specific protection concerning trade unions and representative groups, which is not the focus of this study.[3] Within the pure notion of "assembly" are various interpretations that the word that has been taken to incorporate, including; "a protest, parade, or demonstration";[4] or a gathering, or group social activity.[5] As explored in the literature review, fans commonly gather in groups prior to matches in a social activity linked to the support of their team, enjoyment of camaraderie or atmosphere:[6] social activity that resembles protests, parades, or demonstrations. No domestic or European case-law explicitly extends the concept of freedom of assembly to cover the range of common assemblies of football fans – gathering in or around pubs, public squares, or proceeding to the ground en masse – the legal basis for their specific right to assemble in this context must first be identified, followed by an analysis of the lawful means of limiting social assemblies which no longer retain the characteristic of "peaceful".

The freedom of assembly is also closely connected to the freedom of expression, both freedoms represent hallmarks of a democratic society[7] and there is some overlap between this chapter and the subsequent chapter covering Article 10 ECHR. In considering public protest, Strasbourg has viewed assembly as essential to guaranteeing expression[8] and has therefore developed jurisprudence that is informative for delimiting the scope of both rights.[9] The contingent link has been confirmed by the

[3] Though some supporters groups have sought protection under Article 11 on this basis e.g., *Les Authentiks and Supras Auteuil 91 v France*, App No 4696/11, 27th October 2016.
[4] *Edwards v South Carolina*, 372 U.S. 229, 235 (1963) "assembly in its most pristine and classic form".
[5] *Friend and ors. v The United Kingdom*, Decision on Admissibility, App No. 16072/06, 24th November 2009, [2].
[6] G. Armstrong, *Football Hooligans: Knowing the Score* (OUP, Oxford 1998), 169: M. O'Neill *Policing Football* (Springer, London 2005), 24-32; J. Cleland. E. Cashmore, 'Football Fans' Views of Violence in British Football: Evidence of a Sanitized and Gentrified Culture' 40 Journal of Sport and Social Issues 2 (2016) 124-142, 134.
[7] *Handyside v United Kingdom*, App No. 5493/72, 7th December 1976.
[8] See *e.g., Castells v Spain* App No. 11798/85, 23rd April 1992, [42]-[46].
[9] *Steel and Others v UK* (1999) 28 EHRR 601, [101].

Venice Commission[10] and the Human Rights Committee.[11] Nevertheless there remains a discrete right to assembly that can be enjoyed even without a related expression which any enforcement action by the police against groups of fans must be cognisant of, with the legality of the proposed action assessed in relation to each specific right which might require different considerations.

A.2 Development of the freedom of assembly and its limited protection in English law

Unlike other rights, the freedom of assembly cannot trace its origins to early documents codifying rights, such as Magna Carta or the Bill of Rights. Historically, certain types of gathering were banned in England, and an early law only permitted gatherings with a magistrate present with authority to arrest all attendees.[12] This selective limitation of types assemblies through legislation continues to the present day with a "mushrooming" of restrictions on public gatherings.[13] The magistrate's previous power now subsists in the power of a constable to detain for a broadly defined and "bewilderingly imprecise"[14] breach of the 'Queen's Peace' where there is a likelihood that harm will be caused.[15] This position led Dicey to question the existence of any "right" of assembly as nothing more than the courts' subjective view on individual liberties[16] as confirmed by Lord Hewart CJ in 1936 holding that "English law does not recognize any special right of public meeting for political or other purposes".[17]

Since then a codified right to the freedom of assemble has slowly emerged from the post-war consensus.[18] It is critical for the research questions in this study that early codifications of the freedom of assembly omitted explicit reference to political motivations behind the assembly, and referenced

[10] OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Peaceful Assembly* (Council of Europe, Strasbourg 2019),
[11] UN, Human Rights Committee, General Comment 37 CCPR/C/GC/37 23rd July 2020.
[12] Conventicle Act (1664) 16 Car. 2 C. 4 (Eng).
[13] O. Salat, *The Right to Freedom of Assembly: A Comparative Study* (Bloomsbury, London 2016), 15-16.
[14] H. Fenwick, *Civil Liberties and Human Rights* (Routledge, London 2007), 660.
[15] *per* Lord Sedley in *Redmond-Bate v DPP* (1999) EWHC Admin 733.
[16] A. Dicey, *Introduction to the Study of the Constitution*, (Liberty Fund 8th edition, Indianapolis 1982), 170.
[17] *Duncan v Jones* (1936) 1 KB 218, 222.
[18] J. Inazu, "The Forgotten Freedom of Assembly", 84 Tulane Law Review [2010] 564-590, 571.

instead the broader communal interests as justification for extending legal protection.[19] In more recent times, the ECtHR has consistently restated the universal and fundamental nature of the protection of assemblies without limitation on the content of those assemblies.[20] It is through the ECtHR that we start to see the maturation of the right, with exploration of nuances that allow identification of a positive limb alongside the negative limb of the freedom of assembly that have come to apply in English law in order to secure a "genuine, effective freedom".[21]

The express recognition and direct implementation into domestic law through the HRA constituted "a potentially climactic break with the traditional UK constitutional position" on public assembly, adding complexity to a pre-existing web of overlapping and imprecise public order provisions aimed at limiting the liberties of citizens to assemble.[22] Prior to the introduction of the positive right, and the requirement to consider the Strasbourg jurisprudence, domestic courts had failed to systematically recognise the value of assembly, let alone a concrete right capable of being claimed,[23] due to the desire to protect countervailing interests.[24] The encouraging effect of the HRA on judicial scrutiny of these matters was noted by Lord Bingham in *Laporte,* in which he contrasted the judiciary's former "hesitant and negative"[25] approach with the courts' current approach, under which they must:

> "be satisfied not merely that a state exercised its discretion reasonably, carefully and in good faith, but also that it applied standards in conformity with Convention standards and based its decisions on an acceptable assessment of the relevant facts"[26]

Therefore, the positive right to a freedom of assembly is a relatively new addition to the legal system of England and Wales, but one which has clear implications for the police who must address their

[19] UN Declaration of Human Rights, UNGA Res 217 A (III) 10th December 1948.
[20] *Rassemblement Jurassien and Unite Jurassiene v Switzerland* Application No 8191/78 10th October 1979.
[21] *Plattform Artze fur das Leben v Austria* (1991) App. No. 10126/82, 21st June 1988, "genuine, effective freedom of peaceful assembly cannot... be reduced to a mere duty on the part of the state not to interfere; a purely negative conception would not be compatible with the object and purpose of Article 11... Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals if need be".
[22] n.14 Fenwick (2007), 660-661.
[23] C.f. per Lord Denning in *Hubbard v Pitt* [1975] 3 All ER 1 – but when quoted in *Hirst and Agu v Chief Constable West Yorkshire* 85 Cr App R 143 the 'right' became a 'freedom to protest'.
[24] n.14 Fenwick (2007), 662; *Anderson and others v United Kingdom* App No 33689/96 27th October 1997.
[25] *per* Lord Bingham in *Laporte v Commissioner of the Police for the Metropolis,* [2006] UKHL 55, [34].
[26] *per* Lord Bingham n.25 *Laporte* [37], citing *Christian's Democratic Party v Moldova* App No 28793/02 14th May 2006, [70].

mind to the obligation to assess when an assembly needs either their protection or their restraint in order to allow individuals to genuinely and effectively enjoy the freedom of assembly.[27]

A.3 Beyond political assembly and recognition of social assemblies

Having established the core obligation, the next question to pose is when the obligation applies to the police in respect of football fans. The core of the freedom of assembly is the capacity for people to gather in the exchange of views,[28] but assembly is also based on the justification of allowing citizens to arrange their lives in such a way as to be able to communicate and to share in activities with others as they see fit, free from undue interference.[29] Accordingly, the freedom of assembly is not wholly predicated upon there being a political reason for the assembly.[30] Public assemblies without an overt political message have been celebrated and facilitated by police officers for centuries: [31] brass band festivals, concerts and other festivals,[32] pageants, scout meetings, Whit Walks, as well as church and funeral processions.[33] These examples mirror the subjectively important gathering of football fans as part of their shared identity, to share in enjoyment over a pastime, and to walk-up to the stadium. Further, the effectiveness of these assemblies is a reason for their popularity and longevity. Much as protests are one of the most effective means for ordinary citizens to bring matters to the attention of

[27] T. Dyke, 'Focus on Article 11' 14 Judicial Review 2 [2009] 185-196, 186.
[28] n.2 Crawshaw and Holmstrom, [433].
[29] A. Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting. 32 University of Tasmania Law Review 2 (2013) 148.
[30] n.14 Fenwick (2007), 664-665.
[31] *Barankevich v Russia* App No 10519/03, 26th July 2007.
[32] These events were mentioned in discussions with officers in the force I observed, as they were policed as public order operations, with a view to facilitation of the event, often by the same officers as would be on the roster for a football operation.
[33] See *e.g.*, N. Jarman, M. Hamilton, 'Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly', 1 Journal of Human Rights Practice 2 (2009) 208-235, 218: exceptions to notification requirements in many other countries exist for activities that may *prima facie* be classified as assemblies, including processions and concerts; See further the Russian law on assemblies which applies to "meetings or protests with… expression of a common view… *of a social character"* Federal Law no. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences.

others,[34] assemblies of those with shared interests represent the most effective manner in which ordinary citizens can share in those interests with others in a social manner.[35]

The misconception that freedom of assembly must have a political quality is pervasive in the UK government's approach which conflates the "right to protest" with the right to freedom of peaceful assembly. That causes official reports, reviews, and official guidance to focus on aspects relating the policing of protest without considering how the right extends to other circumstances.[36] It is revealing that there has not been a similar human rights-focused review of the policing of football matches to underpin the extension of a human rights approach to dealing with the freedom of assembly of football fans specifically as has been the case for protestors. Explicit reference is even missing from the College of Policing's APP of Football Policing[37] despite this guidance being used by the same public order officers that police protests following the APP on Protest Policing which has no similar omission. Fortunately, two legal developments provide a firm basis to underline the protection that should be afforded to non-political social assemblies.

A.3.1 Friend gives the opportunity

An opportunity to explore the legal protection of social assemblies was provided by the ECtHR in the admissibility decision in *Friend and ors. v United Kingdom (Countryside Alliance).*[38] The ECtHR had previously determined that the freedom of assembly did not guarantee a right to assemble for purely social purposes wherever one wished;[39] however, that case concerned the right to gather on private property, and the qualifier "anywhere one wished" indicated that a right could still exist to assemble

[34] n.14 Fenwick (2007), 663; G. Flikke, ''Monstrations for Mocracy': Framing Absurdity and Irony in Russia's Youth Mobilization', 25 Demokratizatsiya: The Journal of Post-Soviet Democratization 3 (2017), 305-334.
[35] D. Barnum, 'The Constitutional status of public protest activity in Britain and the US' Public Law [1977] 310, 327.
[36] n.14 Fenwick (2007), 664.
[37] College of Policing, APP, Public Order <https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/#positive-duty> accessed 1st October 2020.
[38] App Nos. 16072/06, 27809/08 24th November 2009.
[39] *Anderson v United Kingdom* (1997) 25 EHRR CD 172, 174.

somewhere. In *Friend* the ECtHR revisited this point in respect of social aspects of public gatherings related to fox hunting. Engaging in this question head-on the ECtHR confidently stated that it would be an "unacceptably narrow interpretation" of Article 11 to confine assembly to only those aimed at participating in the democratic process.[40] Relying on the Article 10 case of *Gypsy Council*, the ECtHR drew an equivalence between expression and assembly, in that neither has a prerequisite of political character in order to be engaged. The court concluding "that Article 11 may extend to the protection of an assembly of an essentially social character."[41]

Assemblies of a social character should therefore benefit from the full protection of Article 11 as this right is concerned with those participating in public gatherings and activities in "pursuit of a common aim". These aims, as Baroness Hale referenced, take on a subjective importance that matches "Bill Shankly's view of the importance of association football."[42] In any case Article 11 is flexible and capable of development, as thinking within the Council of Europe also "grows and develops", and in borderline cases a broad view of the scope should be taken so as to require the state to justify its interference to fulfil the object and purpose of the ECHR.[43]

This expansive reading has to be matched by an enhanced understanding of what interferences with social assemblies will be legitimate. The ECtHR recognises and ascribes different levels of importance to different types of assemblies.[44] While subjectively important to fans, objectively social assemblies are less important for the fulfilment of other connected rights than political assemblies. It follows that limitations on football fans' freedom to assemble which have the aim of preventing disorder, or protecting the rights and freedoms of others, may more easily surpass the necessity and proportionality tests.

[40] n.5 *Friend v United Kingdom* (2009), [50].
[41] n.5 *Friend v United Kingdom* (2009), [50].
[42] *per* Baroness Hale, *R* (*Countryside Alliance) v Attorney General* [2007] UKHL 52, [115] presumably referring to Shankly's oft-misquoted remark that "football's [not] a matter of life and death... it's more important than that"; B. Shankly, 'Live at Two' (Granada TV, 20th May 1981) <https://www.youtube.com/watch?v=xodsnEQC-H0> accessed 14th October 2020.
[43] *per* Baroness Hale n.42 *Countryside Alliance* [2007], [120-121].
[44] *per* Baroness Hale, n.42 *Countryside Alliance* [2007], [121, 124].

The other safeguard for the state is that a larger margin of appreciation is granted to state authorities in determining appropriate measures to limit activity seen as contrary to public morality. Both the House of Lords and the ECtHR deferred to the clearly expressed will of Parliament, and the prior democratic debate about limitations on fox hunting itself, as evidencing the "pressing social need" and legitimate objective of any interference.[45] However in the realm of football policing, there has not been any recent public or parliamentary debate about the appropriateness of restrictions on the policing of fans that would justify such deference and so a higher level of review can be expected into the justification of a pressing social need for limits that are no longer pressing.[46]

A.3.2 Human Rights Committee confirms the international obligation

The extension of the freedom of assembly to social activities has been confirmed by the Human Rights Committee in General Comment 37 on Article 21 International Covenant on Civil and Political rights.[47] During negotiations reviewing the draft proposal states agreed to expand protected assemblies to include those gathering for entertainment, leisure, and cultural objectives and references indicating politically motivated purposes were removed.[48] The OSCE raised the dual objectives of many assemblies, including that those gatherings in respect of for-profit sporting events may also share a common expressive purpose that requires protection.[49] The celebration of the outcome of a sporting event was expressly included as part of assembly[50] as was the extension of assembly to entail those gatherings "intended to assert or affirm group solidarity or identity".[51] Further the facilitation of

[45] n.42 *Countryside Alliance* [2007], [45].
[46] *Norris v Ireland* (1988) 13 EHRR 186, a [46].
[47] n.11 HRC General Comment 37.
[48] Discussions during 3711th Meeting ,129th Session of Human Rights Committee, 1st Jul 2020, see in particular remarks of David Kaye and Christoph Heyns.
[49] Discussion during 3710th Meeting, 129th Session of the Human Rights Committee, 30th June 2020.
[50] n.11 HRC General Comment 37, [7].
[51] n.11 HRC General Comment 37, [12].

social assemblies cannot be easily limited simply because they constitute a nuisance to passers-by or traffic flow.[52]

Taken together, the developments in Friend and General Comment 37 establish the protection of Article 11 extends to social fan assemblies and walk-ups. Neither are directly binding on domestic courts but that is not necessary for they reveal what is encompassed by Article 11 which is binding and to which officers should not incompatibly. Moreover, neither pushes the police into new territory as social assemblies have been respected and facilitated by the police for centuries. What is added in these decisions is an explicit recognition and explanation of the subjective importance of social assemblies. This can assist officers understand how fans' personal relationships and collective identities that are strengthened through meeting up before and after games, even distinct from the separate objective of attending the football match itself.[53] Although individuals in the group may have disparate aims on the day, there is a unification of a common aim in general support of a team that clearly fulfils the standard for group solidarity or identity. A failure to understand this justification for the protection of social assemblies risks officers unlawfully restricting important fundamental rights in practice and undermining a human rights approach.

A.4 The peaceful element of assembly

The vast majority of assemblies of football fans are peaceful.[54] Thus, fan assemblies will qualify for protection under Article 11. The descriptor "peaceful" is understood slightly different from the legal test applied by the ECtHR to assess whether an assembly remains peaceful, with a higher threshold set before an individual loses the protection of the right with even low levels of violence or disorder

[52] n.11 HRC General Comment 37, [24], [85].
[53] G. Pearson, *An Ethnography of English football fans* New Ethnographies (Manchester University Press, Manchester 2012); C. Stott, J. Hodgson, and G. Pearson, 'Keeping the Peace – Social Identity, Procedural Justice and the Policing of Football Crowds' 52 British Journal of Criminology [2012] 381-389.
[54] Incidents of actual disorder were only observed on a handful of occasions; almost all were minor involving a handful of participants.

tolerated within the definition of a "peaceful assembly".[55] The limits of what level of disruption should be tolerated depends on the duration and extent of the disturbance, and to what extent the participants in the assembly have already been able to assemble for their intended purpose.[56]

Application of this standard into domestic law is limited but has been considered in a few cases which indicate a comparable approach. Crowds involved in violent disorder that reaches the level of attracting enforcement proceedings are not likely to constitute "an assembly for a purpose which attracts protection" under Article 11.[57] Similarly under public order law, an assembly must be linked to *serious* disruption to the life of the community in order for the assembly prohibited, rather than minor or inconvenient disruption.[58] There has to be a degree of tolerance towards peaceful gatherings of fans that cause inconvenience, such as large, boisterous groups of fans drinking and singing, or stopping traffic as the walk to the stadium, so that each individual fan's freedom of assembly is not deprived of substance.[59] Just as it would be contrary to common law principles, case law, and democratic values for the police to assess value-based judgement as to the merits of particular protests,[60] so too would be imposing subjective moral judgments on football fans for choosing to participate in society in a way that is viewed as different to a perceived norm.

In contrast to this stance, the overwhelming position is that football fans are still seen as a problem for public order which needs to be controlled, tackled, or supressed.[61] Yet a vast array of evidence shows that assemblies generally do not engage in confrontation or use force as often as feared by authorities.[62] There is also evidence that fans can be effective at self-policing behaviour that

[55] *Navalnyy v Russia* App No. 29580/12 2nd February 2017, [129]-[130]; *Kudrevicius and ors. v Lithuania* (2015), [144].
[56] *Frumkin v Russia* App. No. 74568/12 5th January 2016, [97].
[57] *Commissioner of Police of the Metropolis v Thorpe* [2015] EWHC 3339 (Admin), [13].
[58] S.14A Public Order Act 1986.
[59] *Eva Molnar v Hungary* App No. 10346/05 7th October 2008, [36]; n.14 Fenwick (2007), 685.
[60] n.14 Fenwick (2007), 664; E. Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act', 84 Indiana Law Journal (2009) 851-866.
[61] J. Taylor, S. Faraji, S. Dimova, A. Sutherland, L. Strang, 'Violent and Antisocial Behaviour at Football Events: Review of Interventions' (RAND Corporation, Cambridge 2018), 13, 51.
[62] n.33 Jarman and Hamilton (2009), 208-235, 219-220; C. Whelan, A. Molnar, 'Policing political mega-events through 'hard' and 'soft' tactics: Reflections on local and organisational tensions in public order policing' 29 Policing and Society (1) (2017) 85-99.

contravenes their own accepted norms.[63] Often, the link between the assembly and the claimed harm is insufficiently close or entirely speculative: it is insufficient that the assembly could "create conditions *for* breaches of public order"[64], the assembly has to be shown to be the specific cause of a breach of public order to lose the protection given to peaceful assemblies. Equally a historical record of individual or collective violence does not remove the right to a freedom of assembly, nor does actually occurring violence extinguish the right to freedom of assembly of the non-violent persons, or remainder of any violent individual's rights which may be engaged.[65] The risk of taking a control-focused approach is that creates direct confrontation between fans and officers with misunderstandings and a break-down of dialogue tending to increase tensions and eventual collective dispersal of fans legitimately engaging in peaceful assembly.[66]

The benefit of taking a human rights approach to policing assemblies can be demonstrated here as primarily individualising the assessment of the risk to focus coercive action on those actually committing offences rather than the group of fans of which they are part. The human rights approach also offers a structured decision-making process for assessing when to interfere with a peaceful assembly that is creating an inconvenience. For example, it will not be necessary in a democratic society to stop, disperse, or cordon a peaceful fan walk-up that is causing minor traffic delays as no other tangible individual human rights are affected by a traffic delay while such coercive measures would significantly interfere with those fans' rights. Taking the same approach it may be a proportionate interference for officers to move a static assembly of fans off a major traffic junction contributing to angry tension with drivers to an adjacent open space as this would not significantly alter the fans' enjoyment of the freedom of assembly and is targeted at avoiding the specific risk identified. The standard for assessing a legitimate interferences are considered in more detail in the next section.

[63] G. Pearson, 'Legitimate Targets, the civil liberties of football fan' (1999) 4 Journal of Civil Liberties 28-47, 32-33; D. Baker 'Public Order Policing Approaches to Minimize Crowd Confrontation During Disputes and Protests in Australia' (2019) Policing available <https://doi.org/10.1093/police/paz071>, [2].
[64] *Ivanov and others v Bulgaria* App No 46336/99, 24th November 2005.
[65] n.14 Fenwick (2007), 667.
[66] n.53 Pearson (2012); n.53 Stott, Hodgson and Pearson [2012].

A.5 Restraining the State : The negative limb of the freedom of assembly

A.5.1 Restrictions on assembly that pursue a legitimate objective

The use of illiberal powers to control and disperse protests has been frequently challenged in domestic and European courts.[67] These cases will be instructive for officers in identifying the lawful means of limiting fan assemblies which have not been subject to a similar level of judicial or academic scrutiny, a decision-making process that all officers should be able to engage in considering the duty in s.6 HRA 1998. Domestic courts have partly adopted Strasbourg's method of analysing the legality of actions limiting the qualified rights in Article 11(1)[68] – by assessing first whether a claim to the right engages Article 11, before going on to balance that claim with other rights and interests through the assessment of the validity of an interference.[69] The standards for assessing valid limitations are contained in Article 11(2). A legitimate objective is required, and helpfully the relevant objectives for Article 11 are exhaustively defined as: in the interests of national security or public safety; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others. The restricting act must also be prescribed by law, and deemed to be necessary in a democratic society, which incorporates cumulative limbs that interference must be the least intrusive means available, and not be disproportionate.[70]

The prescribed legitimate objectives signify wide categories that will usually be easily satisfied by the police acting in good faith. The fear of disorder is at the forefront of police minds when policing public order and is unfortunately a common enough occurrence that its future possibility or a

[67] n.27, Dyke (2009), 191.
[68] C.f, D. Mead, 'Of Kettles, Cordons and Crowd Control: *Austin v Commissioner of Police for the Metropolis* and the Meaning of Deprivation of Liberty' European Human Rights Law Review [2009] 376-394, for criticism of the House of Lords failing to follow "the great weight of Strasbourg jurisprudence" in the approach to their analysis in the *Austin* case; see further my discussion on this below.
[69] *R (Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23; J. Jahn, 'United Kingdom' in A. Peters and A. Ley (eds.) *Comparative Study: Freedom of Peaceful Assembly in Europe* (Max Planck Institute for Comparative Public and International Law, Heidelberg 2014)
[70] *Bank Mellat v HM Treasury (Nos. 1 and 2)* UKSC 38 [2013]; *R (Lumsden) v Legal Services Board* UKSC 41 [2015].

generalised risk of disorder can be called upon at any given fixture in an attempt justify restrictions on the assembly of fans. However, reliance on a generalised risk may not meet the standard of preventing crime or disorder without specifying risk or individualising the assessment of risk to those affected by the intervening measure. Using an easily established general risk to impose restrictions to make an operation easier to manage would not be a good faith selection of a legitimate objective. Indeed, the UN Special Rapporteur on the Freedom of Expression has found that public bodies in the UK routinely limited the right of peaceful assembly "where it would impose a cost on public convenience", an unlawful extension of the grounds legitimate objectives in Article 11(2).[71] The potential for misapplication of powers that significantly interfere with fundamental rights means that precision should be used when identifying and implementing tactics that interfere with rights so that the operation can proceed on the correct legal basis.[72]

Police interference with assemblies usually proceeds on basis of statutory powers contained in the Public Order Act 1986 which are commonly used by the police to limit the right to assemble in a place or to process between places.[73] One noteworthy feature of these powers is the differing treatment of 'processions' that meet the notification requirement. Notification requirements are compatible with the freedom in Article 11[74] so long as it is proportionate and "not unduly burdensome".[75] In contrast, requiring explicit authorisation could be incompatible with the right where the restriction operates to remove the core of the right.[76] Organised supporters groups of European teams travelling for away matches may well be in contact with the host force, but formal notification of an intention to assemble or process to a stadium were rare in respect of domestic matches I observed. Just as non-notifying protests will still be policed and not prevented,[77] large groups of supporters arriving in one place were policed on either a reactive or contingency basis. The

[71] Commission on Human Rights, *Civil and Political Rights, including the Question of Freedom of Expression* (11th February 2000) UN Doc E/CN.4/2000/63/Add.3, [79].
[72] F. Klug, K. Starmer, S. Weir, *The Three Pillars of Liberty*, (Routledge, London 1996), 132.
[73] This is much less common in the case in respect of football policing operations as planning officers, dedicated football officers and commanders do not consider the groups of fans to qualify under the act.
[74] n.59 *Eva Molnar v Hungary* (2008), [33]-[48].
[75] *per* Waller LJ in *Blum v DPP* [2006] EWHC 3209 (Admin) [2007] UKHRR 233, [21].
[76] *Lashmakin and others v Russia* App. No. 57818/09 7th February 2017, [363]-[365].
[77] R. Stone, *Civil Liberties and Human Rights*, (OUP 9th edition, Oxford 2012), 382.

legality of the policing of these forms of fan assembly and procession will be explored in more detail in Section B.

Another means of controlling an assembly is through imposing conditions, yet these must be imposed in a clear and unambiguous manner with a rational basis and must also meet the test in Article 11(2) like any other interference. In *DPP v Haw*[78] Lord Phillips CJ held that the powers delegated under primary legislation must clearly allow for conditions to be imposed. One area of potential difficulty, if fan assemblies qualify as processions under the Public Order Act, is that conditions can only be imposed by a "senior police officer" at the scene[79] whereas it is common for the senior Commanders to be situated in control rooms at Force HQ, occasionally without any direct vision of events due to a lack of CCTV but this distinction should not significantly affect the human rights approach of the force if all officers have a clear understanding of the legal standard to be met to limit fan assemblies.

A.5.2 Necessity

As the body primarily responsible for maintaining public order, the police will be granted a great degree of discretion on the matter of what is necessary to achieve the Queen's Peace, though the threshold for 'necessity' in human rights law is not the same as for intervening to prevent a breach of the peace in common law.[80] A more detailed assessment of the differences in Chapter 5, Section A.3 in the context of the freedom of expression. For present purposes it is sufficient to outline how the tests for legitimate interferences with fan assemblies have to be construed strictly, with the need for any restrictions to be established convincingly in order to be certain of surviving assertive judicial scrutiny.[81]

[78] [2007] EWHC 1931 (Admin), [39].
[79] ss.12(1)-12(2) ss.14(1)-14(2) Public Order Act (1986) something that came to the fore in the successful judicial review challenging conditions imposed on XR: *R (oao Jenny Jones) v Commissioner of Police for the Metropolis* [2019] EWHC 2957 Admin.
[80] n.14 Fenwick (2007), 660.
[81] n.2, Crawshaw and Holmstrom, 452.

The adjective 'necessary' implies the existence of a pressing social need, which the ECtHR will grant states a greater margin of appreciation in addressing but which has to be established and linked to the measure being taken by way of a 'rational connection'. The ECtHR holds that measures taken to prevent disorder or protect the rights of others benefit from a significant margin of appreciation[82] if the measure corresponds to the identified harm.[83] In particular, if the property or physical damage threatened by disorder is high, the police will be justified in taking more forceful action.[84] This preserves the police's ability to take coercive action when a clearly identified risk or, or ongoing, serious violence by some individuals removes the protection afforded to those individuals' peaceful assembly ('peaceful' as assessed in Section A.4 above). As set out by Laws LJ in Gough measures to specifically target the "evils of hooliganism" meet the test of necessity and the state has "ample room" to judge – even as part of the human rights approach - the measures necessary in the circumstances to prevent the harm identified.[85] But the connection must exist between the ends and the means.[86] Taking coercive measures against individuals on dubious grounds to disrupt or prevent participation in an assembly without clear unspecified evidence of an intention to commit violence can undermine the legality of the measures taken due to the lack of a rational connection.[87] The tendency of officers to intervene to disrupt the peaceful assembly of fans in and around pubs at an early stage in the operation without clear intelligence of the risk they posed will be considered in Part B.

Demonstrating the inconvenience of an assembly does not demonstrate a necessity for interfering with the rights of those individuals within the assembly. Subject to Article 11(2), the freedom to assemble can apply equally to groups that offend, shock, or disturb the public – based on pluralism, and our expectations of a democratic society.[88] Even groups which challenge that liberal democratic view benefit from the same protections.[89] In a similar way a rowdy group of football fans, that threaten a

[82] See e.g., *Mouvement raelien suisse v Switzerland* App. No. 16354/06, 13th July 2012 [62]-[64].
[83] *Sunday Times v United Kingdom* App No. 6538/74 26th April 1979, [62].
[84] n.14 Fenwick (2007), 677.
[85] *Gough and Smith v Chief Constable of Derbyshire* [2001] EWHC Admin 554, [3]-[5], [78]-[81].
[86] D. Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Hart, London 2010), 209.
[87] *Huseynli v Azerbaijan*, App. No. 67360/11 11th February 2016, [91]-[98].
[88] n.2 Crawshaw and Holmstrom, [451]; *Zana v Turkey* App No 11762/99 6th February 2001.
[89] n.18 Inazu (2010), 568.

view of the sanctity of public order but do not cause serious damage, or physical injury, will benefit from protection as any coercive intervention will not meet the test of necessity.

Any intervention to limit the freedom of assembly of fans must identify the precise conduct that the officer asserts is necessary to curtail and the measure must be targeted at the precise source of the threat to the peace and wider implications of the intervention must be considered.[90] As Lord Rodger summarised in *Laporte*, "a peaceful protester does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of a demonstration."[91] Police intervention must avoid causing a chilling effect,[92] with even minor penalties capable of indirectly affecting the freedoms of others to participate in peaceful assemblies in the future.[93]

The strictness of the necessity test and its implications raises questions about the extent of officer's knowledge of the law, and ability to assess the required considerations in deployment of appropriate tactics to facilitate peaceful fan assemblies pre-match or to interfere with those assemblies which actually cause concern; in Part B of this chapter I will analyse different approaches of the force and show how a human rights approach to analysing necessity assists in making these determinations during different phases of the operation.

A.5.3 Proportionality

Even where interventions are deemed to be necessary in a democratic society, the police must show that they have considered less intrusive means for achieving the same legitimate objective and the actual implementation of the measure does not become disproportionate. [94] The actions of the police

[90] *Christians Against Racism and Fascism v United Kingdom* App No.8440/78 16th July 1980.
[91] n.25 *Laporte* (2006), [82].
[92] n.87 *Huseynli v Azerbaijan* (2016), [99].
[93] *Gasparyan v. Armenia*, App No 35944/03, 13th January 2009, [43].
[94] n.7, *Handyside v UK* (1976).

in *Laporte*, in detaining coaches, effectively abrogated their right to freedom of assembly.[95] While the initial stop may have had a basis in common law, the continued detention engaged the protestors' human rights as it was intrusive and disproportionate. The high standard on the facts of *Laporte* has meant that conduct such a temporary limitations on assemblies may well be proportionate, but actions such as containments and dispersal effectively abrogated the essential elements of the freedom of assembly. The essential elements of an assembly were also considered in *R (Countryside Alliance) v Attorney General.*[96] Here the essential features of a traditional hunt were assessed, and it was held that the fox-hunting ban was not a disproportionate limitation on the freedom of assembly as the gathering of "hunters" could still take place with all of the social engagements that surround those particular days: they were simply restricted in one particularised activity that was not essential to the assembly.[97]

Whereas with hunting with hounds no partial measures could be contemplated that amounted to less intrusive means,[98] in the policing of football fans, the police have recourse to a plethora of tactics which impact on fans to differing degrees. The intensity, and temporal and spatial extent of those tactics offer flexibility to a Commander who can choose tactics which will or will not negate the essential elements of assembly. A context-dependent analysis must be run afresh each time and every tactic deployed should be assessed as proportionate in order to achieve the identified legitimate objective.[99] Like so much else involved in judicial review of police actions, proportionality depends on context assessed by the officer rather than judgment based on hindsight,[100] but proportionality also requires an active and continuing approach to reviewing the tactics as they are being implemented.[101]

The level of review depends on the tactic concerned. For example, the appropriateness of full containment – also known as "kettling" – is questioned by experts and due to its debilitating impact on a number of rights, but in order to be deployed proportionately, the length of containment must be

[95] n.25 *Laporte* (2006), [13].
[96] n.42 *Countryside Alliance* [2007] UKHL 52.
[97] n.42 *Countryside Alliance*, [45]
[98] As the objective was to prevent the suffering of animals, no partial measures could be contemplated if the objective, deemed to be necessary by the democratic body, was to remain absolute.
[99] P. Hungerford Welch, 'Case Comment Public Order Offence: James v Director of Public Prosecutions [2015] EWHC 3296 (Admin)', Criminal Law Review (2016) 212-215, at 213.
[100] *per* Lord Kerr *DB v Chief Commissioner for Police Service of Northern Ireland* (2017) UKSC 7, [74].
[101] n.100 *DB v PSNI*, at [75].

the minimum amount of time that can be achieved.[102] Arrests may be proportionate, and do not necessarily amount to a restriction on the freedom of assembly,[103] so long as arrests are not deployed to such a great extent that they have a suppressive effect on the assembly as a whole.[104] Accordingly, coercive tactics such as arrests for minor infringements during a peaceful assembly of fans, with the aim of "being robust" so as to cause the group to split up, or discontinue their assembly would be a disproportionate method of achieving the legitimate objectives of preventing disorder, and preventing crime. This authoritarian approach epitomises the "chilling effect" that undermines the individual autonomy and essence of social interaction that Article 11 is aimed at protecting.[105]

A.6 Development of and impact of a positive limb of the freedom of assembly

Having considered the negative obligation on the police to not interfere with the freedom of assembly this section addresses a critical aspect of the right, which is rarely discussed in judicial decisions, particularly decisions of domestic courts but which is regularly relied on by the ECtHR and is also contained in national policy guidance for public order policing though often only referred to explicitly in reference to the facilitation of protests. The legal basis for the positive obligation on the police to facilitate social assemblies needs to be set out in a coherent manner to fill a gap in our understanding of the legal framework, and I will analyse how meeting this positive obligation is a fundamental component of delivering a human rights approach to the policing of football fans.

The *travaux preparatoires* of the ECHR reveal a proposal to limit the right to freedom of assembly to cover protection from "government interference" only. This did not gain support as it was "generally understood" that the individuals should be protected against "all types of interference in the exercise

[102] M. Kiai, 'UN Special Rapporteur Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United Kingdom of Great Britain and Northern Ireland (2012) A/HRC/35/28/Add.1, [37].
[103] *Bukta v Hungary* App. No. 25691/04 25th September 2017.
[104] *Budahazy v Hunga*ry App. No. 41479/10 15th December 2015.
[105] V. Ashton, 'State Surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protestor perspectives' 8 European Journal of Law and Technology 1 (2017), 12-15.

of his right".[106] As a result, the structural framework of the ECHR allows for differentiation between the negative limb of protection[107] and the positive limb that imposes additional duties on member states.[108] Those duties can take the form of proactive legislation – as in *Belgian Linguistics,* in order to preserve teaching of the minority language – or it may require specific action from the police against a third party, implement cordons to protect protestors who are being targeted by counter-protestors.[109]

The primary impact of this enhanced duty of protection on football operations is the police have additional responsibilities to protect fan groups that qualify as assemblies from third-parties' conduct.[110] But is there an additional aspect to the positive obligation that goes further than requiring intervention only when the core of the right is threatened?[111] The distinction is not as simple as the distinction between omission and intervention.[112] Ensuring the effective enjoyment of the freedom of assembly must sometimes require the police to do more than just shield fans from being attacked, and will require affirmative conduct to facilitate fans' enjoyment of and participation in peaceful assemblies. Positive obligations seek to impose a duty of result as well as conduct (and given the need for legal enforceability of each of these) and the horizontal effect of a positive obligation is for the police to ensure the effectiveness of the assembly itself.[113] As set out by the Human Rights Committee this requires public authorities to facilitate peaceful assemblies to make it possible for participants to achieve their objectives.[114] This extension of the police's obligation in respect of assemblies under Article 11 has a wide-ranging impact on the scope of policing operations at football matches and would include the police being obliged to ensure fans are able to create the conditions for enjoyment of their assemblies in and around pubs, public squares, and on the way to the stadium. As will be

[106] *Travaux Preparatoires* Council of Europe, 'Preparatory work on Article 11 of the European Convention of Human Rights' DH (56) 16, 16th August 1956.
[107] n.72 Klug, Starmer, and Weir (1996), 19 "the rights…. are for the most part 'negative' – that is rights to be protected from interference from others…".
[108] *Belgian Linguistics Case (No. 2)* 1 EHRR 252; A. Mowbray, *The Development of positive obligations under the European Convention on Human Rights* (Hart, Oxford 2004).
[109] *Ouranio Toxo and others v Greece* App. No. 74989/01 20 October 2005.
[110] n.90 *Christians against Racism and Fascism v UK* (1980).
[111] There is some debate over the precise extent of positive obligations, D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, (Butterworths, London 2009), 18-19.
[112] n.72 Klug, Starmer, and Weir (1996), Human Rights Index, 108-109.
[113] n.111 Harris, O'Boyle and Warbrick (1995), 19-20.
[114] n.11 UN HRC General Comment 37, [23]-[24].

explored in Part B, this facilitative approach is already a feature of some matchday operations, but it is not a consistent features and appears to be a lack of *opinio juris* or recognition and understanding that the law requires a facilitative approach to all types of peaceful assemblies.

Given this extension, and the lack of a generally accepted theoretical basis for the positive obligations under Article 11, it is necessary to construct the legal basis in order to interpret the extent of positive obligations for police forces in public order policing. The remainder of this section will cover three sources of the positive obligation, starting with textual interpretation of the ECHR itself, then analysing judicial precedent, before identifying the development of obligations in current policing policy. Finally, I will turn to assess the contribution that could be made by the concept of a human rights approach to the parameters of the positive duty.

A.6.1 Textual Interpretation on the Convention itself

The starting approach to interpreting any treaty is to take a textual interpretation approach, to analyses the ordinary meaning of the terms in their context, in light of the object and purpose of the treaty.[115] Article 1 ECHR sets out the general obligation on states. Rather simply requiring states to "protect" the rights, the text requires that "all states will secure to everyone". Securing rights, cannot be achieved by state restraint alone[116] and the drafters sought to make it clear that implementation required proactive steps by member states.[117]

The ECtHR regularly interprets the provisions of the Convention as establishing positive obligations based on the standard-setting aspects within the other rights read together with Article 1.[118] The lengths a government has to go to in order to effectively "secure" the rights is determined by a range of factors including the nature of the substantive right in question, the effectiveness of the regulatory

[115] Article 32 Vienna Convention on the Law of Treaties; Commentaries (1966), 264-265.
[116] S. Fredman, *Human Rights Transformed: Positive rights and Positive Duties* (OUP, Oxford 2006) 1.
[117] n.106 *Travaux Preparatoires* (1957).
[118] J. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe, Strasbourg 2007), 8.

framework, and the approach to implementation by various arms of the state.[119] In *X & Y v United Kingdom (Admissibility),*[120] the ECtHR found that Article 1 can refer to both legislative and administrative measures, with administrative practices being the "methods employed or permitted" in implementing the measure. This means operational tactics to control or manage an assembly carried out under legislative powers could be subject to positive obligations to secure enjoyment of human rights through the use of that power.

The positive obligation to secure the enjoyment of the rights in the face of interference by other third parties applies, even in situations where the state does not have control of the situation under scrutiny or the territory.[121] This indicates a plea of the obligation being too difficult to implement due to ongoing disorder or cost being given less weight when considering the legality of conduct in fulfilment of the positive obligation to facilitate assemblies.

The ECtHR's policy of delimiting positive obligations is in part based on its realisation that complex societies need human rights not only to prevent destruction of societal relationships, but also in order to construct a better framework of protection.[122] In the same vein the ECtHR identifies a need for rights to be realised by public authorities in a way so that those rights are "not theoretical and illusory" but "practical and effective".[123] In order to be effective, the right to a freedom of assembly must include an obligation to secure all peaceful assemblies. This does not amount to an unlimited obligation, and certainly would not require the state to secure the enjoyment of the right for assemblies that go against the object and purpose of the ECHR or destroy the core of other rights. [124]

A.6.2 Interpretation of precedent emanating from the ECtHR

[119] *A v United Kingdom* App No. 25599/94 23rd September 1998, [22]-[23].
[120] *X. and Y. v United Kingdom* App. No. 5310/71 (Admissibility) 1st October 1972, [77].
[121] *Illascu and Others v Moldova and Russia* App No 48787/99 ECHR 8th July 2004; E. Bjorge, 'National Supreme courts and the Development of ECHR rights' 9 International Journal of Constitutional Law 1 (2011) 5-31, 5.
[122] B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP, Oxford 2010), 203-205.
[123] *Airey v Ireland* App. No. 62889/73 11th September 1979, [25].
[124] n.106 *Travaux preparatoires* (1957), 664; Article 17 ECHR.

In its consideration of Article 11 cases the ECtHR has discretely expanded elements of the freedom through application – by drawing an equivalence between assemblies and processions, for example.[125] The ECtHR expressly recognised the positive limb of Article 11 in *Plattform "Ärzte für das Leben" v Austria:*[126] the applicant association of doctors held two demonstrations against abortion which were disrupted by counter-demonstrators, not dispersed by the large contingent of police waiting on stand-by.[127] The ECtHR held that the demonstration may "annoy or give offence", but that the participants must be able to hold the demonstration without fearing physical violence. The fear of violence alone was sufficient cause for the state to act as it would deter that group and other groups from assembling together in the same manner. Thus, the freedom to organise a counter-demonstration cannot extend to permitting that assembly from intimidating another's exercise of the freedom of assembly, and the state has the obligation to intervene.[128]

The primary duty is on the state to take reasonable and appropriate practical protection measures as required by the situation,[129] to ease tensions[130] and to ensure the effective enjoyment of the right by adequately protecting the assembled individuals.[131] The choice of means and tactics to be employed are matters for the states – appropriately, therefore, there is reliance on the margin of appreciation doctrine and[132] the burden on the police cannot be an impossible or disproportionate burden.[133] Nevertheless the burden remains on the police to facilitate a safe environment for the enjoyment of the right for individual to assemble, and that obligation is not limited by the political or social purpose of that assembly. If a safe environment for fan social assemblies cannot be provided, the police risk contributing to a "chilling effect" on the effective exercise of the right by fans to assembly collectively to share their identity and engage in meaningful expressions.[134]

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[125] n.109 *Ouranio Toxo v Greece*; n.31 *Barankevich v Russia* (2007).
[126] n.21 *Plattform "Ärzte für das Leben"*, [32].
[127] n.21 *Plattform "Ärzte für das Leben"*, [8]-[12].
[128] n.21 *Plattform "Ärzte für das Leben"*, [32]-[33].
[129] n.21 *Plattform "Ärzte für das Leben"*, [34].
[130] n.109 *Ouranio Toxo v Greece* (2007), [42].
[131] *Wilson and National Union of Journalists and ors v United Kingdom*, App No. 30668/96, 30th January 2002, [41]-[48]; *Identoba and ors v Georgia* App No 73235/12 12 May 2015, [72-75].
[132] n.118 Akindji-Kombe (2007), 51.
[133] n.118 Akandji-Kombe (2007), 18; *Osman v United Kingdom* App No. 23452/94 28th October 1998, [116].
[134] A common concept used by the ECtHR, see e.g. *Baczkowski and ors v Poland* App No. 1543/06 3rd May 2007, [67]; n.105 Ashton (2017), 13-14.

The justification for an expansive interpretation of the positive obligation is that the state must act as the ultimate guarantor of the principles of pluralism, tolerance, and broadmindedness[135] and the freedom of peaceful assembly has a "special importance" for groups for whom gathering together in public spaces is one of the only means of sharing in their common identity, meaning that such assemblies require additional protection beyond what could be achieved solely by prohibiting direct police interference as encapsulated by the negative limb.[136] Thus the ECtHR requires the police to effectively ensure – or to facilitate - groups of fans gathering together in public spaces without fear of being disturbed, dispersed, or forced to move on by any third party.

This does not mean that all fan assemblies are to be treated exactly the same; the operation must still be assessed independently and any specific intelligence of a clear risk of disorder may justify tactics in addition to a facilitative approach. Indeed, a passive approach with a low number of officers deployed to simply monitor developments at arm's length may amount to a failure of the positive obligation if the intended deterrent effect is not effective or counter-productive.[137]

Concerns have been raised over the suitability of using judgments forming part of adversarial court processes for determining the "complex polycentric implications" of making decisions about positive obligations, which "often require a wider lens than the bipolar spectacles" of the judiciary determining one particular case.[138] Yet the ECHR is aspirational and sets high standards on the police to secure the enjoyment of fundamental individual rights. The ECtHR has confirmed its view that this requires "correspondingly and inevitably requires greater firmness" in assessing breaches of the fundamental values of democratic societies.[139] Increasingly, therefore, officer's judgments may be subject of more intense review by the courts in future cases which will consider officer's knowledge of and engagement with the relevant considerations for fulfilling their positive obligation to facilitate

[135] *Informationsverein Lentia and others v Austria* (1993) Series A No. 276, [38]; n.131 *Identoba v Georgia,* [92]-[94].
[136] *Ezelin v France,* (1991) 14 EHRR 362, 389; n.131 *Identoba v Georgia,* [92]-[94].
[137] n.21 *Platfform "Ärzte für das Leben",* [12]-[14].
[138] n.116 Fredman (2006), 20.
[139] *Siliadin v France,* App No. 7331/01 26th July 2005, [121], [148].

assemblies, demonstrating the advantages of taking a human rights approach to planning operations and operational decision-making.

A.6.3 Under present policing policy and guidance

A further source for determining the extent of the relevant positive obligation for football policing is the applicable policy applicable to public order policing. HMIC's *Adapting to Protest* was a catalyst for greater scrutiny of police policy, and choices of tactics in public order operations. In setting out the legal framework the report asserts the positive obligations on the police, requiring tolerance towards gatherings even if they cause obstruction and disruption.[140] Explicitly, HMIC do not engage in the debate about the level of tolerance, which is a matter for a "public and political debate" that has unfortunately not materialised. ACPO's Manual of Guidance on Keeping the Peace was based on HMIC's recommendations and adds a threshold of reasonableness, framing the positive duty as "reasonable steps to protect" assemblies[141] a standard that is proximate to the ECtHR's formulation.[142]

Finally, the College of Policing's APP – the official source of legally compliant policing practice[143] - sets out the positive duty to "take steps" to protect those who want to exercise their rights peacefully.[144] Unfortunately the APP restricts the application of this duty to "certain circumstances" where "there is a threat of disruption or disorder from others" and further only explicitly applies to protests. The ECtHR case-law relating to Article 11 does limit the police's duty to protect the assemblies from interference to only contested situations. The positive limb of Article 11 is still relevant at those situations where the right to assemble does not come under direct threat. A contextual reading clarifies that the positive obligation to facilitate applies at all times as a general

[140] HMIC, *Adapting to Protest* (HMIC, London 2009), 5.
[141] ACPO, 'Manual of Guidance on Keeping the Peace' (2010), 24.
[142] n.21 *Plattform "Ärzte für das Leben"* [34].
[143] College of Policing, APP, Frequently Asked Questions <https://www.app.college.police.uk/faq-page/> accessed 26th March 2018.
[144] College of Policing, APP, Public Order <https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/#positive-duty> accessed 1st October 2020.

obligation[145] and is *enhanced* to include a duty to protect in those situations where the exercise of the right where it comes under particular threat.[146] Accordingly, the police must facilitate assemblies where there is no specific intelligence indicating disorder, and must both facilitate and protect assemblies where there is such intelligence. Only where those engaging in the assembly threaten the precise rights of others does the positive obligation not apply.

The influential role of the APP as an authoritative manual and training guide means that the failure to set out the duty to facilitate peaceful, non-contest assemblies, and assemblies beyond political protests has a subsequent impact on the officers and commanders who may not be aware of the full legal obligations when discharging their responsibilities.[147] This increases the importance of officers taking a human rights approach to consider human rights considerations as part of every decision relating to the operation in order to overcome a systemic problem that prevents full realisation of fans' right to freedom of assembly.

A.6.4 Under international guidance and soft law

The Venice Commission Guidelines on the Freedom of Assembly are the most detailed and authoritative guidance on the extent of positive obligations in public order policing. This clearly sets out the parameters of the obligation on public authorities to facilitate and protect assemblies "at the organiser's preferred location" and within "sight and sound" of the intended audience as a fundamental part of facilitating the delivery of the assembly's objectives.[148] The Venice Commission then goes onto consider what can be permissibly restricted under a facilitative approach as analysing interference with the positive limb of the right does not follow the legal tests of legitimate objective,

[145] *Oya Ataman v Turkey*, App No 74552/01, 5th December 2006, [35].
[146] n.10 Venice Commission (2019), 10.
[147] If important obligations are missing from the official standard setting manual it also risks being missed from national training manuals, local CPD courses, and officers' own practice at refreshing their knowledge.
[148] n.10 Venice Commission (2019), 9, 28.

necessity and proportionality but mirrors that structure and these tests will apply if the interference also engages the negative limb of the right.

Measures to limit the assembly may be appropriately applied to control the time, place, or manner of assemblies, but these must not interfere with the objectives of the assembly which must be given the opportunity to be accomplished.[149] The length and scope of the facilitated assembly depends on the nature of the objectives, which may require a sufficient time for participants to interact,[150] contemporaneous with significant events, or the police may be required to recognise the purely "symbolic and testimonial value" of an assembly.[151] Restrictions must not eliminate the purpose of the assembly by over-regulation so that it becomes a non-entity; measures must be reasonable in the circumstances.[152] The authorities must also consider, and offer, the closest possible alternatives to what was intended, so that the objectives of the assembly can still be achieved.[153] The police have a duty to provide adequate policing resources to facilitate assemblies within "sight and sound" of the intended audience[154] even if this disrupts the ordinary lives of other citizens.

Football fans may have a number of objectives that must be given the opportunity to be accomplished. Fans may also have a variety of intended audiences, such as opposing fans, residents of the host city, or other rivalries who can be communicated with through the internet and mobile communication. Thus, limits on fan assemblies to manage or control football fans must not frustrate these goals and must preserve them to the greatest possible extent. These considerations may be the most critical in police intervention to curtail what they view as disruptive assemblies however restrictions on a facilitated assembly of fans cannot be imposed simply to pre-empt possible eventualities of contestation or disorder.[155] The gathering of football fans in a public square, for example, cannot be supplanted by provision of a remote "fan-zone" that is intended to control or sterilize the impact of

[149] n.10 Venice Commission (2019), 18-20; *Nosov and ors v Russia* App. No. 10441/04, 20 February 2014, [58].
[150] n.59 *Éva Molnár v Hungary* (2008), [42].
[151] *Cissé v. France*, App No. 51346/99, 9th April 2002, [52].
[152] *Makhmudov v Russia* App No 35082/04 26th July 2007, at [68].
[153] n.86 Mead (2010), 100-102.
[154] *Ollinger v Austria* App No 76900/01 29th June 2006 [43]-[51].
[155] n.10 Venice Commission (2019), 27—28; n.145 *Oya Ataman v Turkey* (2006), [38], *Taranenko v Russia* App No. 19554/05 15th May 2014, [66].

assembly based on generalised grounds of public safety.[156] As a consequence of the above, the objectives and context of any assembly, along with any intended audience must be understood by the intervening officers so that appropriate tactics and adequate resources can be deployed to facilitate those objectives, and any intervention is to the minimal extent possible having regard to the objectives of the assembled fans.

A.6.5 Under a human rights approach

As detailed above the trend in ECtHR case-law is towards expanding the scope of obligations under the freedom of assembly. A trend confirmed by both the work of the Venice Commission and the Human Rights Council.[157] According to the latter, states must promote an "enabling environment" for the effective exercise of the right including through the legal or institutional framework or by specific measures with a functioning and transparent decision-making system laying at the core of this duty.[158]

Given the importance, prominence, and extent of fan assemblies around football matches, it is incumbent on the police delivering a specific football operation to review their policies, procedures, and practices to ensure that they do not find themselves in the same position as other public bodies with standard tactics facing judicial scrutiny. However, this reactive approach to structural and operational changes is not effective at ensuring the full legality of operations. The approach to public order operations must reflect the wider legal framework, recognise the important role of human rights in delivering other operational objectives, and view cautiously the potential for the courts to apply human rights analysis critically against longstanding tactics. The requirement for authorities to be conscientious in ensuring their policies and practices are compliant with human rights is already legal requirement.[159]

[156] n.56 *Frumkin v Russia* (2016), [147]-[151].
[157] n.10 Venice Commission; n.11 Human Rights Committee GC 37
[158] n.11 Human Rights Committee GC 37, [24], [28].
[159] s.6 Human Rights Act (1998); see also s.149 Equality Act 2010 the public sector equality duty.

Consequently, a tick-box exercise based on an attitude of minimal compliance with human rights, motivated by maximising efficiency (or control) and aimed towards securing public order may be insufficient to fully analyse the detailed considerations set out above in the case-law and applicable guidance. As breaches of individual rights becomes subject to the exigencies of the legal process, a tick-box approach to human rights can therefore amount to a false economy, failing to protect officers from legal claims, and not advancing the human rights protection of citizens by any significant degree.

The opposite approach is one of maximal fulfilment of the rights of all participants.[160] That requires an appreciation of the complexities involved in balancing the legitimate objective of preventing breaches of public order against different claims for rights in competing space. It involves maximising the benefit of rights to each individual fan engaged by the public order operation. Elements of this approach are already entrenched as part of the structure of public order operations generally, and facilitation as part of protest policing in particular has already benefitted from engagement with human rights considerations.[161] A maximalist position would recognise the subjective importance of fan assemblies for fans alongside the objective importance of a society that encourages social assemblies, and lead to policing operations being orientated to achieving the objectives of those fans gathering without waiting for fans to explicitly claim their rights directly in dialogue with the force or through the courts. Officers acting under a maximalist human rights approach would do as much as they could to make decisions about policing of those gatherings that advanced the fan's objectives, as equal to or more important that maintain public order, and only limited fan assemblies in strict compliance with the developed framework for making rights-compliant decisions.

The final question relating to the implementation of a human rights approach to facilitating assemblies is whether one is required by law. In *R (on the application of the Children's Rights Alliance for*

[160] "Maximum" fulfilment is a concept debated in the field of social and economic rights; its application to civil and political rights is rare due to the formal indivisibility of civil and political rights. However, where there is an empirical lack of absolute protection of a civil right it is a concept that may have cross-application see e.g. n.116 Fredman, (2008), Chapter 3.B.III.

[161] Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest (seventh report)* (2008-09) HL 47-I, HC 320-I, 17.

England) v Secretary of State[162] Laws LJ encouraged the Supreme Court to reconsider the wisdom of the *Ullah* principle, that restricts the obligation on public bodies to the content of what has already been decided as applicable by Strasbourg:

> "… perhaps I may be forgiven for stating, with great deference to the House of Lords and the Supreme Court, that I hope the *Ullah* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights,[…] It is a high priority that the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence. If the road to such a goal is clear, so much the better."[163]

Though an *obiter dicta* statement, it is not a singular utterance that has slipped under the radar. In addition Lord Kerr has spoken strongly against the "*Ullah*-type reticence"[164] and in the *Worboys* case[165] Lord Kerr's comments that such reticence would be an "abnegation" of the Court's statutory obligation under s.6 Human Rights Act were approved by Lady Hale and Lord Neuberger.[166] The reality of decision making in the higher courts means that they are not bound by lines of cases decided by lower courts that only explore narrower basis for rights under Article 11. Friend demonstrates how domestic courts can construct the application of Article 11 to fox-hunting,[167] and indicates how the same could be achieved in respect of football fans. Public authorities may be required to look beyond narrow interpretations of rights and make decisions that advance ECtHR standards in the light of common law obligations.[168]

It is important to state that a maximalist view of human rights protection in public order policing does not preclude the use of force or coercion where that is necessary: the freedom of assembly is consistent with, and can help contribute towards, the duty to maintain public order.[169] The practical

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[162] [2013] EWCA Civ 34.
[163] n.162 *Children's Rights Alliance*, [62-64].
[164] *Ambrose v Harris* [2011] UKSC 43, [126].
[165] *Commissioner of the Police of the Metropolis v DSD and Anor* [2018] UKSC 11.
[166] *per* Lord Kerr n.165 *DSD and anor* [2018], [78].
[167] n.42 *Countryside Alliance* [2007], [115].
[168] *per* Lord Neuberger, n.165 *DSD and anor* [2018], [91].
[169] *Ivcher Bronstein v Peru*, Inter-American Court of Human Rights Decisions and Judgments No. 74 (2002), petition number 11762, 6th February 2001.

implication of a human rights approach is a requirement to subject decisions to use tactics to the lens of human rights law first, and through that lens, requires analysis of the justifications necessitating coercive conduct, looking in particular at exhausting non-coercive means to achieve the objective. The destructive effects of coercion, and the impact that has on the values of a crowd, are therefore minimised.[170] A human rights approach can thus provide the structured and balanced framework through which to inculcate rights, rather than pandering to the "imperative of order maintenance alongside a political need to be seen to respond to individual events".[171] The second part of this chapter will assist in showing how this applies in practice.

B. Policing of the Football Crowd as an Assembly

B.1 Considering assemblies in the pre-match phase

Conversations about the right to the freedom of assembly of fans were not a regular feature of the pre-match planning discussions for most domestic fixtures. The movement of fans to and from the stadium was treated by many officers I observed as a logistical challenge with hurdles to navigate such as "supressing the risk" by identifying and tracking the groups consisting of "risk" fans.[172] As summarised by one Bronze Commander briefing Police Support Units ("PSU") before the start of an operation, "it's our job to monitor them [the fans], see where they go and stop anything happening".[173] That bluntness was not universal, as may be expected there was a more nuanced understanding from knowledgeable and experienced Silver Commanders who often introduced their briefings[174] stressing

[170] J. Jackson, A. Aziz, B. Bradford, T. Tyler, 'Monopolising force?: Police legitimacy and public attitudes towards the acceptability of violence' 19 Psychology, Public Policy and Law 4 (2013), 479-97, 489; C. Stott and S. Reicher 'How Conflict escalates: The inter-group dynamics of collective football crowd 'violence' 32 Sociology 92 (1998), 353-377.
[171] See n.86 Mead (2010); n.161 Joint Committee on Human Rights (2009), [70].
[172] Observation, Silver Commander, Premier League Match 6, Briefing.
[173] Observation, Bronze 2, League 1 Match 3, Briefing.
[174] Silver Briefings included all Bronze Commanders and Commanders of other units such as Mounted Officers and preceded the general briefing of the whole operation.

the importance of the football match to those attending the fixture, and who outlined the role of the police as "make sure everyone has a good day out."[175] Displaying knowledge and awareness of the objectives of fans in this simple manner conveyed the Commander's understanding of the facilitative role of many football policing operations and set the tone for an operation that would aim to respect fan's rights even without expressly referencing the rights of fans. Unfortunately, it was common for the facilitative intention to not translate through to the PSUs - in part due to the formalistic nature of the briefings – and the aforementioned focus on risk factors:

> "PSUs in lines like a school sports hall. Briefing is rigid and swift, previous Silver instruction to "ensure everyone has a nice day out" isn't passed on but implied through phrasing like "don't expect any trouble". …Freedom of assembly flashes up on the screen but isn't referenced or highlighted to officers. Importance and link to facilitation missed."[176]

Formally the right was referenced in both the briefing powerpoint presentation and the Operational Order at almost every operation I observed constituting a formal identification of the freedom of assembly as a relevant right that could be engaged by the operation. In relation to domestic fixtures, at no point in this pre-match process was either the positive duty to facilitate, nor the negative obligation to not interfere with peaceful fan assemblies explored in detail or contextualised into relevant tactical considerations.

The formal identification of the right did not translate into a recognition of the importance of the right for the fans or for the broader operation. The opportunity to reinforce officer's legal knowledge, to train their minds to focus on the contextual human rights considerations when policing football crowds was missed with reliance instead placed on officer's own varied knowledge and experience[177] of using human rights when implementing their statutory or discretionary powers. The impact of Gold and Silver Commander's intention to conduct the operation in accordance with human rights standards by engaging with the positive facilitation of fan assemblies at domestic fixtures was blunted

[175] Observation, Silver Commander, Premier League Match 8, Silver Command Briefing.
[176] Fieldnote, Observation, Silver Commander, Premier League Match 8, Pre-Match Briefing.
[177] Conversation, Planner, Premier League Match 8, Pre-Match Briefing; Interview, Gold Commander.

by the failure to specify applicable principles and translate a broadly phrased, imprecise instruction of intent into workable, understandable terms to assist Bronze Commanders and PSU officers to incorporate contextually relevant human rights considerations into their decision-making processes.

This approach was justified by one Planner as officers "know human rights stuff from their day job",[178] this was backed up by an interview with a Gold Commander who identified officer's training as preparing them with sufficient legal training for most situations.[179] That justification may apply for officers in the Force Events Unit, or Special Operations department but those forming PSUs or acting as Bronze Commanders will not regularly have to put their mind to the thresholds for facilitating or intervening in social assemblies. As set out above in Section A.5, assessing the necessity and proportionality of measures is not straightforward. While there is no obligation for total accuracy in such finely-balanced context-dependent decisions, a failure to consider human rights at all can undermine the justification relied upon by an officer taking coercive action affecting fans rights.[180] The limited initial recognition of the freedom of assembly and failure to remedy deficiencies in PSU officer's knowledge and experience indicates an operational weakness that limits – from the outset – the extent to which the force can be assessed as delivering a human rights approach.

B.2 Control of fans in the build-up

B.2.1 Intelligence assessments and the role of Spotters

The planning process for a football operation starts with the team of operation planners ("planners") who will compile successive drafts of an Operational Order based on factors including; categorisation of the match, the date, time, the clubs involved, the capacity of the host club to provide efficient stewarding, and other events taking place across the force.[181] The planning team work from an existing collection of Operational Orders and intelligence reports fed in by the Dedicated Football

[178] Conversation, Planner, Premier League Match 8, Pre-Match Briefing.
[179] Interview, Gold Commander.
[180] n.100 *DB v PSNI*
[181] Observation, Planner, Premier League Match 7, Phase 1.

Officers who are assigned to particular clubs and who will be involved in every operation concerning that club, including travelling to monitor those fans at away games. In this way the risk classification, level of police response, and tactical options available are all based on a mixture of historic data and "best estimates" as there is rarely precise intelligence of a sufficient quality to contribute to accurate assessments of actual risks.[182] This is then addressed by the deployment of Spotters on matchday to identify fans their either recognise, or who share behavioural features with risk fans.[183]

The limits of this study prevent conclusions being drawn about the information collected and used by Spotters in these intelligence assessments. However, the practice of Spotters trailing fans raises the question about whether this tactic causes a 'chilling effect'[184]. Spotters are aware of this impact as they are watchful for groups that break apart and leave an area in twos and threes to head elsewhere to evade further police scrutiny. Fans continue to congregate in public places and frequent pubs pre-match so a chilling effect is difficult to evidence, and, where deployed in a targeted hands-off manner, there can be little argument that legitimate low-level monitoring functions of a police operation engage or limit the freedom of assembly. However, I also observed occasions where heightened scrutiny or coercive tactics were deemed "necessary" where fans drinking in pubs refused to look at Spotters,[185] or answer Spotters' questions,[186] with this attitude interpreted as hostile and one of the clearest basis for identifying a "risk fan".[187] Fans refusing to engage with officers are still afforded the full protection of the freedom of assembly, and all officers – including Spotters – have an obligation to facilitate rude, evasive, or even hostile fan assemblies until they no longer qualify as 'peaceful'. Thus, the human rights approach may require Spotters to adopt less intrusive tactics, or adopt more structured understanding of the threshold of necessity of interference with fan assemblies.

B.2.2 Facilitation of "normal" fan behaviour

[182] Observation, Planner, Premier League Match 7, Phase 2.
[183] Observation, Spotters, League 1 Match 10, Phase 1.
[184] See further Section A.6.2 above.
[185] Observation, Spotters, League 1 Match 10, Phase 1.
[186] Observation, Silver, Premier League Match 3, Phase 1.
[187] Observation, League 1 Match 4, Phase 2.

During the pre-match phase, the whole operation is focused on identifying where fans gather, in what numbers, and what assessment of risk to categorise those fans arriving onto the operational footprint. Some suburban force areas to designate away pubs[188] to manage this task but this is very rare in the city centre where choice and geographic scope render this impractical.[189] Away fans may still be directed to certain pubs hosting away fans, regardless of whether they are actually doing so, or whether they were knocked down 2 years prior.[190] Directing fans to pubs or places may engage either limb of Article 11, analysed through the facilitative frame officers must consider the closest possible alternatives if an initial choice of location is deemed to significantly affect the rights of others. Throughout my observations there were numerous examples of officers seeking to accommodate fans intending to gather pre-match within constraints they deemed necessary to prevent crime or disorder. At one domestic cup match, close liaison between the police and a licensee facilitated the assembly of away fans for an early kick-off by opening early, with fans accommodated in a sizeable outdoor area just off a main road near the stadium but away from the entry routes of home fans. In this facilitated space, sufficiently proximate to the home fans, they away fans were encouraged to congregate, hang flags, and engage in vocal exuberant forms of support.[191]

While forms of facilitation of this nature reveal an understanding of the objectives of travelling fans, this was not a process that was replicated in other domestic fixtures that was in part caused by a lack of understanding across the force. I observed officers with varying degrees of understanding about the importance of social assemblies in the pre-match and post-match period with many reducing peaceful assemblies to problems that needed "fixing",[192] a viewpoint that undermines any claim to assess human rights considerations in good faith.

In contrast experienced officers have an outline understanding based on training informed by crowd psychology and past experiences that it can be unproductive to try to engage a group of drinking fans

[188] Observation, Bronze 2, Cup Match 3, Phase 1.
[189] Conversation, Silver Commander, Premier League Match 12, Phase 2.
[190] Observation, Bronze 4, European Match 4, Phase 1.
[191] Observation, Bronze 2, Cup Match 3, Phase 1.
[192] Observation, Bronze Commander, Premier League Match 15, Phase 1.

with coercive tactics such as dispersal and look to other methods to achieve their objectives.[193] I observed some Bronze Commanders who actively engaged fans by providing directions, advice, or otherwise encouraged fans to gather in pubs in the build-up:

> Bronze is chatty, banter with fans about the predicted score – a certain impending defeat – asked where's good for a drink, he identified the desire for a quieter pint "there's a good stretch there with a few places open and the one on the end has real ale on, you'll have no problem in there""[194]

There is no absolute right for the fans to assemble in any particular pub,[195] but the licensing team or other officers regularly engaged with doorstaff or landlords to facilitate entry, often accompanied with promises of police support if any trouble arises.[196] This light touch approach to facilitation certainly fulfils the positive obligation, and also respect the negative limb of the freedom of assembly; fans are generally not interfered with in their choice of pubs before a game, particularly where there is no intelligence of disorder.

Where the behaviour of fans was identified as "normal"[197], such as in the above examples, the approach of officers was based around positive engagement. Assessment of 'normality' is a subjective assessment that appeared to signify qualities of calmness and predictability for officers wary of overly boisterous behaviour or unexplainable movements of fans to and from different places for pre-match gatherings.[198] Yet the right to assemble is enjoyed by all fans that are not seriously disruptive or violent. Thus, just as non-notifying disruptive protests will still be policed and not prevented or dispersed before they have achieved their objectives,[199] so should groups of supporters arriving unexpectedly at a place be facilitated in achieving their objectives, with any limitation judged on the

[193] Silver TAC, Premier League Match 7.
[194] Observation, Bronze Commander, Cup Match 2, Phase 3.
[195] Following *Anderson v United Kingdom* App No. 33689/96 27th October 1997.
[196] Police Liaison Team, European Match 2, Phase 2.
[197] Observation, Bronze 1 TAC, Cup Match 4, Phase 1.
[198] League 1 Match 3, Phases 1 and 3, where fans arriving at a different station to that expected were viewed as avoiding police gaze and out to cause trouble. There was some indication here that they wanted to avoid the police gaze to have a drink in peace in a picturesque village one stop away from the ground.
[199] n.77 Stone (2012), 382; n.10 Venice Commission (2019), 9, 28.

actual risk posed by the assembly rather than its departure from a perceived norm.

B.2.3 Interfering with unusual assemblies

Assessment of the actual threat posed by certain fans potentially forming part of a fan assembly is primarily undertaken by Spotters who feedback to Silver Commander who uses those assessments in making decisions on where to deploy resources for the remainder of the operation.[200] Where fans act in a way perceived to be unusual or "organised", they will be seen as a threat to public order, and an escalated response is deemed necessary to disturb or disrupt the identified fan assembly, even prior to any offences or threat to the peace being identified. That approach was taken by a Silver Commander deploying officers in large numbers to engage risk fans identified in a pub that had never previously been on the radar and which caused concern due to its location:

> Away fans in the student area of the city, pub is cheap but also near subway under roundabout and industrial wasteland. Silver's concern about organised clashes with home fans apparently based on one piece of specific intelligence. Several PSUs deployed to sit outside the pub whilst another team inside was to get "hands" on the risk fans. The Spotter congratulated for role in identifying the location of "risk" fans and for identifying the "grounds for the containment".[201]

The existence of some intelligence – of which I was not party to - had the potential to justify the necessity of interfering with this fan assembly which remained peaceful until the interference and so the fans' rights were engaged. However, there was a failure to consider the application of human rights considerations to the tactical manoeuvre to achieve the operational objective of preventing fans clashing in the streets. Officers would have to reconstruct their justificatory basis in order to demonstrate a decision-making process that complied with human rights law and such peremptory action runs the risk of officers acting incompatibly with human rights if this analysis is not an automatic response. In this situation however, the Silver Commander demonstrated an understanding

[200] Observation, Spotter, League 1 Match 4, Phase 1.
[201] Fieldnote, Silver Commander, Premier League Match 1, Phase 1.

that the freedom of assembly remained a relevant consideration even after an initial interference when, in the face of opposition from his TAC, he instructed the fans to be escorted to the stadium so they could watch the match in a rights-compliant result that permitted the continuation of the fan assembly away from the source of the threat.

B.3 Facilitating fan assemblies during European fixtures

For European matches the planning process is carried out with in-built dedicated Police Liaison Teams, and an ethos of collaborative communication in the planning phase with visiting supporter groups.[202] It is in this context that the police liaise with the local council[203] to arrange a "fan reception area" (distinct from a "fan-zone"[204]) in a main city square. This is a tactic that is flexibly refined for each set of visiting fans but at its core, the area offers many positive aspects that assist a facilitated assembly:

> Courtyard feel surrounded by 4 pubs, but with free access on four sides that can fit around 2,000 fans when fully extended by additional barriers when needed. Acoustics reward loud chanting, and the central location between shopping streets and transport hubs encourage fans to put on a show for the home fans. Open street drinking is encouraged with no enforcement, even outside the technical barriers of the area. PLTs comfortably moving in and out of different fan groups, engaging, smiling, or posing for photographs.[205]

The positive benefits of the facilitated assembly area are clear, tailored towards social assembly and expression and balanced by a lack of compulsion. The area appears to meet the criteria of facilitation set out above in Section A.6 from the ECtHR in designating a protected space to a potentially disruptive or annoying assembly[206] and guidance from the Venice Commission in delivering a

[202] Commonly there will be more than one supporters' club attached to European teams.
[203] Observation, Bronze 5, European match 7, Planning phase.
[204] Observation Bronze 6, European Match 3, Phase 1.
[205] Observation, PLT 1, European Match 3, Phase 1.
[206] n.21 *Plattform "Ärzte für das Leben"*, [32]-[33].

voluntary arena for effective assembly within "sight and sound" of an intended audience,[207] and further in respect of the tolerance towards unlawful activities such as street drinking in the vicinity which was not enforced and allowed an effective assembly and prevented strict rules producing a chilling effect.

One feature of this area indicated a further benefit to the police; the street furniture also allowed for close but unobtrusive monitoring of the crowd:

> With Bronze 6 monitoring fans, feel partially out of site due to brick wall and raised podium…. Bronze 6 TAC pointed out the different groups of fans he could identify from the intelligence briefing and Evidence Gathering Team directed to film those handing flares out.[208]

Direct surveillance of the facilitated assembly like this was uncommon and did appear to be targeted at specific intelligence for that fixture but the features of the area clearly benefitted the police's objectives at the same time as providing an area that met the positive obligations and the core of the freedom of assembly was not impacted by the necessary and proportionate limitations imposed. It was more common for the police presence to be limited to the exterior. As described by officers this was considered to be "a presence for public safety reasons"[209] or "just in case something does happen, they know we're on hand," rather than the control rhetoric that permeated domestic fixtures, and derbies in particular.[210] The exceptional feature of these operations was the deployment of Police Liaison Team who were tasked with communicating with as many of the fans as possible.

The relationships built by PLTs was a critical element of the facilitated assemblies. In one case the interactions meant that the PLTs could identify a group of supporters who have "been coming here for years"[211] and know what to expect. In the view of officers, away fans at European matches exhibit some differences from the football fans they usually encounter: that they are on holiday, and want to

[207] n.10 Venice Commission (2019), 9, 28; See further Section A.6.
[208] Observation, Bronze 6, European Match 5, Phase 1.
[209] Observation, Bronze 6, European Match 5, Phase 3.
[210] Observation, Silver Commander, Premier League Match 1, Phase 2
[211] Observation, PLT, European Match 3, Phase 3.

engage in tourism, shopping, and visiting other football grounds[212] which make it easier to facilitate the assembly:

> PLTs swapping stories of the previous night experiences and reporting their friendly interactions with amiable fans who "drank a lot, but slowly…. unlike our lot who wolf it down." Street briefing with Bronze kept being interrupted by fans chatting to PLT recognised from the night before"[213]

The fan reception area was offered but not enforced upon fans,[214] but the frequency with which the area was filled by fans engaging in social activities – chanting, drinking, displays of support through flags, flares, and colourful visuals – indicated the successful implementation of measures to fulfil the police's obligation to facilitate fan assembly of away fan at European fixtures. The exception was a single European fixture where fans – who were less pre-occupied with drinking throughout the matchday - did not arrive early in the morning and by 2pm visible officers in yellow jackets stood behind metal barriers outnumbered away fans who appeared to turn down the option of lunch under this watchful gaze in favour of other options. Though exceptional, this constitutes a warning against a rigid implementation of even a successful facilitation approach, the means of facilitating fans has to be assessed independently on every occasion in order to give effect to the fans' objectives and meet the legal standards required.

The framework of the fan reception area did prove to have flexible elements. On one occasion a Bronze Commander identified that the fans consisted of several different sub-groups which did not agree on which group should be leading the chanting which posed a problem:

> Around 4pm the crowd had started to grow when the Bronze Commander was approached by a leader of the "Wizard Fans" who asked for a different area for his group to congregate for a short period of time, evidently to display their separate identity. The Bronze Commander quickly identified a suitable location and took around 100 fans to a grassy knoll with a couple

[212] Observation, Silver Commander, European Match 7, Phase 3.
[213] Observation, PLT, European Match 3, Phase 1.
[214] Away fans at European match 5 did not take up the offer despite 1,800 travelling; a minimal police presence at their chosen locations ensured this facilitative approach was sustained.

> of PCs…Checked with the side group assembly 15 mins later, clearly enjoying the specialised location. Bronze was pleased but didn't frame in any legal sense "do what you can to help them out".[215]

Despite the force clearly delivering a human rights-compliant operation and successfully meeting its legal obligation, there was little recognition of the legal obligation, even one that was easily surpassed in each of the European operations observed. Justifications for the tactic vaguely indicated human rights considerations along the lines of the desire to "give fans what they want".[216] The clearest example of allusions to human rights considerations came from a Silver TAC who drew a distinction between the "forceful herding of fans" by European police forces in contrast to the "pleasant British approach which is based on consent and not escalating to forceful tactics unless necessary."[217] The lack of explicit consideration of the positive proactive facilitation of social assemblies couched in express human rights terms did not pose an operational problem for the police as the rights-compliant tactics reached prevented reactions to illegitimate tactics in any case. But such incidental compliance with human rights based on public safety or management of crowd is subject to other intervening considerations stripped of the strict legal tests contained in Article 11 which have developed to maximise respect for rights of individuals in the face of the state's power to intervene in social assemblies. Human rights considerations are detectable in decisions when they help the force achieve these other objectives. While present in some form, they are not at the heart of every policy, practice, and measure implemented showing the limited impact of human rights law and public order policing policy on an otherwise very positive structural aspect of the football policing operation.

B.4 Fan walk-ups as facilitated processesions

[215] Observation, Bronze 6, European Match 5, Phase 1.
[216] Observation, Silver Commander, European Match 2, Phase 2.
[217] Observation, Silver TAC, European Match 2, Phase 2.

For many European fixtures facilitated walk-ups were an integral part of the policing operation and a natural feature to facilitate following on direct from a facilitated assembly. They are also the feature that most closely resembles the policing of protests, from which officers appear to have . At one of my early observations, Silver Commander was concerned about intelligence reports received that indicated home fans would try to ambush the walk-up. Although primarily this appeared to be as a result of the route design which took the walk-up past a home pub – but importantly for fulfilling other operational objectives did not block traffic on the main road to the stadium. An assessment was made about the level of intelligence, an analysis that mirrored a human rights analysis led to what the Commander labelled as a "proportionate tactic":

> Walk-up formed with a horseshoe cordon around the front of the march. Resources front loaded around the "noisy lot" of fans at the front – Bronze indicated that those in black were the "risk element"….Moved off but a noticeably thinner cordon further back. No compulsion to join walk-up…Later fans free to leave the side and rear of escort."

This set-up was implemented partially on the basis of recognising the rights of fans to assemble and express themselves which appeared to be transplanted directly from officer's experience policing protests. Officers expressly considered that the tactic was "proportionate" because it gave fans a degree of freedom, but also achieved their goal of avoiding disorder by partly controlling the direction, and speed of the procession. The restrictiveness of the cordon around the fans corresponded to the particularised threat level of different groups within the crowd, with officers correctly identifying that less intrusive measures were able to be imposed where there was less specified risk identified with resources shifting forwards and backwards as the walk-up unfolded. The flexibility, and reflexivity of the policing of this walk-up also indicated the influence of human rights analysis:

> "en-masse movement of fans out of the cordon to the left in the middle of industrial estate. Immediate response to send further resources to the 'breach' but quickly clear that fans were running only to get to the walled grass verge to urinate. Bronze called back the PSUs "not necessary" From that moment Bronze noticeably relaxed, "nothing likely to happen now"

Other walk-ups consisted of different scales, risk categorisations, and manners of expression and further examples will be explored in subsequent chapters. The walk-up routes were predetermined for each of the main clubs and were not altered except on a pragmatic basis to avoid "pinch-points" or [218] minimise disruption to traffic.[219] Overall the routes struck a balance, and certainly did not compare to the extreme examples in the case-law on time, place, and manner restrictions – limiting assemblies to remote forests, for example.[220] Critically, the choice of fans to join walk-ups was voluntary. That permits the conclusion that walk-ups were tailored to achieve the fans' objectives as on a number of occasions fan ran to join in the back of the marshalled procession rather than be left behind and miss out.[221] Article 11 rights were engaged by the cordon tactic, and officers facilitated an effective assembly that sought to secure the fans' objectives, with limitations that did not affect the core of the right.

Facilitation of European fixture walk-ups remained a consistent feature throughout the period of my observations, partly because of the ability to meet multiple objectives at the same time as respecting the objectives of the fans. Where fans were not as keen on walking, their movement to the ground was nonetheless facilitated through dedicated public transport.[222] The force also displayed knowledge that interferences with walk-ups had to meet high standards under human rights law. The clearest link to such express human rights considerations came from a Silver Commander in a planning meeting who was coming under political pressure from local government and agencies to stop facilitative walk-ups so as to not to cause disruption to the city centre and traffic flows,[223] to which Silver responded that "it doesn't work like that" and such disruption was "not necessarily a relevant consideration". This analysis reflects the international obligation recently reinforced by the Human Rights Committee, that minor inconvenience is not a sufficient reason to interfere with a peaceful assembly.[224]

[218] Observation, Bronze 6, European Match 7, Briefing.
[219] Observation, Bronze 6, European Match 5, Briefing.
[220] n.56 *Frumkin v Russia* (2016).
[221] Observation, Bronze 2, European Match 4, Phase 1.
[222] Observation, Bronze 4, European Match 6, Phase 2.
[223] DFO, European Match 7, Silver Commander, European Match 7.
[224] n.11 HRC General Comment 37 (2020).

Walk-ups at domestic matches were rare, occurring only at local derbies in the lower leagues and the line between a facilitated walk-up and an imposed containment was not always clear to me, the fans, or Commanding officers.[225] Every domestic walk-up that I observed started at a pub which had been monitored by Spotters or a PSU and was policed with much fewer resources than the equivalent at European fixtures. These tactics were much more concerned by the desire for control, to "set a robust style early on"[226] and to "keep idiots apart"[227] and often took on more coercive feature to achieve those objectives:

> Walk-up agreed between fans and Spotters. Commenced with fans in loud voice out of the pub but noticeably muted a few streets on. Reinforcements were called for due to something mentioned by a fan in the group. Debate sparked between Silver TAC and Silver Commander about whether the group had consented to the cordon which by the time it reached the stadium cameras have taken on the form of a coercive containment.[228]

Contrasts with the facilitative, human rights-fulfilling tactics identified above in European fixtures and verged on engaging the Article 5 rights of the fans who had no choice about movement once they had entered into the walk-up at the start. Accordingly, the correct legal analysis is to assess these walk-ups under the negative limb of Article 11 and assess the legitimacy of the police's interference with fan assemblies. Across my observations it was clear that Silver Commander and his TAC adviser were most keenly concerned with the necessity and proportionality of coercive policing a walk-up that appeared "muted" by the time they came into view of a CCTV camera. Concerns were expressed that the Bronze Commander had overreacted to boisterous behaviour and that fans were not part of the coercive walk-up voluntarily which could render the tactic illegitimate. After half a mile fans were told they had the option of leaving the group[229] indicating a necessary reflexiveness and

[225] Observation, Silver Commander, Premier League Match 1, Phase 1.
[226] Bronze 2, League 1 Match 10.
[227] Silver Commander, League 1 Match 3.
[228] Fieldnote, Silver Commander, League 1 Match 10, Phase 1.
[229] Observation, Silver Commander, League 1 Match 10, Phase 1.

responsiveness within the command structure, remedying an operational weakness and demonstrating the importance of applying a human rights analysis to decisions affecting fans' rights.

As Silver Command was based remotely, those officers lacked clear visual or audible link to important information held by the Bronze Commander, or PSU officer which they relied on when limiting the freedom of fans in a walk-up. This underlines the importance of all officers having thorough legal training to be able to analyse the threshold at which variations on the time, place, manner of an assembly becomes a coercive restrictions requiring explicit analysis of the necessity and proportionality of such action.

A critical difference in approach between European operations and domestic operations is the presence and activity of Police Liaison Teams. As a tactical option, Liaison Teams can deliver dedicated two-way communication between the Silver Commander and the crowd on one topic in a more direct way than filtering through layers of PSU command. The impact of Liaison Teams in conveying the mood, intentions, and concerns of football fans has significantly altered the policing response on a number of occasions. For example, where a group of away fans wanted to stop on the walk-up at the first clear sighting of the stadium for photographs at an advantageous angle.[230] Liaison Team communication meant the Bronze and Silver Commanders didn't react to try and force the group along but simply stood and waited for around three minutes in the middle of a main road carriageway. As can be seen, genuine dialogue between law enforcement authorities and organisers can ensure the smooth conduct of public assembly. That this approach is not replicated in domestic matches was attributed by officers to the fact that English fan groups do not replicate the clear leadership hierarchies seen on across Europe.[231] Nevertheless, difficulties in identifying and communicating with leading members do not negate the duties to facilitate the social assemblies and the benefits for policing in pursuit of maintain public order, if the intentions of fans are fully understood and assessed as part of a human rights analysis of interventional tactics.[232]

[230] Observation, Bronze 3, European Match 4.
[231] Observation, Bronze 6, European Match 5, Phase 2.
[232] n.160, Joint Committee on Human Rights (2008), 14.

C. Conclusion

In the above analysis I have demonstrated that social assemblies should be afforded the same protect as protests or political assemblies. I have explored how the applicable standards in arising out of ECtHR case law apply to assemblies of football fans which should therefore be facilitated whether they are present in the area for domestic or European fixtures and whether they have been identified as 'normal' or 'risk' fans. I have analysed how the force's formal, limited recognition of the rights of fans to assemble limits structurally limits fans' enjoyment of the right, and at the same time does not permit officers to absorb the relevant contextualised human rights considerations required for a lawful intervention to limit fan assemblies. Other features of relevance include the potential for Spotters to introduce a 'chilling effect' on otherwise legitimate fan assembles in and around pubs through close monitoring that does not take fans rights into account. Where fan assemblies are facilitated, this is very clear as the structure of the whole operation changes and tactics are directed towards a liaison approach to fulfil the intentions of the visiting fans. However this incidental compliance is insufficient and is a weak form of fulfilling the human rights approach which does not stand up to greater scrutiny as the justification and reasons for facilitation should be explicitly recognised as being to fulfil rights, as well as to achieve the police's other objectives. This means that when the facilitation arrangements need to be altered, all parties are clear that the alteration is taking place on a human rights-compliant basis. A human rights approach can most clearly be identified in the policing of fan walk-ups to the stadium which visually, and legally mirror the police's experience in policing protests. Finally, where the liaison approach is missing from the operation, the facilitation of walk-ups is less successful at meeting human rights standards.

CHAPTER 5 : FACILITATING THE FREE EXPRESSION OF FOOTBALL FANS

A. The human rights framework protecting free expression

The right to freedom of expression is the second human right that will be assessed. Commonly referred to as "free speech", expression is a very nuanced right with structural limitations that do not exist in respect of other rights examined in this study. The policing of political forms of expression has been studied extensively, but there is a growing recognition of the right to engage in social forms of expression and the extent to which fan behaviour engages the right to freedom of expression needs to be determined.

This chapter will first address how fan expressions engage the protection of Article 10 ECHR beyond the well-established political elements of this right and explore how different fan expressions were facilitated or limited by the police during my observations. To assess whether the force's operations met the human rights approach I will demonstrate how the force respected certain forms of expression when this assisted the achievement of other operational objectives, but limitations were placed on fan expression without officers engaging in explicit human rights analysis, and finally how unruly expression was considered to be prima facie illegitimate behaviour that was not capable of engaging Article 10 when legal framework requires a different approach.

A.1 The democratic justification for the freedom?

The freedom of expression is a feature of a democratic community that is "of great significance to the individual and to society as a whole".[1] It is common for authors to deploy this democratic justification

[1] R. Crawshaw, L. Holmstrom, *Essential Cases: ECHR and Policing* (Brill Nijhoff, Leiden 2006), 433.

for the freedom of expression; [2] however, the ECtHR repeatedly confirms that freedom of expression in Article 10 ECHR is a basic condition for society's progress and that this freedom is "essential for each individual's self-fulfilment",[3] which appears to go beyond a purely democratic justification not restricted solely to the political domain. Article 10 establishes the right to freedom of expression as fundamental in and of itself; however, it also acts as an "enabler" of other rights – including economic, social and cultural rights[4] – most notably in respect of the closely connected right to freedom of assembly where free expression to communicate about, during, and against assemblies is protected.

Undue limitations on the freedom of different forms of expressions have rightly been criticised as undermining democratic values and the rule of law.[5] But the legitimacy of limitations varies dependent upon the context of the content being regulated, with greater levels of scrutiny given to limitations on forms of expressions deemed to be more vital to a healthy democracy.[6] Accordingly, the democratic justification does not apply universally and the rule of law does not adequately explain why the normative framework of the right to the freedom of expression adapts to the different contexts in which it is applied.

This context-dependency – where expression is granted greater protection when fulfilling political or democratic qualities – offers limited protection to the football fan who engages in socially important expression, but which is only of residual importance to the remainder of society.[7] Dicey thought little of this contextual freedom, noting that the freedom of expression in England is "little else" than the "right to write or say anything which a jury consisting of 12 shopkeepers think it expedient should be

[2] n.1, R. Crawshaw (2006), 433; A. Kenyon, 'Assuming Free Speech' 77 Modern Law Review 3 (2014) 379-408, 379.
[3] *Lingens v Austria* (1986) App No. 9815/82 9th July 1986, [41].
[4] UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (3rd May 2011) UN Doc A/HRC/17/27.
[5] n.1 Crawshaw (2006), 436.
[6] J. Frowein, *Freedom of expression under the European Convention on Human Rights* (Secretary-General Compliance Monitoring Unit, Council of Europe, Strasbourg 1997), 10.
[7] The term "social expression" is not in common usage but will be used in this chapter to refer to expressions falling into the non-political category (itself a crude concept).

said or written".[8] In contrast to many other countries, there is no constitutional hook on which to place any defence for contested speech. However, protections under Article 10 are not limited to purely political expression, and police have a clear duty to facilitate a wide range of fan expressions and a corresponding duty not to interfere with those expressions.

A.2 Beyond political expression

The right to the freedom of expression extends to expressions disseminated by any individual, group and type of media,[9] and is still developing to cover "new" forms of expression through jurisprudential development.[10] A question arose during observations from officers who queried the relevance of "protest rights" for the regulating the policing of fan behaviour which they viewed as distinct. The premise of the question was misconceived, but understandable, as the social aspects of the right to freedom of expression have not be discussed in depth in the existing literature or the case-law. Although there have been recent moves to clarify the normative framework of a right to social forms of expression, notably by the Human Rights Council (See Chapter 4 Section A.3.2), previous studies and public discussion have, justifiably, focused on the legal protection given to political expression.[11] Thus is it necessary to set out the legal basis for the right to engage in social forms of expression before assessing if the limitations that apply to Article 10 apply to social expression in the same way.

Nothing in the text of Article 10 suggests that expression is limited to the political realm. The ultimate justification is a truly liberal one; that everyone must be allowed to express themselves – particularly non-conformist expressions - to "exchange error for truth" and to permit human understanding to

[8] A. Dicey, An Introduction to the Study of the Law of the Constitution (Liberty Fund 8th edition, Indianapolis 1982), 235-252.
[9] M. Macovei, *A guide to the implementation of Article 10 of the European Convention on Human Rights* Human Rights Handbooks (Council of Europe 2nd edition, Strasbourg 2004), 7.
[10] UNESCO, *World Trends in Freedom of Expression and Media Development, Global Report 2017/18* (Paris, OUP, 2018), 83- 92, on the freedom of expression of user-generated content in a digital age; n.8 M. Macovei (2004), 15.
[11] See e.g., H. Fenwick, *Civil Liberties and Human Rights* (Routledge, London 2007), 299-802.

flourish undimmed by any tie to existing power structures.[12] Laws LJ built on this concept to conclude in *Miranda* that "free thought, which is a condition of every man's [*sic*] flourishing, needs free expression" and that while a lack of free speech would be an indication of an undemocratic regime, free speech is not "a creature of democracy".[13] This view is supported by ECtHR case-law with the Strasbourg court taking an expansive interpretive approach. Written and oral expression are protected equally,[14] along with pictures, images and actions intended to express an idea.[15] The Court has recognised the right of a person to express their ideas through a chosen mode of dress,[16] which may resonate with football fans as protections on modes of dress can apply even if that form of dress is insulting or potentially libellous.[17]

Identifying the full scope of the right to freedom of expression is complicated by the rarity of occasions when non-political expression is contested in court[18] but underlying principles of an expansive basis for the right can be identified. In a democratic society pluralism, tolerance, and broadmindedness require free expression in all areas of society, without which there is no "democratic society".[19] In *McCartan v Times Newspapers* Lord Bingham described the participation in the communal "public life" of a "modern developed society" that underlies the importance of the freedom of expression.[20] Expression is essential for individual self-development, including autonomy, control, learning, and realization of potential within society.[21] For this reason the development of human faculties through engagement with the arts, in community with others is intrinsically as worthy of

[12] J.S. Mill, *On Liberty* (Parker, London 1859), 51-54
[13] *Miranda v Secretary of State for the Home Department and Ors*. [2014] EWHC 255, [44]-[45].
[14] *Otto-Preminger Institut v Austria* (1994) App No. 1347/87 20th September 1994.
[15] *Muller and Others v Switzerland* (1988) App. No. 10737/84 24th May 1988; *Chorherr v Austria* (1993) App. No. 13308/87 25th August 1993.
[16] *Donaldson v United Kingdom* (2011) App. No. 56975/0914 25th January 2011, [20]; *Vajani v Hungary* (2010) App No. 33629/06 5th March 2010, [58].
[17] *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [36]-[37]; *Stevens v United Kingdom* (1986) App. No. 11674/85 3rd March 1986.
[18] A situation which may in fact be an indication of the ubiquity of politics
[19] n.3 *Lingens v Austria*, [41]; *Handyside v United Kingdom*, App No. 5493/72, 7th December 1976, [49].
[20] *McCartan v Times Newspapers Ltd* [2001] 2 AC 277.
[21] T. Emmerson, *The System of Freedom of Expression* (Random House, Michigan 1970), 6-7; M. Redish, 'The Value of Free Speech' (1982) 3 University of Pennsylvania Law Review (130) 591-645, 591-592.

protection.[22] In parts of society it is football not politics that rouses emotions, strong opinions, and disagreements: an apt description, perhaps, for Mill's "public ventilation"[23] of views, as he could easily have been referring to modern football when he identified robust free speech as "a struggle between combatants fighting under hostile banners".[24]

It was in this context and with this weight of precedent that *Countryside Alliance v Attorney General* was considered by the House of Lords, where the Lords engaged with the question of whether Article 10 and Article 11 applied to gatherings of fox-hunters. Lord Rodger explored whether the elements of a hunt were "integral to their identity". Concluding that when pursuing their interest "they really come alive": for some, the right to express themselves in ways that show off their identity is of a far more practical purpose than the right to express some aspect other aspect of their identity.[25] Further, Baroness Hale added that it was just as important to protect the right to assemble as a group as to protect "some of the things they do".[26] Therefore, protection of the freedom of the assembly of groups such as football fans would be meaningless without also extending protection to a number of their intended activities that have subjective importance for that individual and for the collective identity – a point confirmed by the Human Rights Council in 2020 that the expressive purpose of an assembly can include expressions essentially for asserting "group solidarity or identity" the manner of which, be it music, or clothing are to be protected and only limited in specific circumstances.[27] The freedom of expression of football fans is therefore intrinsically worthy of protection. Consequently, I will move to consider the limits of that protection and how the fans' right can be interfered with by the police.

A.3 The negative obligation to not interfere with free expression

[22] n. 15 *Muller v Switzerland*, [27].
[23] *per* Lord Bingham in *R v Shayler* [2003] 1 AC 247, [21].
[24] n.12 Mill (1859), 58.
[25] *per* Lord Rodger, R (*Countryside Alliance) v Attorney General* [2007] UKHL 52, [96]-[99].
[26] *per* Baroness Hale, n.25 *Countryside Alliance* [2007], [116]-[118].
[27] UN, Human Rights Committee, General Comment 37 CCPR/C/GC/37 23rd July 2020, [14], [68]-[71].

The text of Article 10 succinctly prohibits the state from interfering in the freedom to hold opinions and to receive and impart information and ideas on "all subjects, practical or speculative…"[28]. But these forms of expression are not exhaustive. Article 10(1) incorporates the qualifier, "this right shall include...", opening up scope for interpreting other forms of expression to benefit from the protection. Clearly, the primary aim of Article 10(1) is to prevent certain forms of governmental interference in the lives of citizens. I will analyse the limits of interference in this section before considering the state's positive obligations to facilitate free expression.

In public order policing officers regularly enter situations in which groups of people engage in verbal or physical expressions that could easily be described as "irksome" [29] or unruly that they wish to regulate but which remain expressions that engage the protection of Article 10. As indicated above, the boundaries of protected free expression are context-dependent, and public order officers are required to quickly assess the legality of the conduct in a dynamic context, as well as the appropriateness of their intervention in a context where the legitimacy of interference can shift in a matter of seconds.[30] This means that officers benefit from a broader margin of appreciation when using their powers to limit expressions whilst there is a specific risk of on-going disorder.[31] Article 10 also places duties on those expressing themselves, not all subjectively important expression is protected as there are objective limits to responsible expression. Notwithstanding those points, limitation of protected forms of expression must be justified in accordance with the test of legitimate objective, necessity and proportionality contained Article 10(2). These limits on police power are considered below.

[28] n.12 Mill (1859), 15.
[29] *DPP v Smith* [2011] EWHC 3992.
[30] *DB v Chief Commissioner for Police Service of Northern Ireland* (2017) UKSC 7, [64]-[66].
[31] *Steel and Others v UK*, App. No. 24838/94 23rd September 1988, [101]-[108]; Y. Arai-Takahashi, *The Margin of Appreciation doctrine and the Principle of Proportionality in Jurisprudence of the ECHR*, (Intersentia, Oxford 2001), 105.

A.3.1 Regulation of fan expression by the Public Order Act and common law

States have had a clear margin of appreciation in freedom of expression cases since *Handyside,* in which the ECtHR identified that states are permitted to set limits on acceptable expressions within its own national or local context.[32] The governance of freedom of expression in England and Wales has been based unsteadily on moral foundations, which have influenced the punitive structure of common law and legislative restrictions on expressive conduct that contravenes "public morals".[33] The Public Order Act 1936 introduced legislative sanctions for "words or behaviour" that was "threatening, abusive, or insulting", and likely to result in a breach of the peace[34] - a criterion that intended "to solve the difficult question of how far freedom of speech or behaviour must be limited in the public interest".[35] Following a recommendation by the Law Commission that the "threatening, abusive, or insulting" standard should be applied to a new summary offence,[36] the requirement for a breach of the peace to be likely was removed, with the currently applicable Section 4 Public Order Act 1986 offence requiring intent to cause a person to fear unlawful violence.[37] This expansion of the scope of expressions that can be criminalised has been criticised[38] and potentially includes inflammatory or insulting comments or chants from fans, even where due to the physical segregation in separate stands actual violence is highly unlikely.

In 2014 any intended clarity was undermined when the criminalisation of "insulting" words or behaviour was reversed in respect of Section 5 offences, but not in respect of Section 4 or Section 4A Public Order Act offences.[39] Therefore at present, to use insulting words or behaviour that unintentionally cause harassment, alarm or distress is not an offence, but use of an insult with intent to

[32] n.19 *Handyside,* [48]-[49].
[33] See e.g., R (Whitehouse) v Lemon [1979] AC 617l; *Shaw v DPP* [1961] AC 220; *Knuller v DPP* [1973] AC 435.
[34] s.5 Public Order Act 1936.
[35] *per* Lord Reid, *Brutus v Cozens* [1973] AC 854, 862.
[36] Law Commission, *Criminal Law: Offences Relating to Public Order* (HMSO, London 1983), [1.5]-[1.6] and [2.5]-[2.7].
[37] Later further added to by s.4A Public Order Act to include intentional causing of harassment alarm or distress.
[38] E. Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act', 84 Indiana Law Journal (2009) 851-866, 863.
[39] Repealed by s.57(2) Crime and Courts Act 2013.

make a person believe that violence may be provoked against them by others is an offence.[40] The overlap of these provisions makes quick identification of appropriate offences difficult,[41] especially in dynamic public order policing situations where rapid decision may be required to detain an individual based on fleeting comments picked out amongst other crowd noises.[42] Accordingly the enforcement of public order legislation is almost reliant upon police discretion, their understanding of the legislation, and whether they recognise that "unruly" expression can only be limited if the contextual tests of necessity and proportionality are met.

Not everything that is offensive is distressing.[43] Context is critical to considering what is alarming or distressing. Young people swearing when playing in a park may not translate to those within earshot experiencing alarm and distress.[44] Where police officers are the individuals deemed to feel alarm or distress, their particular experience and fortitude has to be borne in mind as in Harvey where the Court of Appeal found no evidence of officers experiencing harassment, alarm or distress[45] that would meet the threshold of "real emotional disturbance or upset".[46] Accordingly, in the context of a football policing operation those officers who police matches regularly will be used to the usual epithets, or, as often quoted from *DPP v Orum*, "behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom".[47] Decisions about common chants that go beyond the threshold of offensive and into abuse are harder to exclude from the provisions of the Public Order Act in the same manner and cannot be dismissed as commonplace. Nevertheless, chanting and related fan behaviour engages Article 10 and the accompanying human rights analysis such that any intervention to halt abusive chants should still be identified as a necessary intervention

[40] See further: Joint Committee on Human rights Report into Freedom of Speech at UK Universities (London, House of Commons 2018).
[41] J. Dimbleby, 'For freedom of speech, these are troubling times', *The Guardian* (21st September 2015) <https://www.theguardian.com/commentisfree/2015/sep/21/freedom-of-speech-online-witch-hunts-law--bbc> accessed 10th October 2020.
[42] G. Mills, 'Successes and Failures of Policing Animal Rights Extremism in the UK 2004-2010' 15 International Journal of Police Science and Management 1 (2013), 30-44; Note that a police officer can be the person who feels harassment, *DPP v Orum* [1989] 1 WLR 88; *Southard v DPP* [2006] EWHC 3449 (Admin).
[43] n.29 *Smith* [2011].
[44] *Harvey v DPP* [2011] EWHC 3992, [14]; G. Broadbent, 'Swearing and s.5 of the Public Order Act 1986' 77 Journal of Criminal Law 2 (2013), 98-101, 99.
[45] n.44 *Harvey*, [13].
[46] *R (R) v DPP* [2006] EWHC 1375 (Admin).
[47] n.42 *DPP v Orum*

that is not disproportionate. Any legislation – including Public Order legislation - that amounts to a ban on permissible expression not covered by Article 10(2) would have to be read down so as to be compatible under the strong interpretative obligation under Section 3(1) HRA 1998.[48]

A.3.2 Structural limits at the ECHR

A major concern of the drafters of the ECHR was the potential for the freedom of expression to develop to give protection to Nazi ideology. It is possible to identify three structural safeguards within the ECHR which prevent use of the freedom of expression by those promoting harmful views to the detriment of the rights of others. First, the *prima facie* assessment of whether Article 10 is not engaged due to failure to exercise free expression with responsibility, second, the more common limitation clause in Article 10(2) and finally, the rarely identified abuse clause in Article 17.

The tiered approach to determination of abusive expression in the ECtHR's decisions[49] means that certain extreme forms of prohibited hate speech are assessed on a *prima facie* basis as not even forming a cogent expression capable of engaging Article 10(1) protection. This prevents further consideration of the context in which the expression arose and avoids giving any weight to justifications of the abusive expression.[50] Expression that engages the right in Article 10(1) can be limited by the police in accordance with the legitimate objectives set out in Article 10(2).[51] The final approach is by recourse to Article 17, which is an abuse clause providing an identifiable threshold for content-based restrictions such that the freedom of expression cannot be used to destroy the

[48] *R (Rusbridger) v Attorney General* [2003] UKHL 38, [8].
[49] D. Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' 25 Netherlands Quarterly of Human Rights 4 (2007), 641-663.
[50] H. Cannie, D. Voorhoof, 'The abuse clause and freedom of expression in the European Human Rights Convention: An added value for democracy and human rights protection?' 29 Netherlands Quarterly of Human Rights 1 (2011), 54-83, 58.
[51] These are when the interference is *"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

Convention's underlying values of "tolerance, social peace and non-discrimination".[52] Examples of this backstop in actin includes expressions that engage Article 10(1) but also intrinsically undermines the rights of others such as intentionally stirring up hatred or violence,[53] anti-semitism or Nazi apologism.[54] Although criticised for giving national authorities opportunities to limit the protections available to minority groups,[55] and for overly broad interpretation in cases such as Norwood which go beyond the object and purpose of Article 17[56] – recourse to its use is rare.

The ECtHR does not require free expression to respect the subjective views of others so long as the expression does not extinguish the right of others to express themselves or enjoy the right to private and family life.[57] It is also important to note that using Article 17 to disqualify irritating or unruly expression would not be in accordance with the object and purpose of Article 17, nor supported by the subsequent case-law or any evolving interpretation. The impugned expression must be identifiably directed at destroying the core of another fundamental right for it to fall into this category. That narrow reading is vital because if the police wish to interfere with fans' expression it is appropriate to engage in the standard human rights analysis under Article 10(2) which preserves the ability for the police to act to counter criminality with requisite thresholds and safeguards. The type of strong executive power to summarily prevent highly abusive expressions legitimated by Article 17 will only be appropriate in a very small number of cases, mainly involving political protests. In all of my observations there was no situation when fan expression sought to extinguish the rights of others fans, however insulting or derogatory those expressions were at times.

[52] *Ivanov v Russia* App No. 35222/04 20 February 2007; *Norwood v the United Kingdom* App No.*23131/03* 16 November 2004.
[53] *Pernicek v Switzerland* (2016) 63 European Human Rights Review (6), [115].
[54] *Witzsch v Germany* App No. 4785/03 13th December 2005.
[55] n.50 Cannie and Voorhoof (2011), 54; c.f. A. Khan, 'A "right not to be offended" under article 10(2) ECHR? Concerns in the construction of the "rights of others"' European Human Rights Law Review [2012] 191-204.
[56] n.52 *Norwood v United Kingdom* (2004).
[57] n.30 *DB v PSNI* (2017), [50]-[55].

A.3.3 Duties and responsibilities

The exercise of the freedom of expression is to be carried out in accordance with "duties and responsibilities", a phrase unique to this provision of the ECHR. The concept of "duties" has been used to limit protection to those in sensitive roles that, due to their "particular characteristics", cannot benefit from the freedom, such as the military or civil service.[58] In contrast, the level of responsibility when exercising expression is dependent upon the extent of form and reach of the particular expression.[59] Domestic courts tend to identify duties and responsibilities so as to dismiss claims for forms of expression they consider, in their subjective view, are undeserving of protection[60] - such as pornographic images, which Baroness Hale has dismissed as "well below celebrity gossip" in the hierarchy of speech which deserves the protection of the law.[61]

This approach verges on imposing further content-based restrictions on the freedom of expression. Moreover, this occurs in a piecemeal and unpredictable way which does not assist with giving public order officers sufficient certainty when assessing the types of limitation on expression. The weight to be given to individual and subjective importance of expression to a fans' identity apparent following Strasbourg case law, is difficult to square with a hierarchy of protections based on societal importance as designated by an unrepresentative senior judiciary. In a public order context, the responsibilities of protestors or football fans must be contextually analysed with reference to the type of expression and the public forum in which the expression is occurring. The APP guides police to intervene to restrict free expression where people "over step their rights" to "commit criminal offences"[62] but a great many criminal offences are committed in mass gatherings without censure[63] or are tolerated through an exercise of police discretion. Therefore, the identification of a legal thresholds resorts to

[58] *Engel and ors v The Netherlands* App No. 5100/71 8th June 1976; M. McGonagle, 'Restrictions to the expression of opinions or disclosure of information about politicians or civil servants' [1997] *Monitor/Inf* (3) 18-24, 21–22.
[59] n.38 Barendt (2009); *Reynolds v Times Newspapers Ltd.* [2006] UKHL 44, [9].
[60] n.38 Barendt (2009), 860.
[61] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [16].
[62] College of Policing, Authorised Professional Practice (APP), 'Public Order' (30th January 2020) < https://www.app.college.police.uk/app-content/public-order/> accessed 13th March 2020.
[63] J. Gravelle, C. Rogers, 'Policing Public Protests and Corporate Social Responsibility' 39 International Journal of Law Crime and Justice (2011) 111-120, 115.

identification of basic principles. Being assessed to have a lower level of structural or societal responsibility may give football fans greater latitude, to expression themselves through forceful, vehement, or accusatory chants, or flares than those similar expressions which would be more likely to be condemned in a political protests.[64]

Clearly the context of the expression is vital in assessing the legitimacy of the interference. Two factors considered crucial in ECtHR decisions are the pervasiveness of the form of media carrying the expression, and the impact on the affected community is considered.[65] The scope of the responsibility of the individual depends on "his situation and the technical means he uses."[66] This emphasis on contextualisation is useful for police officers deploying their discretion to intervene to supress fan expressions perceived to be potentially causing harassment, alarm or distress as the context of a chant in a sparsely populated stadium concourse should be assessed differently to that of a central shopping street.

A.3.4 Limitation under Article 10(2)

Article 10(2) sets out how officers can limit fan expression without contravening s.6 HRA 1998. Each limitation must serve a legitimate objective and fulfil the necessity and proportionality criteria (See below Sections A.3.4.a - A.3.4.c). The courts should take a rigorous approach, assessing each criterion as though the approach was "underpinned by statute".[67] In reality, domestic courts have a tendency to analyse the appropriateness of the limiting act through the framework of previous domestic precedents, and then ask whether the final result is compatible with the freedom of expression or not.[68] A wide range of measures will constitute interference with the right: the ECtHR

[64] *Taranenko v Russia* App No. 19554/05 15th May 2014; *Belge v Turkey,* App Np. 50171/09, 6th December 2016.
[65] See n.19 *Handyside,* [33] and [52].
[66] See n.19 *Handyside,* [49].
[67] *per* Lord Bingham n.23 *Shayler* [2003].
[68] n.38 Barendt (2009), 862-864; *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15.

considers any "formalities, conditions, restrictions or penalties" to be covered.[69] Certainly rules requiring prior approval before expressions are permitted would be an interference; [70] this applies even in respect of hanging banners in private areas like train stations.[71] It is notable that even minor criminal penalties such as small fines, or seizure of the means of expression (such as megaphones or banners) can amount to a penalty if it was likely to discourage that type of expression from arising again.[72]

A.3.4.a Limitations must meet a legitimate objective

Seven legitimate objectives are listed in Article 10(2) but the "prevention of disorder or crime" is the most common basis for intervention in public order policing[73] but a satisfactory definition is elusive as state authorities commonly exploit claims that they are furthering a "democratic necessity" when limiting expressions, with little supporting argument that the interference chosen was directly aimed at mitigating risks of expected disorder or crime.[74] There is an unfortunate tendency to overly defer to the state's assessment of the risk of expressions causing disorder or crime.[75] As a result, it is difficult to identify the factors that constitute the boundary of legitimate limitations on expression in different factual circumstances, beyond showing a sufficient link between the interfering measures and the achievement of the stated objective.[76]

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[69] *Jersild v Denmark* App. no. 15890/89 23rd September 1994, [88].
[70] Such as the Russian law, where protests seeking prior authorisation (rather than notification) can be limited to banners and flags of a certain type, Federal Law no. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences.
[71] *JK v Netherlands* (1992) App. No. 15928/89 13th May 1992.
[72] n.3 *Lingens v Austria*, [39].
[73] n.15 *Chorherr v Austria*.
[74] T. Mendel, *A Guide to the Interpretation and Meaning of Article 10 of the European Convention of Human Rights* (Centre for Law and Democracy, Toronto 2012), 38; O. Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, 8 German Law Journal 7 (2007), 711-734, 722, and 727-728.
[75] E.g., when intervening to prevent prisoner's private letters *Silver and ors. v United Kingdom* App No. 6205/73 25th March 1983.
[76] S. Greer, *The Exceptions of Articles 8 to 11 of the European Convention on Human Rights' Human Rights Files 15* (Council of Europe, Strasbourg 1997), 32-33.

Taranenko demonstrates the requirement of this link to be sufficiently precise and showing how the courts, taking a human rights approach, can give greater scrutiny to the state's selection of a purportedly legitimate objective. Here the dispersal of protestors from a public building interfered with their expression as there was no threat to public safety through a risk of disorder as the building was otherwise unoccupied.[77] The ECtHR appeared to give greater scrutiny of the link due to the objective and subjective weight of the expression which raises the possibility of greater deference in cases where the expression is of lower importance to the individual or society.

Following *Silver*, the burden is placed upon public authorities to justify every interception with communications on an ongoing basis.[78] The grounds for the legitimate objective need to exist and be capable of being proven to a sufficient standard for each interference. Yet the courts do not require strict election of objectives or scientific precision.[79] In *Abdul v DPP*[80] the appellants protested against the return of a regiment of soldiers from Afghanistan and Iraq; their prosecution was held to be in "pursuit" of the protection of the "rights of others" and the prevention of disorder. The construction of Article 10(2) requiring the "pursuit", (rather than the fulfilment of) a legitimate aim gives even greater flexibility to the police, who do not need to identify a specific right of another or threat of disorder and can simply rely on the likelihood of either of these to fulfil the criteria for interference. However there is a developing requirement for sufficient diligence in identifying the appropriate basis at planning and review stages of public order operations.[81] A common feature among the disorder and national security exceptions is the provision of effective supervision of decisions, and the obligation to review measures to ensure the intervention remains justified.[82] This ongoing review of legality also matches with the police's policy contained in the APP National Decision Model[83] showing that the

[77] n.65 *Taranenko v Russia*, [1], [6].
[78] n.75 *Silver and ors. v United Kingdom* [1983], [290].
[79] n.74 Mendel (2012), 38-39.
[80] [2011] EWHC 247 (Admin)
[81] n.30 *DB v PSNI* (2017), [50]-[55].
[82] n.76 Greer (1997).
[83] College of Policing, Authorised Professional Practice (APP), 'National Decision Model' (30th January 2020) https://www.app.college.police.uk/app-content/national-decision-model/the-national-decision-model/ accessed 24th October 2020.

identification and review of the legitimate objective for the interference is a crucial part of ensuring an interference meets the human rights approach to decision-making.

A.3.4.b Necessity

Necessity adds to the assessment of legality of the interference by requiring police officers to consider the weight and importance of the restriction itself, as public bodies need to consider whether the interference meets a "pressing social need".[84] This assessment involves an element of balancing as (which is inherent to the whole Convention[85]) it may be necessary to intervene to uphold the appropriate limits of free expression, for example in order to protect the rights of others. Recently the Court has made more frequent use of the "least intrusive means" test. This requires that of all of possible measures, the one selected must be the least problematic from the perspective of the individual rights at stake.[86] Particularly in relation to expression, the Court will often substitute "intrusive" for the phrase "less draconian measures".[87] On other occasions the Court has taken a summary view and provided a general analysis of necessity; this is common where the State's reasoning has not established any requirement to take action at all.[88]

There is little scope under Article 10(2) for restrictions on freedom of expression where that freedom is of the utmost importance to the individual or groups – the "in a democratic society" qualifier to necessity is important in assessing the compatibility of measures.[89] In contrast, states have a wide margin of appreciation when it comes to identifying the necessity of limiting public forms of hate speech.[90]

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[84] *Sunday Times v United Kingdom* App No. 6538/74 26th April 1979, [62].
[85] *Soering v United Kingdom,* App No. 1403888 7th July 1989, [89].
[86] See further, J. Gerards, 'How to improve the necessity test of the European Court of Human Rights' 11 International Journal of Constitutional Law 2 (2013), 466-490.
[87] *Urper v Turkey* App No. 22678/93 20th October 2009, [43]
[88] *Daroczy v Hungary* App No. 10851/13 21st October 2014, [33].
[89] *Stoll v Switzerland* App No. 69698/01 10th December 2007, [101]; *Morice v France* App No. 29369/10 23rd April 2015, [124].
[90] n.69 *Jersild v Denmark* (1994).

A broad interference, with a range of objectives and targets, will not be likely to meet the test of necessity as it will not be directed to achieving an identified legitimate objective. Where the target of the interference is broader than the individual or group expressing themselves, it 'sends a message' to a wider audience which can have a major chilling effect[91] does not meet the standard of a necessary restriction. Where the sanctions imposed for the expression are severe or lack sufficient procedural guarantees that can also undermine the necessity of the purported interference as less intrusive measures may have been more appropriate.[92]

The margin of appreciation enjoyed by the national authorities preserves the ability to respond to criminal activity. However, the risk of disorder must be real in order for intervention to be necessary. The applicants in *Belge* were arrested by the Turkish Government for using slogans associated with the PKK, who claimed that the use of the PKK colours, alongside an unspecified reference to the general previous criminal activity of some PKK members, required the limitation of expression of these protestors and fell within the margin of appreciation. ECtHR rejected this argument as these factors were only relevant if the risk of violence was real.[93] Discomfort, or fear of a potential consequence based on prejudicial assumptions are not sufficient reasons to legitimately assert the necessity of an intervening measure when shutting down undesirable expressions. Unusual or non-traditional expressive behaviour that is not likely to cause a serious disturbance is protected.[94]

Assessing necessity in public order operations, therefore, is not a majoritarian analysis balancing rights of those expressing themselves against the putative rights of the general population. A balance which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position must be achieved.[95] The police have a duty to enforce the least restrictive measures open to them in ensuring that freedom of expression is facilitated notwithstanding any anticipated disorder.[96]

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[91] *Karacsony and ors v Hungary* App No. 42461/13 17th May 2016, [79]-[82].
[92] n.91 *Karacsony v Hungary* (2016), [79]-[82]; n.38 Barendt (2009), 851-866, 861.
[93] n.65 *Belge v Turkey* (2016), [26]
[94] n.91 *Karacsony v Hungary* (2016), [91]-[92].
[95] n.83 APP, 'Public Order', 'Core Principles and Legislation' (30th January 2020) < https://www.app.college.police.uk/app-content/public-order/> accessed 13th March 2020.
[96] I. Channing, *The Police and the Expansion of Public Order Law in Britain 1829-2014*, (Routledge, London 2015), 159-160.

Finally, any limitation must be based on relevant reasons, and substantially contribute to the achievement of the identified legitimate aim.[97] In public order operations, this could apply to the prior planning meetings as much as to operational decisions on the ground as necessity adds a new dimension to accountability to the process of selecting tactics and contingencies to deal with anticipated breaches of the peace. As *Redmond-Bate* demonstrates, where the police intervened to stop a speaker, rather than the hostile element of the crowd, the necessity of a measure has to be carefully analysed in relation to the exact usage.[98] A general desire to quell tensions would not meet the strict test of using the least stringent measures under necessity or be a measure sufficiently linked to a legitimate objective.

Before any coercive intervention to prevent a breach of the peace, officers must assess if there are other measures that could avoid that breach occurring. This threshold is high notwithstanding the breadth of this common law power. As set out in the Public Order APP, restrictions of lawful exercise of rights "can only be justified in truly extreme and exceptional circumstances".[99] As analysed by Lord Carswell in *Laporte* the first duty of the police is to protect the rights of innocent citizens rather than to compel the innocent to cease exercising them.[100] Hence, the necessity test is met by action to confront a breach of the peace where the constable had just grounds for believing that peace could only be preserved by that particular police conduct.[101] This high threshold highlights the importance of officers' understanding the desire of football fans to express themselves and understand the range of tactical options available to manage fan expressions with explicit consideration of less intrusive measures such as dialogue approaches or Liaison Officers providing to be ineffective.

[97] n.84 *Sunday Times v United Kingdom*, [62].
[98] *Redmond-Bate v DPP* [2000] HRLR 249, 255-556.
[99] n.83 APP 'Public Order' (2020)
[100] n.17 *Laporte* [2006], [124].
[101] *per* Lord Carswell, n.17 *Laporte* [2006], [127] citing *O'Kelly v Jarvey* (1883) 14 Law Review of Ireland 105.

A.3.4.c Proportionality

Proportionality is the third and final assessment of the legality of an interfering measure. This focuses on the efficiency of the measure to ensure that "sledgehammers are only used [to crack nuts] when nutcrackers prove impotent."[102] Generally proportionality is a factual analysis,[103] and according to Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No 2)*[104] assists decision makers to determine a balance: the following:

> *whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.*[105]

The current structured approach to proportionality is a fusion of UK and ECtHR influences.[106] The approach is preferable to the prior tendency to deploy proportionality loosely, and in a doctrinal[107] or political manner.[108] As set out in *Handyside* and repeated throughout subsequent case-law, the demands of pluralism, tolerance and broadmindedness (without which there is no "democratic society") requires every "formality", "condition", "restriction" or "penalty" imposed on free expression to be proportionate to the legitimate aim pursued.[109]

This adaptation of the classic proportionality test to include a balancing between the individual and community interests echoes the requirement for call to individuals to exercise the freedom of expression with responsibility, and preserves the ability of the police to intervene to protect community interests.[110] However, it would be wrong to look at balancing as a purely quantitative

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[102] J. Rivers, 'Proportionality and Variable Intensity of Review', 65 Cambridge Law Journal 174-191 (2006), 177–182.
[103] See e.g., *R v Alamgir* [2018] EWCA Crim 1553.
[104] [2013] UKSC 39, [20].
[105] The applicability of the test on ECHR cases has been confirmed by the Supreme Court *per* Lord Reed, *R (Lumsden and Ors) v Legal Services Board* [2015] UKSC 41, [26] and [100].
[106] A. Sweet, J. Matthews, 'Proportionality Balancing and Global Constitutionalism' Faculty Scholarship Series (Yale University) 14 (2008), 53.
[107] T. Hickman, *Public Law and the Human Rights Act* (Hart, Oxford 2010), 181-183.
[108] See comments *obiter* of Laws LJ n.13 *Miranda* [2014], [40].
[109] n.19 *Handyside*, [49].
[110] J. Waldron, 'Security and Liberty: The Image of Balance' 11 Journal of Political Philosophy 191 (2003), 192.

exercise of balancing scales.[111] Discussion about the extent of considerations under the general approach to balancing is advanced by others[112] but for the purposes of this chapter concerning Article 10, the relevant assessment will usually be an assessment of public interests (risk of disorder, or rights to the enjoyment of rights by others), compared against individual claims to expression based on its subjective importance for that person or objective importance for society. For this reason, prohibitions on forms of expression will be given a high degree of scrutiny, with arguments considering only the interests of a "majority" population such as the interests of a local population or 'fans' in general, is not sufficient to meet this systematic view of balancing.[113]

Where general measures are implemented legislatively, the Court assesses whether the desired balance between interest was analysed through the state's legislative choices along with the quality of parliamentary and judicial review of the necessity and proportionality of a measure.[114] For common law powers or powers based on police discretion the same principles will be sought. In respect of public order policing, this means courts can review a full range of measures which were previously thought to be off-limits to the courts.[115]

Limited or temporary measures to restrict expression may not be sufficient to satisfy the proportionality test (even if they were necessary in the circumstances). Temporary limits on certain forms of expression can completely negate its value where, for example, a short delay deprives the expression of *all* its value and interest.[116] Accordingly, the time, place and manner of the intended expression are important factors in assessing the proportionality of the interference. For fans this means that expressions linked to certain parts of the match or matchday experience may not be able to

[111] R. Dworkin *Taking Rights Seriously* (Harvard, Harvard University Press 1977), 271.
[112] See further; S. Tsakyrakis, 'Proportionality: An assault on human rights?' 7 International Journal of Constitutional Law 3 (2009), 468-493; n.102 Rivers (2014); T. Hickman, 'The Substance and Structure of Proportionality' Public Law [2008] 694-716.
[113] n.14 *Otto-Preminger-Institut v Austria*, Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarczyk, [9].
[114] *Novikova and ors. v Russia*, App No. 25501/07 26th April 2016; *Animal Defenders International v United Kingdom* App No. 48876/08 22nd April 2013, [108].
[115] *per* Templeman LJ in *R v Chief Constable of Devon and Cornwall ex. Parte. CEGB* [1982] 1 QB 458; D. Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Overs' Cambridge Law Journal [1988] 101-128.
[116] n.69 *Jersild v Denmark* (1994).

be curtailed at all such as goal celebrations which only have value and interest in the seconds after a goal.[117]

The assessment of the reasonable alternative places, times, or manners of expressing support should not be confused with an assessment of the reasonableness of the expression itself which is much less relevant in the proportionality assessment. The perceived unreasonableness of disturbing or unruly expression does not have a significant impact upon the proportionality analysis unless that conduct impacts on the tangible rights of others.[118] As stated by Laws LJ in *Tabernacle*:

> *"Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by those not in sympathy…."*.[119]

Measuring the extent of the negative impact on the rights of others is therefore a requirement before assuming the proportionality of any interference on that basis, and authorities should not engage in a speculative exercise of predicting harm to the public interest.[120] Where there is a risk of disorder, or to the enjoyment of rights by others, the risk identified must be imminent, or else the decision to interfere will proceed on a premature and misidentified basis.[121] The requirement of specificity in risk identification is integral to the proportionality test because the enjoyment of fundamental liberties is at stake. It can be difficult to measure risk, and the lack of indicators to measure levels of enjoyment of rights like expression, makes precise understanding of the subjective importance of expression for fans all the more important for making accurate assessments.[122] Finally, the human rights approach to interfering with fan expression can be achieved only by a meticulous approach to identifying and

[117] All observations took place prior to the implementation of the VAR review system.
[118] *Haw v Westminster CC* [2002] EWHC 2073 (QBD); *Huang v Secretary of State for the Home Department* [2007] UKHL 11. *Van den Dungen v Netherlands*, App No. 22838/93 22nd February 1995, buffer zones prohibiting protests outside abortion clinics dismissed because of the clear justification of the protection of the rights of others.
[119] *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, [42]-[43].
[120] *per* Lord Widgery, *Attorney-General v Jonathan Cape Ltd* [1976] Q.B. 752, [770-771].
[121] n. 17 *Laporte* [2006], [33]-[36].
[122] C. Stott, O. West, M. Radburn 'Policing football 'risk'? A participant action research case study of a liaison-based approach to 'public order'' 28 *Policing and Society* (1)(2018) 1-16; C. Stott, G. Pearson, 'Football banning orders, proportionality and public order'45 Howard Journal of Criminal Justice 3 (2006), 241.

recording grounds for interference, and in particular assessment of the exact risk of disorder caused by the expression or the harm to the enjoyment of rights by others.

A.4 The positive obligation of expression in public order policing

A pure negative obligation to not limit the freedom of expression would not be effective by itself. The rationales of furthering knowledge, democratic society, and self-development would not automatically flourish simply through the absence of government interference with individual's expression.[123] It is therefore appropriate that Article 10 mirrors Article 11 in entailing positive obligations[124] and many of the justifications set out in Chapter 4 Section A.5 regarding the positive obligation under Article 11 are repeated in this next section.

Discussion of public authorities' positive obligations under Article 10 are scarce in the case law. Where this does take place, the focus is on the democratic necessity of independent media or political parties rather than that of the obligations relevant to football policing. Indeed, the complex considerations required to make assessments about expression lead some academics to query the role of courts in securing positive free speech.[125] This section sets out what can be identified from the caselaw on positive obligations under Article 10, separate from that that has been discussed in the previous chapter on freedom of assembly.

The ECtHR evaluates positive obligations by having regard to the fair balance to be struck between the general interest of the community and the interests of the individual, along with the diversity of potential situations and the difficulties involved in policing modern societies.[126] The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the

[123] R. Post, *Democracy, Expertise and Academic Freedom: a First Amendment Jurisprudence for the Modern State* (New Haven, Yale University Press 2012), 6-7; n.1 Crawshaw (2006), 482.
[124] *Fuentes Bobo v Spain* App No. 39293/98 29th February 2000, [38]; *Ozgur Gundem v Turkey* App. No. 23144/93 16th March 2000, [42-43].
[125] A. Kenyon, A. Scott, *Positive Free Speech* (Hart, Oxford 2017).
[126] *Kharaahmed v Bulgaria* App No. 20587/13 21 February 2015, [110]-[111].

authorities[127] but they are the ultimate guarantor of the principles of pluralism, tolerance, and broadmindedness which form the essential basis for society's full enjoyment of the right.[128] Precisely because of the fundamental nature of the freedom of expression,[129] the indivisibility of the freedom requires that those that who hold unpopular views, or belong to minorities, should be afforded additional protections because they are more vulnerable to marginalisation[130] or direct attacks by third parties.[131] The positive obligation achieves this objective, whereas a purely negative conception would not.[132]

The guidance of the Venice Commission assists in understanding how the obligation applies in context. Those participating in assemblies have, as a part of the right to freedom of expression, a choice of the form in which their ideas are conveyed; the symbolic nature of an expression is vital and requires the same level of facilitation as the latter is intrinsic to the former.[133] Unpopular expressions create particular duties for the state, as the likely reaction of an unpopular expression is confrontational.[134] The state should therefore make available adequate policing resources to facilitate both the unpopular expression and any reaction.[135] In this way the facilitation of freedom of expression has been described as "a prerequisite" for ensuring public order: the police must therefore maintain public order through active protection of human rights including expression – provided that that expression is not the cause of disorder.[136]

[127] *Osman v United Kingdom* App No. 23452/94 28th October 1998, [116].
[128] *Informationsverein Lentia and others v Austria* (1993) Series A No. 276, [38]; *Identoba and others v Georgia* App No 73235/12 12 May 2015, [92-94].
[129] *Ezelin v France*, (1991) 14 EHRR 362, 389.
[130] A. Donald, J. Gordon and P. Leach, *The UK and the European Court of Human Rights: Equality and Human Rights Commission Research Report 83* (EHRC Press, Manchester 2012), [5.10].
[131] n.124 *Ozgur Gundem v Turkey* (2000) [42]-[43].
[132] n.128 *Identoba and others v Georgia* (2015), [92-94].
[133] OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Peaceful Assembly* (Council of Europe 2nd edition, Strasbourg 2010), 22; *Women and Waves v Portugal* (2009), App No. 31276/05 6th February 2009.
[134] *Dink v Turkey* App. No 2668/07, 14th September 2010, [137].
[135] n.133 Venice Commission (2010), 28.
[136] *Ivcher Bronstein v Peru* Inter-American Court of Human Rights Decisions and Judgments No. 74 (2002), petition number 11762, 6 February 2001.

Applying the above principles to public order, the police would be under an obligation to facilitate both the means and variety of public expression; particularly, in relation to football, they must take any measure that is instrumental to the expression of fans. The police do not require notice of problems impacting fans before being required to take positive steps to protect their enjoyment of their right, but they do not have to continue to facilitate expressions that become purely threatening and abusive, crossing a "threshold of legitimacy".[137]

The Court in *Appleby* considered the extent of the police's positive obligation to facilitate expression by protestors at a private shopping centre: the availability of alternative venues for this expression, and the weight of countervailing rights of others including the public, outweighed the need to facilitate the specific expression in that specific time and place.[138] However, where the location is the only one where the expression can be effectively exercised, then the positive obligation on the police may require that expression to be facilitated even when contrary to the property rights of landowners. Accordingly, the police may be required to facilitate expression in and around privately-owned football stadiums if the expression is of a nature that could only be effective inside the football ground.[139] That requires a great deal of knowledge, understanding, and good judgment from the police running the operation. The actual risk of expression leading to disorder must be interrogated this is because entirely peaceful gatherings cannot possibly breach the rights of other individuals.[140] Any claim by the club or the corporate entity that their rights are being violated must be treated by embarrassing expression must be treated with scepticism.

Having set out those principles, it is also accurate that positive obligations cannot create impossible burdens: [141] the difficulties in policing modern societies and the choices that must be made in terms of priorities and allocation of resources must be acknowledged.[142] Implementing positive obligations to facilitate freedom of expression is undoubtedly complex and the diversity of potential expressions that

[137] n.80 *Abdul* [2011], [31].
[138] *Appleby and ors. v UK* App No. 44306/98 16th July 2003, [42]-[49].
[139] OSCE, *Human Rights Handbook on Policing Assemblies* (OSCE, Warsaw 2016), 13-20.
[140] *Bukta v Hungary* App. No. 25691/04 25th September 2017.
[141] n.127 *Osman v UK*, [116].
[142] n.1 Crawshaw (2006), 453-454.

might be required to be accommodated is potentially unlimited as each individual may have a valid claim to competing expressions.

B. Ethnographic observations

B.1 Recognition of expression in the build-up to a matchday operation

For most matches observed the police operation commenced around 3-4 hours before kick-off.[143] Deployment took place into town and city centres where fans had already started to gather. The build-up to the match is important to many fans and pre-match traditions are rooted in repetition of simple actions that are symbolic, semiotic, and resonant with cultural meaning.[144] Fans are not a homogenous group, but there is a core of regular match-goers have a primary intention to create atmosphere by collective gathering, chanting, social drinking[145] (sometimes to excess) and engaging in other expressions of partisan support that can sometimes be elided with masculinity.[146] These sit and stand alongside fans who may identify with only one of these behaviours, or fans who seek to express their support in less common ways. It is therefore critical for all officers to retain, at the forefront of their considerations, the vast range of possible expressions that fans are free to engage with without limitation at all stages of the football policing operation.

[143] Category C matches and derby fixtures deployment may be up to 6 hours before kick-off.
[144] G. Armstrong, *Football Hooligans: Knowing the Score* (OUP, Oxford 1998), 169: M. O'Neill *Policing Football* (Springer, London 2005), 24-32.
[145] M. James, G. Pearson, 'Public Order Policing and the rebalancing of football fans' rights' Public Law [2015] 458-475, 466.
[146] J. Cleland. E. Cashmore, 'Football Fans' Views of Violence in British Football: Evidence of a Sanitized and Gentrified Culture' 40 Journal of Sport and Social Issues 2 (2016) 124-142, 134.

B1.1 Planning and intelligence

In respect of the midweek fixtures in European competitions, plans to accommodate various forms of expression was built-in to the operational plan. Planners and PLTs would be in contact with the official and unofficial fan groups from the visiting club to seek information about what behaviour was to be expected and how the police could help to ensure the build-up passed off smoothly.[147] That information fed into the development of the operational order, and discussion of tactics to accommodate specific requests for forms of expression such as unusual chants and stadium displays, as well as discussing whether fans will congregate during the day of the match and proceed to the stadium in a walk-up.[148] Information coming from foreign clubs was not always consistent or reliable:

> "DFO reporting that club and visiting force have no information on fans, "they don't share information with us". DFO reports previous behaviour in other cities has been 'good' but can at first glance seem intimidating if all in black, and not engaging."[149]

Where clear intelligence was lacking, a default plan (reception area and likely walk-up) was put in place and commanders resorted to using their experience and judgment to accommodate unusual or unexpected forms of expression with contingency plans which would only be needed if intelligence about disorder crystallised.[150] This is consistent with the force's positive obligation to facilitate fan expression under Article 10 which applies up until the point where the core interests of the rights of others are significantly affected and was the appropriate response to an intelligence assessment that did not specify clear risks.

For domestic matches indications of specific forms of fan expressions were rarer and more intelligence assessments more anodyne. The focus of reports about behaviour was on previous incidents of violence taken from local or national databases, which would reference expressions such

[147] Informal interview with Planner, European Match 1; Observation, European Match 8, Planning Meeting.
[148] Observation, Silver Commander, European Match 8, Planning Meeting.
[149] Fieldnote, European Match 5, Briefing.
[150] Conversation, Bronze 6, European Match 5, Phase 1.

as "heavy-drinking"[151] or "boisterous on public transport" as the basis for concerns about the potential for these groups to engage in violent behaviour.[152] Less frequently there would be positive indication linked to these expressions, usually with the accompanying descriptor of "normal fan behaviour"[153] being a common refrain, along with information about the league position and form of the club. Therefore, the information about fans' identity, culture, and subjectively important expressions disseminated in the briefings and operational orders was usually limited to the level of alcohol consumption, and the general propensity to violence based on previous history.

Accepting the difficulties of obtaining accurate and detailed intelligence assessments, the default position of the planning phase should be to prepare to facilitate fans in engaging in any expressions of their choice. The competition being played should not affect the level of facilitation embedded in the operational plan but unfortunately there was a stark difference in how the force approached domestic and European fixtures in respect of the positive obligation to facilitate expression. The difference was queried, but the query received only simplistic responses such as "the fans don't want it"[154] which ignores the normative framework, reveals a lack of understanding of how Article 10 is engaged, as well as revealing a lack of understanding of the importance of expressions for fans.

B1.2 Deployment and limitation of fan expression in Phase 1

Those fans drinking several hours prior to a match were of special interest to officers deployed in Phase 1. This was based in part on the preceding briefings and a function of officers wanting to "engage in doing something" as it was a feature even in Category A, low risk of disorder matches that were being policed purely out of public safety grounds rather than due to the risk of disorder.[155] Bronze commanders toured their designated patches, assessing the suitability of Phase 1 deployments,

[151] Observation, Championship Match 1, Briefing.
[152] Observation, League 1 Match 12, Briefing.
[153] *e.g.*, Observation, Premier League Match 4, Briefing.
[154] Conversation, Bronze 6, European Match 5, Phase 3.
[155] Interview, Gold Commander, Premier League Match 7.

but also observing the behaviour of fans in order to convey tangible intelligence to Silver control.[156] Usually the first sweeps would result in nothing to report except raw number of home and away fans, but particularly early drinking would be commented upon as abnormal and suspicious – as with one Sergeant shocked by fans drinking in Wetherspoons at 8:30am, ahead of a 12:30pm kick-off.[157]

Pubs and bars are important sites in the policing of football matches. As drinking in pubs is a subjectively important expression for some fans, interventions with drinking fans must proceed on the basis of an identified legitimate objective, actual risk, and be necessary and proportionate. Officers were therefore at risk of acting contrary to human rights law when requesting a pub to close purely out of an abundance of caution[158] or in order to encourage fans to get onto coaches and go home[159] as there was no consideration of less intrusive measures which could have been effective such as dialogue and encouragement, and thus there was no necessity of the measure.

The proportionality test is trickier to analyse as fulfilment of the criteria for successful balancing depends on whether officers are required to actually go through the various considerations[160] or just settle on a result that is balanced. In the above situations no considerations that could evidence an assessment of the proportionality of the measure were expressed prior to the decision being made. It is, therefore, difficult for the force to demonstrate that either the decision-making process, or the result fulfilled the human rights approach - as opposed to achieving other operational objectives.

A potential proportionality consideration was identifiable in those rare cases when officers directed licensees to permit "local" or "regulars" in order to avoid an unwanted mixing of opposing fans.[161] Ordering a pub to close where an identified risk of disorder has crystallised, or where disorder is

[156] Observation, Bronze 3, League 1 Match 4, Phase 1, a function also engaged with by the Spotters.
[157] Observation, Silver Control, Premier League Match 1, Phase 1
[158] Observation, Bronze 2, League 1 Match 4, Phase 1.
[159] Observation, Bronze 2, League 1 Match 3, Phase 3.
[160] In these examples the considerations include; availability of alternative locations, the temporary nature of the measure only affected one part of their day, and the presence or lack of others nearby who rights were being affected by boisterous or dangerous expressions.
[161] Observation, Bronze 2, League 1 Match 3, Phase 3.

ongoing[162] would likely fulfil the necessity and proportionality criteria, but where the risk has passed any direction should be lifted, and a decision left to the licensee to consider reopening.

Spotters police more matches per season than other officers: they observe one set of fans twice a week at both home and away fixtures and are attentive to what they perceive as unusual behaviour. At a low-category fixture spotters entered a regular pub for home fans in the town centre, ostensibly to look for and identify those fans that may be looking to engage in violence later in the day. The pub was mostly empty but the hostile reaction of two older gentlemen meekly propping up the bar caught the attention of the spotters, who seemed riled that the gentlemen did not respond to a friendly greeting. Outside the officers identified them as "old risk" who had been involved with football violence previously and who hadn't been seen at a match in a while. That, together with their refusal to say hello, caused the spotters to consider that "there's something wrong with their attitude" and "they might be up to something".[163] For the rest of the shift the officers pursued the men from pub to pub, only reluctantly engaging in other intelligence gathering activities:

> "…after circling around van pulls up behind them on the lane towards the Con Club. Man 1 shouts "fucking problem mate we're having a beer" Spotter 2 "I've got no problem with you, it's your attitude, its not on". Men enter club. Spotter 1 speaks with [*Spotter*] 2 and decides to ask the bouncer to extricate the two men from the larger group inside who are now collectively chanting 45 mins to kick-off. At this time two police cars are parked at either end of the narrow alley. For more than an hour now, all cops on this operation have been focused on these two fans whose only action so far has been to refuse to say hello and move from pub to pub."[164]

The fans' details were formally taken, with an intelligence report created about their "behaviour", and although the fans were permitted to go to the match their whole pre-match build up had been interfered with by officers on unconvincing grounds that they posed a risk – a basis that was not

[162] Observation, Bronze 3, Premier League Match 13, Phase 1.
[163] Observation, Spotter 1, League 1 Match 5.
[164] Fieldnote, Observation of Spotter 1, League 1 Match 5, Phase 1.

critically appraised at any point and did not qualify as a legitimate objective as there was no specified risk to crime or public order. At no point was their freedom of expression even considered by officers. As explored above, interference does not have to amount to an actual "penalty" in order to impact upon expression. Indeed, much police interference in the pre-match phase will amount to minor penalties rather than strict sanctions, but such low-level interferences must nonetheless be necessary in a democratic society. Necessary police actions, such as filing an intelligence report, could be achieved through less intrusive means that did not involve chasing, or removing fans from pubs where they may be engaging in subjectively important forms of expression.

B1.3 Facilitation during Phase 1

Where fans are accommodated, other operational objectives may be achieved through or alongside the positive facilitation of fans' expressions. For domestic fixtures this can take the form of recommended areas of town or specific 'away' pubs. At one League 1 club an away pub near the ground is suggested to visiting fan groups. The police negotiated with the licensee to permit fans to put up flags and banners in the car park and two officers were deployed nearby (not at the pub) to report and respond to concerns – but none arose, and fans were described as in good spirits by spotters.[165]

Facilitation of such prominent displays of fan identity was rare. The proximity of the ground, position of the pub in relation to the main road and the low-level policing made facilitation of expression especially effective. Moreover, this tactic was intentionally directed to provide for freedom of expression: commanders remarked that it was "perfect for fans who want to have a beer and a sing-song"[166]. The benefits were recognised; commanders identified that "giving them somewhere of their own" was a vital part of their "big day out".[167] A split in understanding was apparent, however, with one well-intentioned officer travelling past the pub asking the Bronze commander over radio if he

[165] Observation, Bronze 2,League 1 Match 5, Phase 1; Observation, Bronze 1, Cup Match 2, Phase 1.
[166] Observation, Bronze 2, League 1 Match 5, Phase 1.
[167] Conversation, Bronze 2, League 1 Match 5, Phase 1.

knew about the "50 or so noisy risk fans in The Watering Hole", a question met with sighs and a polite reply through gritted teeth.[168]

This facilitative approach is not replicated across the force or across fixtures at the same ground. This was explained by commanders variously as a logistical difficulty based on the lack of ideal location,[169] or of resources to maintain segregation on public safety grounds.[170] Commanders at larger clubs also expressed a desire not to specify away pubs: "fans of either team are welcome in any pub, I don't like splitting it up because then you get all the attention on one place and that can cause problems".[171] Yet the preferences of officers, or references to generalised concerns are not sufficient grounds for failing to facilitate fan expression if certain forms or locations of expression were particularly sought out by fans. As recognised by one senior officer, even having low-level policing of an urban centre can create "safe" or facilitative conditions for even partisan displays of support across the city without diverting resources away from other operational objectives for any specific tactical operation.[172]

Specific tactical operations aimed at facilitating fan expression are implemented for fixtures involving larger clubs. More concretely, this occurs at European matches where operations encourage expressions throughout the build-up, starting with provision of a dedicated area for fans to gather. The combination of pub terraces and street furniture created a very public forum for expression and encouraged interactive dialogue within and even without the crowd – as passers-by would photograph, film, watch, or even sometimes join in the chanting and drinking. The primary aim of this tactic was to successfully manage the crowd from a public order perspective, but the intentions of the fan groups were factored into the planning through direct and ongoing liaison:

[168] Observation, Bronze 2, League 1 Match 5, Phase 1.
[169] Conservation, Silver Commander, Premier League Match 13.
[170] Conversation, Silver Commander, League 1 Match 7.
[171] Conversation, Silver Commander, Premier League Match 12, Phase 2.
[172] Conversation, Silver Commander, Premier League Match 12, Phase 2.

> "It obviously makes it easier for us to control them, we know where they are. But it is also a good place for them. You've got pubs there, its relatively self-contained which is what they wanted, and we can always close it off or expand it depending on numbers."[173]

A number of officers highlighted the acoustic features of the area – "it resembles a stage"[174] – as well as the suitability for surveillance, showing the pursuit of dual operational objectives.[175] The visibility dynamic worked both ways. As a central site with nearby raised walkways the fans' displays would be seen by one of their intended audiences, the host city, and in turn the fans could be seen by the police on the ground and in the control room. This demonstrates how police tactics can fulfil the positive obligation to facilitate whilst not undermining their other objectives.

For every European match advice was given to officers that in the facilitated area they should only intervene if behaviour rose to the level where violence was imminent. Officers were asked to use their judgment, but to tolerate low-level contraventions.[176] Street-drinking, ignition of flares and the throwing of plastic cups were particularly referenced as falling within this latter category. Street-drinking in particular was encouraged by disapplication of a local by-law for the period of the operation.[177] A range of fan behaviour took place in and around this area that would lead to sanction if it occurred outside this context, including exuberant chanting, ad-hoc and coordinated flare displays and jumping on tables. This tactic of facilitating and toleration minor transgressions of an otherwise peaceful assembly fulfils a human rights approach to policing of fans, and this success was evident in the passionate participation of not only the fans in the zone, but also participation of passers-by and curious members of the public.

Bronze commanders assigned to oversee this part of the operation were invariably experienced commanders, and in briefings they laid down clear thresholds of acceptable behaviour to staff. Interference with expression only occurred where the fans encroached onto the flight of steps on the

[173] Fieldnote, Conversation with Planner, European Match 2, Phase 1.
[174] Observation, Bronze 6 TAC, European Match 3; Silver, European Match 1.
[175] *e.g.*, Planner, European Match 1; Planner, European Match 2; TAC, European Match 3.
[176] *e.g.*, Observation Briefing, European Match 3.
[177] Observation, Silver Commander, European Match 3, Briefing.

front boundary, or when capos attempted to stand on top of a pub signpost. Both of these interventions were justified on the grounds of public safety, and would probably meet the necessity threshold, and both elicited proportionate responses that were limited to achieving a satisfactory level of safety.

The peak of facilitation occurred during a European operation when a capo from a prominent and energetic fan group came to the Bronze commander and asked for permission to conduct chanting from a concrete promontory beside the flight of steps, right next to the police command point:

> "The Bronze TAC refused the fan's request, but Bronze 6 had a wry smile in overruling. The fan looked ecstatic and threw himself up on the step. A wobble caused some nervousness. Bronze 6 said 'leave him, he's fine'. The crowds' attention quickly turned to the conductor who like a jester controls the crowd's movements. The fans appeared more unified, and the officers were enjoying the performance. The TAC was grinning from ear to ear, and Bronze 6 even took a snap of the scene."[178]

The facilitation of this particular expression may not have been for totally selfish reasons and the duality of police conduct was again apparent when the commander sought a favour in return from the capo.

> "After about 15 minutes of chanting Bronze 6 asked the capo to get the now largely unified and compliant fans to start to move off to form the walk-up, a message he passed on in the vernacular."[179]

Nothing prevents expressions being facilitated in order to achieve other operational objectives, particularly where fan expression has been facilitated in situ for multiple hours and logistics require officers to prompt the commencement of a voluntary walk-up.

[178] Fieldnote, Observation, Bronze 6, European Match 5, Phase 1.
[179] Fieldnote, Observation, Bronze 6, European Match 5, Phase 1.

B1.4 Unnecessary or disproportionate limitation of the expressions of minority groups

I observed numerous examples of officers acting to limit expressions that were characterised as unusual. Police officers consistently interpreted the actions of small groups of fans exhibiting distinct identities as symbolising 'risky behaviour'. Often, the reaction of officers to such fans was to limit their expression without a clear legitimate objective identified, and in ways that were unnecessary or disproportionate. One element of fan expression that was particularly troubling to officers was unrestrained exuberance in public spaces – including loud chanting, aggressive arm movements, and collective actions such as swaying or jumping – with officers seeing warning signs, even though such behaviour would be seen as natural if the fans were inside the stadium. Outside of the stadium and nearer to town centres officers classified these expression as "anti-social behaviour" that indicated a risk of disorder.[180] As considered above throughout the discussion of the legal framework, the context of expression is an important consideration when assessing the legitimacy of an interference[181] but so is the subjective and objective importance of the right which was often (but not always) lacking from officer's discussions about unusual and unruly expressions, thus showing a lack of appropriate balancing as required by proportionality.[182]

This method of making quick judgments without engaging in balancing was even present during operations for European fixtures. Minority groups of fans who gathered in other parts of the city were monitored with a cautious awareness. Where their behaviour manifested as "aggressive chanting" they were encouraged to join the main fan gathering area.[183] Officers expressed that this was for reasons of convenience, and due to a lack of resources to facilitate their separate high-amplitude[184] expression elsewhere, as opposed to low-amplitude expressions which could tolerably be left to intermingle with

[180] Observation, PSU Inspector, Premier League Match 14, Phase 1.
[181] See Section A.3.3
[182] To paraphrase Laws LJ's words – the freedom of expression is only worth having if it protects unruly expression.
[183] Observation, Bronze 4 in conversation over radio with PLT, European Match 6, Phase 1.
[184] A term selected to neutrally reflect an expression that deviated from an expected norm in its quality, scope, or intended impact.

non-football crowds. The rights of those fans would be engaged were the measures coercive, or if the encouragement to join the facilitated area was design to supress their less usual forms of support as otherwise those fans have an equally valid claim to have their preferred expressions facilitated. The limits of this obligation exist in the ability to alter the time, place, or manner of either the majority or minority expression in order to accommodate the alternative group, with a final safeguard for the police that they cannot be required to meet an impossible burden. Given the smaller number of the splinter groups it would be reasonable to conclude that officer's experience with similar situations in protest policing indicate that attempts at facilitating other group's expressions should be made within the boundaries of what is possible in the circumstances whilst not significantly affect the ability of the force to facilitate the main group of fans.

Usually when such groups exhibited high-amplitude forms of expression, they were picked up and tracked by spotters or CCTV operatives. Commanders would make a decision about whether the group posed a problem or not based on available information and reports from officers on the ground, with the determination made dependent on the number of "risk fans" and the distinctness of the expression. When one group of away fans at a Premier League match took a detour to walk through the central retail district rather than take public transport as expected:

> "Silver monitored the group on camera, previous reports of a group upsetting shoppers on main thoroughfare chanting loudly and acting drunk. Group appears to be singing but not significantly bothering people…no sign of criminality….Silver comment "we need to check the risk element in there" and later "can we get rid of them…to the tram get them to the ground" he appears satisfied with what appears to him to be a quick solution but he looks around the control room for support, a look which is met with nods of assent nobody raises an objection beyond logistical issues with committing officers to shadow them to the ground."[185]

As the group was identified as a potential risk, the group were encouraged onto public transport and arrived at the vicinity of the ground more than an hour before kick-off, with no option but to go to the

[185] Fieldnote, Premier League Match 9, Phase 1.

stadium. The intervention completely fettered their opportunity to express themselves in a manner of their choosing. Interfering upon the rights of others would have been a legitimate justification available to the police, but at the time of observing the group there was no apparent or imminent impact on the rights of those passing by. Similarly, their removal to the vicinity of the ground was disproportionate and less intrusive means to prevent the interference of others existed ranging from visible monitoring, speaking to the fans, or encouraging them towards any number of proximate pubs or bars where their fellow fans were congregating.

Fans who arrived at the stadium late, or left early were subject to equally uninformed assessments.[186] At one League 1 match the home team added to their poor run of form by going 3 goals down within the first 20 minutes. When around 12 fans left in a loose group, officers immediately panicked and summoned resources to stop them leaving the car park as the Bronze commander feared they were pre-planning disorder with away fans because "why else would they be leaving after having paid all that money?".[187]

When a group of away fans, after seeing their team gain an unlikely victory, walked towards a quiet city centre bar exhibiting loud chanting, arm movements and some expletives towards home team fans, spotters communicated to the Silver commander their fear that they may incite an aggressive reaction from any home fans they may meet later that evening.[188] The Silver commander, relying on descriptions and assessments from the ground, agreed in principle that any confrontation could result in disorder and agreed with the spotters' proposal to issue Section 35 notices to disperse the group from the city centre.[189] The spotters conveyed the fans' representations that they "just wanted to have a drink in a bar in the city centre". No evidence of actual risk was apparent at the time, simply a fear that if they carried on drinking, they would not be able to control their provocative chanting towards home fans later in the evening. Accordingly, the s.35 notices were not necessary to prevent disorder as none was imminent or even likely until much later in the evening. The notices were not proportionate,

[186] Observation, Bronze 2 Loggist, Premier League Match 4.
[187] Observation, Bronze 1, League 1 Match 1, Phase 2.
[188] Observation, radio communication from Spotter 1 to Silver, Premier League Match 3, Phase 3.
[189] Observation, Silver, Premier League Match 3, Phase 3.

as they were issued to every individual in the group and required them to take a train from a specific station immediately, and so there was no fair balance between their interests and the community interests and, finally, much less intrusive means could have been deployed to achieve the same objective. The reason for alternatives not being considered became apparent when I questioned the Silver commander:

> "Silver looked a little sheepish when given an update that the group of 18 fans were walking compliantly to the station. He checked with the Spotter the justification for the s.35 notices, "what did you put down as the reason again" Ans: "risk of disorder if they came into contact with home fans" Silver: "was it the same for all of them" Ans: "yes". I asked Silver further if the correct procedure was followed, he said "there wasn't any immediate risk, they weren't fighting, but we couldn't risk something happening later and we can't be here all day". Stand-down [to complete the operation] commenced about 25 minutes later as the fans got on a train.[190]

Therefore, resource constraints as well as risk aversion played a part in the active limiting of fan expression. The contemplation of possible disorder, even where none was apparent in the present circumstance, was for these officers sufficient justification to interfere in minority expressions as part of a summary analysis that did not even recognise these fans' equally valid claim to the freedom of expression.

B1.5 Walk-ups

For midweek matches in European competitions, the facilitation of expression continues through to the police providing the resources to allow the fans a walk-up to the stadium. To varying degrees, fan movement is controlled (as discussed in chapter 6), but expression within the corralled group is largely unregulated. Certain elements of the walk-up tactic impact upon the effectiveness of the fans'

[190] Fieldnote, Premier League Match 3, Phase 3.

enjoyment of the freedom of expression. One planned walk-up route takes the escorted fans under a series of railway bridges, which amplifies the vocal and visual expressions of sonorous chants and colourful flares which bounce light of the walls.[191] Fans reacted very positively on each occasion this route was taken, and many fans had phones out recording the cacophony created, meaning that the expression was conveyed not just to the local population but to thousands of viewers live online and uploaded clips. Facilitation of this specific expression was intentional: the police stopped the crowd movement for a period of several minutes just as the most vocal fans were in the perfect position to maximise the acoustic effect. PLT officers told me that they did this because they knew the fans wanted opportunities to sing collectively for the camera, and that this point near the start of the walk was aimed at keeping them happy for the remainder of the lengthy journey ahead.[192] The PLT officers were aware of the benefits of facilitating expression, and they expected greater compliance from the crowd "when it got a bit tricky later on" and there was a little bit of give and take.[193] When PLT officers actively engaged with fans in continual dialogue on walk-ups there was noticeable flexibility in policing tactics, which were responsive to fan concerns. Various forms of fan expressions remained relatively unaffected by the large police presence en-route to the ground. Even some illegitimate expressions – such as one occasion when flares were waved provocatively towards passing buses – were not treated as abnormal and requiring a reaction. The PLT would reassure commanders that the behaviour would not step over the mark and was limited to a handful of individuals within the larger group of 2,500 fans. Accordingly, there was no interference with the expression of that minority group.

A contrasting example occurred on an alternative route, where no opportunity was given for the fans to gather and engage in collective expressions during the early part of the walk-up, and where dialogue was only ever intermittent as the PLT walked some distance ahead of the fans. Partially because of this, fan group leaders were engaged in conversations about the best opportunity to use and discharge flares on the walk-up. Instead, officers on the escort cordon took enforcement measures to

[191] Observation, PLT 1, European Match 3, Phase 1.
[192] Conservation, PLT 1, European Match 3, Phase 3.
[193] Conservation, PLT 1, European Match 3, Phase 3.

remove backpacks containing flares from fans, an even larger number of whom were then visibly distressed by the confiscation of what appeared to them to be a fundamental part of their pre-match ritual.[194] A significant number of the fans attempted to leave the walk-up, dispersing where they could by taking alternative turns at junctions, or going slow so as to drop out the back of the police lines. The enforcement action and confiscation of flares at this fixture was unusual. Silver and Bronze commanders had expressed a desire to prevent flares entering the ground, but that usually meant they were happy to permit flares to be lit during the build-up on the day, or during the walk-up:[195]

> "Bronze Commander related a story I have heard several times before, of the striking impact the tactic to encourage the discharge of flares had when a Dutch team visited, and on the walk-up had approached the main road full of home fans, the flares were lit in a coordinated manner 500 metres from the stadium and together with the noise made by the fans, the impression stuck with the officer who had never seen anything like it in domestic fixtures."[196]

This balance of facilitating expression – only intervening to place proportionate limits where necessary, such as not allowing flares inside the ground on the basis of public safety – was expressed by one senior officer as "the ideal position".[197] But the policy was not applied during the incidents of confiscation above, where the fans were still more than 1 mile away from the stadium. The decision to intervene, made by PSU inspectors deployed to the walk-up, was not evidence of a human rights compliant approach.[198]

Policing of walk-ups can also take on a punitive character, and serve to completely supress expression within the group with negates any initially facilitative intention. One League 1 fixture between local rivals, in a relegation battle near the end of the season, was the scene of a planned deployment of 2 PSUs to manage the risk of the walk-up of away fans from their allocated pub. The Bronze commander initially reported that there had been no trouble as they had been "in good spirits",[199] but a

[194] Observation, European Match 6, Phase 1.
[195] Observation, Briefing European Match 6.
[196] Fieldnote, European Match 7, Phase 2.
[197] Conversation with Bronze 6, European Match 7 Phase 2.
[198] Observation, European Match 6, Phase 1.
[199] Observation, radio communication from Bronze 3 to Bronze 1, League 1 Match 9, Phase 1.

tight cordon would be applied for the walk-up anyway, even though the fans numbered only 30-40 with 12 risk-fans. As the group came into view of the stadium cameras the fans were stony silent, not animated, or engaging even with each other, and they were surrounded by one police offer per person.[200] The Bronze commander in charge stated later that "we did our job, there wasn't a peep out of them…it was necessary with the risk like…".[201] Rather than facilitate the fans' free expression, it had been negated without a legitimate basis, through use of a tight cordon that certainly wasn't necessary or proportionate. However, tight cordons do not always supress expression this way, and the impact depends on the context: other League 1 fixtures saw larger groups of fans walking-up and maintaining their collective expressions to the turnstiles, but usually these tactics had a less disproportionate number of officers carrying out the task.[202] Accordingly, a proportionate level of deployment may lead to less intrusive interferences and therefore meet the standard of proportionality.

B.2 Expression inside the stadium

B.2.1 Police obligations within the stadium

The start of the game usually led to a reduction in the interaction between police and fans, a natural result of the fans engaging with opposing supporters or action on the pitch. The police also withdrew from front line positions, in keeping with their differing function on private land where the police are specifically invited to perform subsidiary duties in support of club management of the crowd. The start of the match usually provided a clear example of collective expression, as fans traditionally place an emphasis on the creation of an aurally intimidating atmosphere for visiting players and fans.[203] Police concern was notably absent from these first parts of matches. Loud partisan chants were seen

[200] Observation, League 1 Match 9, Phase 1.
[201] Conservation with Bronze 3, League 1 Match 9, Phase 2.
[202] Observation, Silver control, League 1 Match 2, Phase 1.
[203] R. Spaaij, 'Men Like Us, boys Like Them' 32 Journal of Sport and Social Issues 4 (2008) 369-392.

as "natural excitement"[204] and not cause for concern. This pattern was only broken by the lighting of flares,[205] an early resort to extraordinarily offensive chants (see below), or an early goal.[206]

The police's obligations not to breach human rights apply at all times, including when they are engaged on private property, [207] and particularly where they are carrying out a function that is in the public interest.[208] Positive obligations also continue to apply on private property where that is the only location that permits their effective expression.[209] Therefore, the police have an obligation to prevent stewards from unnecessary interference with the expression of fans. This obligation is not widely recognised by officers but amidst a sometimes uneasy relationship with the club safety officers they would direct stewards to refrain from interfering to not "rile them [the fans] up" or to only engage in ejections with police support – for which I understood to also mean police scrutiny of the club's decision-making process. Although not universally observed, these findings support a limited recognition of the obligation of the force to ensure only justifiable interventions in the enjoyment of expression by fans. This was not identifiable in officer's express human rights language, but a partial human rights approach nevertheless contributed to fulfilment of the positive obligation inside the stadium.

The role of the force is less clear in respect of their negative obligation inside the stadium. Officers occasionally made the point that "there is no right to watch a football match".[210] However the ability of fans to have some control over the time place and manner of their expressions is a vital consideration for the police to bear in mind in the decision-making process.[211] For fans supporting their team (or opposing the opponent) the only truly effective location for their expression during a match is inside the stadium. Where the removal of a fan from a stadium negates the effectivity of their

[204] Conversation, Bronze Commander, Premier League Match 7.
[205] Observation, Ground Control Room, European Match 7, Phase 2.
[206] Observation, Ground Control Room, League 1 Match 9, Phase 2.
[207] *Storck v Germany* App No. 61603/00 16th June 2005; *per* Baroness Hale *YL v Birmingham City Council* [2007] UKHL 27, [56].
[208] *per* Parker L.J *A, R v Chief Constable of B Constabulary* [2012] EWCA 2141, [35].
[209] n.138 *Appleby v UK* (2003); n.71 *JK v Netherlands* (1992).
[210] Conversation with Spotter 1, League 1 Match 5, Phase 2.
[211] n.10 Venice Commission; n.69 *Jersild v Denmark* (1994).

chosen expression, the freedom of expression is clearly engaged and limited by any police interference which must meet the standard for limitation set out above in Section A.3.4.

The majority of ejections were carried out solely or primarily by the club stewards to whom the same duties to not apply. Officers did occasionally assist in ejections, and made assessments about the legitimacy of actions that disqualified the fan from remaining in situ on behalf of steward – such as coin-throwing, or setting of flares – which officers believed disqualified them from any legal protection. Accordingly, the human rights obligations were engaged by this conduct even if, as repeated by officers, "stewards have the primary responsibility".[212] Unfortunately, there appeared to be no recognition that fans rights were being engaged by standard tactics such as ejecting fans. On one occasion a 17-year-old fan was initially ejected by stewards on the advice and direction of the police after being identified from photos posted on social media in which he warned the away fans to "watch their backs", combined with an emoji knife. The post was clearly not intended to be taken as a serious threat, but the image was interpreted as aggressive provocation – with a 12-minute discussion about whether the knife in the picture was real, and if so, how to check the fan was carrying it.[213] Officers were motivated by public safety considerations and prevention of crime and disorder, but at no point expressly engaged in human rights analysis. Nevertheless, an element of necessity and proportionality appeared in an eventual reconsideration of the decision to eject after detaining the fan for a short period outside the stadium, after officers satisfied themselves that post was ill-advised rather than ill-intentioned.[214]

The legitimate objective for intervening in free expression inside the stadium is motivated by public safety rather than public order and legal responsibility for safety lies with the respective clubs. Commanders' relationship with the clubs varies from club to club and even match to match. There is constant negotiation between the police and the club about spheres of responsibility, and despite officers only providing "support functions and help that is specifically requested"[215] officers were

[212] Observation, Ground Control Room, League 1 Match 9, Phase 2.
[213] Observation, League 1 Match 7, Phase 1 and Phase 2.
[214] Observation, League 1 Match 7, Phase 2.
[215] Observation, Bronze 1, League 1 Match 6, Phase 1,

observed working closely with the club on a range of operational matters, including variations of ticketing policy, deployment of stewards, communications and decision making.

During one fixture, it became clear that concerns about limiting legitimate fan expression was a key motivation of some of this close cooperation with the clubs – for example at a match where, exceptionally, the away fans were split between two stands. Movement was permitted between the two at half-time but prevented in the second half to prevent a rush to the segregation line near the end of the game.[216] This appeared to be a proportionate limitation on fan movement with necessity rooted in specific intelligence of this weakness being tested by fans at a previous fixture. A similar situation could be observed at a match where an adjacent pub was opened at half-time to serve fans quicker and allow them more room to move about the concourse if they didn't enjoy the tightly confined spaces where "beer chucking"[217] was in full flow.[218] The Bronze commander at this latter fixture described his function as "making sure the fans have a good time, and that they do it safely".[219] But this also achieved a human rights compliant result without express consideration as direct intervention with the beer chucking fans was not necessary as less intrusive means of achieving public safety was available to the commander.

Despite this accommodating approach on some occasions, the facilitation of expression was not consistent. At the same ground on different dates with different commanders there was inflexibility in tactics that though initially sound did not accommodate the developments of expression through the course of the match.

> "Officers were extremely keen to cordon off the last 5 rows of seating in order to keep the away fans isolated from the corner of the stand. The fear was that fans would come into contact, but 8ft fences blocked the possibility of a physical confrontation…..Goal scored, wild celebration fans forward down and onto the pitch, fans moving sideways to escape crush,

[216] Observation, League 1 Match 7, Phase 2.
[217] A. Jacks, 'Curb your enthusiasm: concourse behavior has consequences' (Football Supporters' Federation blog, 6th January 2017) <http://www.fsf.org.uk/blog/view/curb-your-enthusiasm-concourse-behaviour-has-consequences> accessed 5th October 2018.
[218] Observation, League 1 Match 3, Phase 2.
[219] Conversation, Bronze 1, League 1 Match 3, Phase 2

> other fans rushing towards the end of the stand massive roar and all with arms waving in the area. The sterile area was lost. Officers now pushing fans back out of the sterile area, reports of batons drawn, fans detained for breaching the sterile area then arrested and ejected for struggling with the stewards. Bronze Commander comment to me, "you'll get a lot of human rights issues out of today's match then"[220]

That comment stuck with me as I considered the lack of reference to, and consideration given to human rights generally in the decision-making process of the club control room, notwithstanding that officers knew of my presence and theme of research. Although decisions were made quickly, and often with limited information, it is still necessary to consider the human rights implications of decisions impacting upon the various expressions inside the stadium.

B.2.2 Limiting unruly forms of expression in accordance with the human rights approach

The use of flares, smoke bombs, or similar pyrotechnics in confined spaces such as stadium concourses, or stands are seen as a public safety issue by the police due to the danger of smoke inhalation or burning. Fans persist in using flares and 'pyros' as highly visible forms of expression.[221] The issue of how and when to intervene in the interests of public safety in a crowded stand or concourse was regularly debated by officers. Commanders identified a point at which the behaviour of a few individuals impacted "disproportionately" on other people's enjoyment of the match for their intervention.[222] This broadly maps onto an analysis of necessity of an interference such as an ejection but without the officers expressly analysing less intrusive means of securing public safety, e.g., using

[220] Fieldnote, League 1 Match 5, Phase 2.
[221] A. Gurden, 'No pyro, no party?' (Football Supporters' Federation blog, 17th March 2014) <http://www.fsf.org.uk/blog/view/no-pyro-no-party> accessed 10th October 2018.
[222] Conversation, Silver, Premier League, Match 4, Phase 2; Although one commander identified a "zero-tolerance" approach and directed intervention as soon as flare was lit, Conversation, Bronze 1, League 1 Match 3, Phase 2.

PA announcements. Elements of the proportionality balancing could also be identified in the officer's indirect recognition of the impact of flares on others, with his concern for their "enjoyment of the game" standing in for explicit recognition of the need to facilitate the rights of other fans to assemble and express their support in different ways which affects the proportionality of the interference.

However, explicit engagement with human rights analysis may have led to much more thorough consideration of other relevant factors as part of proportionality balancing such as the temporary impact of thick smoke, recognition of the importance of the expression for certain football fans, and the low likelihood of a serious impairment of the core of other fans' rights to go alongside the legitimate concerns for safety. Assessing the proportionality of an interference through balancing competing considerations is not easy, but it is essential to achieve a human rights approach. The contextual nature of the assessment, added to the judicial deference granted to officers seeking a legitimate limitation of expression assists public order commanders when then make a decision based on the facts in front of them.[223] Circumstances may weigh in favour of permitting flares to continue due to the impossibility of reaching the offenders without disrupting public order,[224] or where the sparse crowd raises no immediate safety considerations,[225] but also weigh in favour of urgent action to prevent the dangerous or reckless use of flares causing a risk of harm.[226]

A further difficulty arises in this context which requires balancing the competing interests of high amplitude expressions, such as fans using flares with the rights of fans expressing their support in other, potentially less visible, ways. Both are equally protected rights that must be facilitated inside the stadium. Following Hale in *Miss Behavin'*[227] determining the less socially useful form of expression may lead to those fans using pyros having their rights limited more easily. However, that raises the question of who decides what is socially useful when the domestic and ECtHR case law stress both the subjective and objective important aspects of expression,[228] and the time, place, and

[223] n.30 *DB v PSNI* [2017].
[224] Observation, European, Match 4, Phase 2.
[225] Observation, League 1, Match 9, Phase 2.
[226] Observation, League 1, Match 7, Phase 2.
[227] n.61 *Miss Behavin'* [2007], [16].
[228] n.25 *Countryside Alliance* [2007], [116]-[118].

manner of supporting a team with flares is only effective inside or immediately proximate to the stadium, thus has a level of importance above low-amplitude expression.

A human rights approach cannot provide a set of answers, simply the tools for analysis and a structure to arrive at an answer that does not risk the officer breaching s.6 HRA. The officers observed in the above operations had a threshold for intervention motivated by legitimate concerns for public safety. The practical impact of a human rights approach would be to allow officers to recognise that unruly expression also engages Article 10 rights and provide a structured method for assessing the legitimacy of their precise intervention on that specific occasion.

This structure of a human rights approach to aid decision-making can be analysed through the lens of the following two fieldnotes.

> "Bronze 2 assists Club Security Officer + CCTV team to zoom in on smoke bomb in stand….Frame by frame tracing back, now 8 people involved including 3 police…individual eventually identified as having moved to a different group to drop the smoke bomb – possibly to get them in trouble. Fan ejected with details taken"[229]

The objective to protect public safety was clear to the officers, they viewed intervention to eject as necessary to avoid more smoke bombs being set off so they worked with the club safety officer to take great care in identifying the individual responsible, without taking collective sanction against the adjacent fans initially wrongly identified as responsible. This intervention was also proportionate as there was no good faith expression being engaged with, the individual was clearly just out to cause trouble and so the balancing weighed easily in favour of the rights of other fans.

Officers also took different approaches to intervention in response to missiles depending on whether they were inflatables or coins.[230] On one observation a large number of inflatables were allowed in by the club – to the consternation of officers concerned about the criminal offence of such "missiles"

[229] Fieldnote, League 1 Match, Phase 2, Ground Control Room.
[230] Though the law does not make such a distinction: s.2 Football (Offences) Act 1991.

being thrown onto the pitch.[231] The fans revelled in waving the inflatables in unified motion, taunting the opposition fans in what was initially a very humorous manner. As the Bronze commander remarked "whatever floats their boat…its not harm to no-one".[232] Officers continued to facilitate this expression by throwing back those inflatables that "dropped" to the side of the pitch recognising the subjective important to those particular fans. In this manner, the officers recognised there was no necessity to intervene despite criminal offences being committed, and balancing considerations weighed in favour of allowing a harmless expression to continue even if it caused annoyance for some.

This can clearly be contrasted with the legality of throwing of coins which commonly occurred during matches between close rivals. Reports of coin-throwing would occur relatively early in the match, but proved to be difficult to trace, and so police action to intervene in the practice was called for by Silver Commanders, briefed ahead of the operation, but ultimately rare. Intervention took the form of deploying officers down the gangways between sets of fans to deter coin-throwing.[233] When an offender was identified, their conduct was recorded as a crime even though that was rare.[234] Deployments down segregation line have a low level of intrusiveness, which appears to meet the criteria of necessity to prevent crime or to secure public safety, and such deployments were often temporary mitigating in favour of it also being a proportionate tactic despite the chilling effect on more other forms of subjectively important expression - such as chanting – on the fans near the segregation line.

B.2.3 Policing offensive chants

[231] Observation, Bronze 1, Cup Match 3, Phase 2.
[232] Conversation, Bronze 1, Cup Match 3, Phase 2.
[233] Observation, Premier League Match 13, Phase 2.
[234] Only two such crimes were recorded during observations, Observation, Premier League Match 13, Phase 2; Observation, Cup Match 3, Phase 2.

Long-standing chants referencing disastrous events in history were treated consistently by commanders as necessitating specific attention. These were highlighted at briefings, with specific tactics discussed as contingencies should intervention be necessary. Officers were instructed about the need to take action to prevent chants spreading, but guidance on how to achieve this was lacking. One officer indicated that he would use his judgment and training on "escalating levels of engagement" to fans who were willing to chant grossly offensive songs.[235] Commanders faced difficult decisions about the appropriate moment to intervene and instructed officers to make a visible presence in the gangways and in front of the violating fans, as no other tactics were considered to be effective.[236] Clearly, there can be no human rights concerns about the suppressive "chilling effect" of assertive tactics to counter grossly offensive hate speech chants.

Officers confided a lack of confidence in being able to effectively prevent inappropriate chants spreading: "its difficult to get to them and get them out, even if you can see who it is, they're in the middle of 30 others and it would be a pain to try and get them out in that situation".[237] Officers admitted they would be more likely to intervene if the individuals were sat at the end of the rows.[238] These comments reveal a form of contextual proportionality analysis: if the measure necessary to achieve the legitimate objective impacts other innocent parties disproportionately (i.e., through physical force or disorder) then the balancing act may way in favour of attempting other methods.

During my observations, the occurrence of seriously offensive chants was limited, though audible for short periods; only a few voices engaged in sustained chanting of this type. Enforcement did take place against a couple of individuals, usually fans sat near the heavily policed segregation line, in sight of the police control room, and where officers were instructed to take action (in conjunction with stewards) by a more senior officer.[239] No explicit human rights considerations were raised in the decision-making process resulting ejection and detention. One Silver commander referenced the

[235] Conversation with Sgt, League 1 Match 5, Phase 3.
[236] Observation, Premier League Match 12, Phase 2.
[237] Conversation with Bronze 2 TAC, Premier League Match 13, Phase 2.
[238] Observation, Bronze 1 TAC, Premier League Match 9, Phase 2.
[239] Observation, Premier League Match 12, Phase 2.

unacceptability of the behaviour, and the basis of preventing potential disorder ("mayhem") later if police allowed the chants to continue unchecked.[240]

The broader issue of the chanting being expressed by larger numbers in the crowd, albeit for short periods of time, shows that such chants were tolerated or even accommodated by the police. To some extent this was justified by a lack of resources available at the ground and in prisoner units to process the necessary number of arrests:

> "It's a problem, but you just can't arrest 100, 1000, we've haven't got the space to do that, we don't have the physical cells…We just can't do it with the resources we've got"[241]

The publicity of such a move was also considered relevant, and interference with a large number of fans to prosecute chanting of songs that were already in the public eye was not viewed as conducive to the objective of an operation concluding without major incident. The level of attention of the global media was a factor relevant to the decisions made some commanders. Notably, in briefings for the bigger matches, the Silver Commander would introduce the match in question as the most-watched match in the world that weekend,[242] that officers (and the force) were on global show and should avoid slipping from their professional standards. Legally, the relevance of these considerations in any balancing to determine the proportionality of arresting fans for abusive chanting would be low but these comments revealed that legality and the prevention of criminal offences was only one of several priorities for football operations.

C. Conclusion

In the above analysis I have demonstrated that various forms of subjectively important expressions commonly engaged in by fans benefit from protection under Article 10 ECHR which is not limited to

[240] Observation, Silver Commander, Premier League Match 6, Phase 2.
[241] Observation, Silver TAC, Premier League Match 5, Phase 2.
[242] Observation, Briefing, Silver Commander, European Match 2.

only protecting political expressions. Though fans have duties to exercise their expression responsibly, and within the limits of criminal law, purely annoying or inconvenient expressions must be facilitated and only interfered with to ensure protect of tangible rights of others. I have analysed how the force facilitated expressions of European away fans and of 'normal' fans in special contexts such as big cup games or local derbies. In contrast, fan behaviour identified as 'boisterous' or disruptive were considered indicators of 'risk fans' and officers sought to limit such behaviour without explicitly recognising the rights those fans still retained. This failure to recognise the applicability of the freedom of expression to these contexts, and to forms of minority expression apart from otherwise facilitated main groups, prevented officers from engaging in the appropriate human rights analysis for lawfully limiting the right. Accordingly, facilitation appears to be a tactic used when this achieves other operational objectives, but once a facilitated successfully, officers were confident at nurturing the more high-amplitude expressions of fans. Finally, other parts of the operation were confident at taking on liaison tasks otherwise carried out by the PLTs.

CHAPTER 6 : POLICING AND THE LIBERTY OF FANS

A. Liberty, security, and the common law

The right to liberty is the third substantive area of human rights law that is engaged by football policing operations, but which has remained understudied. Even the extensive literature criticising the direction of jurisprudential development in cases concerning the detention of protestors have only fleetingly considered the position of football fans. This chapter seeks to set out the legal framework applicable to fans' liberty situated in the contemporary debates about the legality of preventative detention and containments through exploration of arrests, the fan escort tactic, and the hold-back tactic. Following this I will analyse how these tactics can be used during football policing operations in accordance with the human rights approach and identify some of the features of the policing operation and the legal framework which limit fuller engagement with the human rights approach.

Before I analyse four areas delimiting the boundaries of what forms of liberty are protected within the notion of the right to liberty under Article 5 ECHR, I will first assess the content of the right in English law and address how the common law has been interpreted following the HRA 1998.

A.1 On liberty: the content of the right in English law

The state's "mischief" in controlling the liberty of people has been a conspicuous feature of the development of modern democracy.[1] Within the machinery of state the police have had a wide discretion to interfere with and limit the freedom of citizens.[2] Whilst for decades the police have implemented militarised tactics to achieve control over crowds, tactics have developed in an attempt

[1] J. Mill, *On Liberty* (Longmans, London 1869), 22-24 and 219.
[2] C. Emsley, *The Great British Bobby: A history of British Policing from the 18th Century to the Present* (Penguin, London 2009), 46.

to meet the test of policing by consent.[3] The success of developments in the public order context is limited: the police continue to use tactics which control access to, and impose definitions of acceptable behaviour in public spaces. This limits people's interactions[4] in a process of exerting control described as "order maintenance".[5] The imposition of legal penalties in the process of restricting liberties increases the social stigma of the impugned conduct, so any state control both directly and indirectly supresses the liberty of persons a process that is also referred to as the "chilling effect".[6]

The common law freedom of liberty can be traced back to Magna Carta.[7] Blackstone recognised that English law preserved the individual's prerogative of changing one's situation, or "moving one's self to whatsoever place one's own inclination may direct".[8] This included "matters of pastime, pleasure, or recreation" that were equally protected "compulsion by… restraint of liberty."[9] But it was not until recently that a 'right' to liberty was enforceable against the state.[10] Formally at least, liberty was stringently protected by the courts: Lord Anderson famously described the protection of liberty as a "pillar", stating that every detention is *prima facie* unlawful in English law unless authorised by law and justified by the person directing the imprisonment.[11] Yet it was a fragile liberty, at the mercy of a sovereign Parliament – and could easily be subject to administrative controls in the name of collective security.[12]

The international post-war consensus established liberty as a fundamental rights, despite it previously being absent from other international legal treaties.[13] As will be explored in section B below, the

[3] n.2 Emsley (2009); 47; P. Waddington, *Policing Citizens* (Routledge, Oxford 1999), 206-208.
[4] C. Stott, 'Policing Football 'Hooliganism': Crowds, Context and Identity' in M. Hopkins, J. Treadwell (eds.) *Football Hooliganism, Fan Behaviour and Crime: Contemporary Issues* (Palgrave MacMillan, London 2014), 248-272.
[5] n.3 Waddington (1999), 16, 42 and 207.
[6] *Huseynli v Azerbaijan*, App. No. 67360/11 11th February 2016, [99].
[7] Magna Carta (1297) CCIC (c.9)
[8] W. Blackstone *Commentaries on the Laws of England (*Clarendon, Oxford 1765), 125.
[9] n.8 Blackstone (1765), at 123-127; *The Case of Monopolies* (1601) 11 Coke Reports 84b, 87b.
[10] *per* Baroness Hale, *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [113].
[11] *per* Lord Atkin *Liversidge v Anderson* [1942] AC 206, 245; *Leach v Money* (1765) 19 State Trials 1026.
[12] Lord Wright, 'Common Law and Liberty' 9 Cambridge Law Journal 1 (1945), 4-8.
[13] Article 3, UN Declaration on Human Rights UNGA Res 217 A (III) 10th December 1948; *Avena and Other Mexican Nationals (Mexico v United States of America*) 2004 ICJ Rep 12, "of fundamental importance".

development of ECtHR jurisprudence introduced more precise standards for protecting liberty, with specific constraints on the powers to be used by the police in the maintenance of public order.[14] At the core of the right to liberty is a right not to have individual freedom arbitrarily deprived.[15] An arbitrary deprivation will include elements of illegality, inappropriateness, or lack of due process.[16] As will be explored further in Section B, when considering the positive and negative obligations of the police, identifying the core of the right as arbitrary conduct preserves the ability for officers to take justifiable enforcement action in fulfilment of a human rights approach.

A.2 The extent of protection afforded to liberty in domestic law

The modern right of liberty is not unrestrained: it is limited by legislation, considerations of security, and common law powers that restrict its enjoyment.[17] I will discuss these limits in the following sections. It is important at the outset to underline the distinction between restriction of liberty and deprivation of liberty. A range of activities impede the right to liberty before it reaches the standard of "deprivation": examples in public order policing include cordons or "kettling"; temporary detention to prevent a breach of the peace; preventative detention; physical searches; and formal arrest on suspicion of committing a criminal offence.[18] Liberty once limited – for example by being stopped for a search – is still a right retained by the individual in a residual form[19] and so it can be subject to further restrictions that can either independently or cumulatively develop into a deprivation.[20] Accordingly, those who are detained by the police and transferred to custody, or similarly a person

[14] See Section B below, e.g., *Engel v Netherlands* App. No. 5101/71 (1976), [58].
[15] *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, [13].
[16] *Van Alphen v Netherland,* 305/1988 Human Rights Committee [5.8].
[17] *per* Donaldson MR *Attorney General v Guardian Newspapers Ltd and ors*. (No. 2) [1988] 2 W.L.R. 805, 869.
[18] R. Stone, 'Deprivation of liberty: the scope of article 5 of the European Convention of Human Rights' European Human Rights Law Review 1 [2012] 46-57, 2.
[19] *per* Lord Jauncey in *Weldon v Home Office Respondent* [1992] 1 A.C. 58, 174.
[20] *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 691.

stopped and then searched, may suffer a series of interferences that eventually amount to a deprivation.[21]

Both statutory and common law powers can be used to deprive an individual's liberty, but an officer will be on a surer footing if the relevant criteria for a statutory power are met.[22] Deprivation can be based upon discretionary powers, but these must derive from a legal source that sufficiently clarifies the scope of any discretion conferred and the manner of its exercise.[23] As liberty is "fundamental", courts will generally not allow liberty to be overridden by general or ambiguous wording of powers, or where parliamentary intent to constrain liberty is not sufficiently clear.[24] Notably, the common law power to prevent a breach of the peace has been determined to be sufficiently clear.[25] Clarity also requires procedural propriety in the decision-making process with the relevant considerations and the reasons for a decision to limit a person's fundamental liberty must be readily ascertainable by the person affected. This supports the argument that under a human rights approach officers are required to explicitly engage with human rights consideration, a process that is then available to be reviewed.

The courts recognise their role in protecting personal freedom[26] and will be vigilant to ensure general legislative wording does not override fundamental rights.[27] Lord Bingham in *Gillan* identified an increasing number of statutory exceptions eroding the "cherished" freedom to be confident that one will not be stopped and searched without clear authority and objective justifiable reasons.[28] It is still "axiomatic" that explicit legal authority is needed for the interfering power to be used.[29] Accordingly, significant interferences cannot be predicated purely on broad powers to impose "any such conditions" as deemed necessary:[30] such powers have to be subject to conditions such as giving reasons for a decision, and further controls on the use of unaccountable powers such as external

[21] *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155, 1162.
[22] As opposed to a discretionary power cf *Re Fox* [2013] NICA 19, [41]-[49].
[23] *Gillan and Quinton v United Kingdom* App No. 4158/05 12th January 2010, [76]-[77].
[24] *R v Home Secretary ex parte Simms* [2000] 2 AC 115, 131.
[25] n.23 *Gillan v United Kingdom* (2010), [77].
[26] *Lindley v Rutter* [1981] QB 128, 134.
[27] n.24 *R v Home Secretary ex parte Simms* [2000], 131.
[28] *per* Lord Bingham *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 A.C. 307, 1.
[29] *Secretary of State for the Home Department v GG* [2010] QB 585, [12].
[30] n. 29 *Secretary of State for the Home Secretary v GG* [2010], [12]-[22].

review by the courts.

A.3 A liberty to watch a football match?

Liberty includes aspects of volitional motion, which does not equate directly with the concept of free movement of the person, a more precise right more easily engaged by even temporary interferences, but which has not been ratified by the UK and so is not an applicable or enforceable right here.[31] Additional facets of liberty, such as the enjoyment of "taste and pursuits", the framing of a "plan of life" without impediments[32] and the freedom to unite with others[33] may also be deprived without violating the essential core of liberty. As cautioned by Baroness Hale, a fundamental freedom must be "something more than the freedom to do as we please".[34] Although there have been occasional passing references to the individual's right to watch a football match expressed in Parliament,[35] there is no public law right to attend football matches as a paying spectator.[36] Similarly, the Football Banning Order scheme, properly operated, and applied to cases where the individual has a propensity for football hooliganism, was held to be compatible with ECHR rights.[37] A legal right to watch football subsists only in contract law in accordance with the relevant contract (*i.e.,* ticket).[38]

Being confined to one's own home by court order can in principle be a breach of liberty[39] but being excluded from particular places on match days is not clearly as "draconian" restriction as other forms

[31] Article 2 Protocol 4; see Section B.4 or see further L. Todts, 'Area-based restrictions to maintain public order: the distinction between freedom-restricting and liberty-depriving public order powers in the European legal sphere' European Human Rights Law Review [2017] 376-390, 376.
[32] n.1 Mill, (1869), 22-24.
[33] n.10 C*ountryside Alliance* [2007], [114]-[115].
[34] *per* Baroness Hale n.10 *Countryside Alliance* [2007], [111]-[114].
[35] Football Spectators Bill [Lords] HC Deb 17 July 1989, vol 157, col 44 (Frank Dobson), col 44 (Michael Foot), on the interference the Spectators ID cards would cause.
[36] *per* Edis J in *Commissioner of the Police of the Metropolis v Thorpe* [2015] EWHC 3339, [19].
[37] *Gough v Chief Constable Derbyshire* [2002] EWCA Civ 351, [85]-[86].
[38] *Manchester United Plc v The Commissions of Customs and Excise* 2011 WL 606306, [19], [22].
[39] *per* Mostyn J in *Rochdale Metropolitan Borough Council v KW* [2014] EWCOP 45, 26.

of deprivation of liberty.[40] Controversially,[41] this deferential approach has also been applied in respect of overseas travel bans applied to football fans- though further limitations on liberty are avoided through the operation of a 'special circumstances' exemption[42] that permitted banned individuals like Gough to attend holidays in countries far removed from the relevant team's overseas fixture.[43]

In respect of criminal law powers, any situation where there is a formal "arrest" amounts to a deprivation of liberty and so the correct legal power should be used.[44] Arrest is the "paradigm form"[45] of state enforcement limiting a person's liberty, hence the development of detailed legislative safeguards and Code of Practice.[46] Accordingly arrests should proceed on the basis of explicit powers. "Detention" falls short of arrest and is not as clear a legal concept, covering a range of scenarios including most commonly, being held in a location or transported to a police station to prevent a breach of the peace. How detentions have been defined and assessed as human rights compliant despite ambiguity of legality of the powers is a key debate explored further below in Section A.4 and Section B. The right to liberty can also be limited by other forms of penalty that "concretely affect" the freedom of the individual due to their compulsory nature.[47] Famously, the House of Lords assessed the plethora of anti-terrorism measures that could be implemented in a way as to cumulatively amount to detention in breach of Article 5.[48] Not all penalties are assessed as affecting defendants in the same way. Sanctions that may appear penal at first sight have been upheld by the courts as not amounting to a detention –such as disqualification orders,[49] or football banning orders.[50]

[40] *R v Irving* [2013] EWCA Crim 1932, [21]-[22].
[41] M. James, G. Pearson, '30 years of hurt: the evolution of civil preventative orders, hybrid law, and the emergence of the super-football banning order' Public Law [2018] 44-61, 51-56.
[42] n.37 *Gough* [2002], [95]-[97] where it was reported that all 60 requests received for exemptions to travel bans were granted.
[43] n.37 *Gough* [2002], [96].
[44] n.23 *Gillan v United Kingdom* (2010), [76]-[77].
[45] S. Stark, 'Deprivations of liberty: beyond the paradigm' Public Law [2019] 380-401, 380; *Secretary of State for the Home Department v JJ and ors* [2007] UKHL 45, [36]-[46].
[46] Police and Criminal Evidence Act 1984, Code C (Revised) (London, TSO 2018).
[47] *R(LF) v HM Senior Coroner for Inner South London* [2015] EWHC 2990, 125.
[48] *per* Lord Bingham, *Secretary of State for the Home Department v MB* [2007] UKHL 46, [11].
[49] *R v Field and Young* [2002] EWCA Crim 2913.
[50] *Commissioner of the Police of the Metropolis v Thorpe* [2015] EWHC 3339.

A.4 Breach of the peace

A.4.1 Power to prevent a breach of the peace

Breach of the peace is a "juristic concept"[51] and a term of art that is widely used by officers in public order policing as a justification to respond to perceived threat. It is different to the statutory powers covered above and so requires separate detailed examination. The concept does not specifically map onto the descriptive qualities of a broken peace – although, as will be discussed in Section C, this is a common understanding amongst officers. The common law standard for a breach of the peace is an "evolving concept" with the core continually identified by the courts as requiring violence, or arguably a threat of violence.[52] The police therefore have common law discretionary powers of arrest and detention, and powers to curb violent assemblies, in order to prevent a breach of the peace.[53] Where an officer believes a breach of the peace is imminent, that belief trumps any claimed "right" the public may be exercising at that point in time, and permits the officer to act on their discretionary powers.[54]

On top of this distinction, the police refer to their duty to "Preserve the Queen's Peace".[55] This is a broader duty with a specific objective,[56] rather than a justificatory basis for temporary detention. As their Lordships underlined in *Laporte*, the police should be careful not to confuse the definition of breach of the peace, which is confined to situations involving actual violence, with the threshold at which their discretionary powers can be used, which includes situations where violence is imminent.[57]

[51] *Lewis v Chief Constable of Greater Manchester* [1991] 10 WLUK 290
[52] *R (Laporte) v Commissioner of Police for the Metropolis* [2006] UKHL 55, [27].
[53] H. Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest' Public Law [2009] 737-765, 738.
[54] *Duncan v Jones* [1936] 1 KB 218; see further I. Channing, 'Policing extreme political protest' Policing (2018) 1-20, at 13 <https://doi.org/10.1093/police/pay010>, accessed 1st October 2020.
[55] T. Newburn, 'Policing since 1945' in T. Newburn (ed.), Handbook of Policing (Cullompton, Willan 2003), 87.
[56] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [29]-[35].
[57] *per* Lord Brown, in n.52 *Laporte* [2006], [113].

The power to prevent a breach of the peace is lawfully exercised when the tripartite test identified in *Mengesha* (as applied in *Wright*[58]) is met:

1. that the officer had a reasonable apprehension of an imminent breach of the peace
2. the officer honestly believed a breach was imminent and the belief was made on reasonable grounds
3. the measure was necessary and was also proportionate.[59]

As a "bewilderingly ambiguous common law power"[60] the power to prevent a breach of the peace has been criticised as unsuited for use in making difficult, context-sensitive decisions such as dealing with mass assemblies.[61] As "problem-solvers" the police have frequently engineered ways to utilize their powers to achieve simple and swift outcomes; the power to prevent a breach of the peace is one police officers have used to curtail peaceful assemblies – and even pre-emptively impose restrictive tactics – on the basis of expediency.[62]

The contentious application of such discretionary police tactics has led to a revival of interest in checks and balances on their exercise.[63] Nevertheless, officers benefit from a high degree of deference from the courts in respect of their consideration of tactical options. In part, this is necessitated by the difficulty in reviewing what officers honestly perceived at the time of making the decision.[64] However deference should not be unlimited as it risks permitting arbitrary decisions of the very type prohibited in human rights law. The weak position of the individual is also a relevant reason to temper this deferential approach as it is difficult for the impacted person to challenge the incorrect use of the discretionary power, and they benefit from none of the favourable presumptions that occur when courts consider statutory powers that significantly interfere with freedoms.[65]

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[58] *Wright v Commissioner of Police for the Metropolis* [2013] EWHC 2739, [27].
[59] The human rights language of proportionality being a relatively new addition to the test at common law.
[60] R. Stone, 'Breach of the Peace: The Case for Abolition' 2 Web Journal of Current Legal Issues 2 (2001).
[61] n.53 Fenwick [2009], 737-765, 738.
[62] n.54 Channing (2018), 15.
[63] R. Glover, 'Keeping the peace and preventative justice – a new test for breach of the peace?' Public Law [2018] 444-460, at 444.
[64] n.54 Channing (2018), 14.
[65] *McFarlane v Nisbet* [2013] HCJAC 81, [11].

The subjective nature of the police's power and the legal test means that beyond a bald duty to "preserve" peace and an obligation to act in accordance with the law, there is little guidance for police officers on how to respond to a perceived breach of the peace. The duty to preserve peace is one of result rather than conduct. Therefore, there is a natural tendency to react in any way that removes the possibility of peace being disturbed.[66] In public order operations it would be preferable to establish a duty of conduct rather than result, switching to a requirement for officers to take "all reasonable and proportionate" steps to prevent a breach of the peace. Such a conceptualisation may be criticised for eroding clarity, but it would explicitly provide an in-built opportunity for ongoing review of tactical decisions and whether further escalation or de-escalation is required by the evolving situation.[67]

A.4.2 Assessing the imminence of public disorder

Any appraisal of the police's use of breach of the peace has to consider how finely balanced judgments are in public order policing as in *Wright v Commissioner for the Metropolis.* Yet *Wright* also demonstrates how judicial deference tends to favour the police officer's assessment of the imminence of public disorder. In this case impugned conduct was a shout to a protest crowd that the protest's target was "coming this way" – from an unexpected direction. On the balance of probabilities, the High Court found that the officer did have reasonable grounds to fear violence from the crowd advancing "at speed" in the direction of the President of Israel's car. Deference continued to credit the officer's need to respond rapidly to the situation as it was developing permitting a containment that would otherwise be viewed as excessive.[68] However, Wright's single shout was an action falling short of any conduct requiring containment,[69] and even further away from inducing an

[66] n.63 Glover [2018], at 444.
[67] Which is already required by the National Decision Model but would be reinforced.
[68] n.58 *Wright v Commissioner of Police for the Metropolis* [2013], [61].
[69] D. Mead, 'The police pen is mightier than the sword' (Protest Matters, 11th September 2013) <https://protestmatters.wordpress.com/2013/09/11/the-police-pen-is-mightier-than-the-sword/> accessed on 19th March 2019.

imminent breach of the peace, as there was no indication that harm or violence was contemplated.[70] Indeed, the use of a side door and the wish of the gathered protestors to move in response to that evasion should have been pre-empted. The duty to prevent a breach of the peace being an obligation of result (and the fear of negative publicity) meant there was no capacity for the officers to consider less restrictive alternative tactics.

It is insufficient for breach of the peace to be just a 'real possibility': 'imminence' is a narrower concept and can be based only on events which are actually occurring,[71] or about to occur.[72] In *Moss* a "workable standard was given; the anticipated breach must be reasonably proximate in time to the point of intervention.[73] However, the imminence standard is invariably viewed as inadequate, "chimerical"[74] and lacks sufficient certainty to meet rule of law concerns.[75] The slider of imminence is too easily shifted according to the subjective positions of individual officers, rather than according to objective standards of clear and present danger.[76]

Fortunately, a threshold can be identified in Lord Bingham's "narrow imminence" standard, where intervention by the police occurs at the last possible moment that intervention would be effective. In *Laporte* he cautioned officers against embellishing the imminence of a threat in making their assessments,[77] but stated that when faced with actual ongoing disorder there will not be "specious exactitude" about the exact second the peace has been breached.[78] Applying a strict imminence test gives maximum protection to human rights, but still leaves the police with the difficult task of intervening within a very constrained period of time.[79] The influence of principles from the ECHR in this debate is clear, but the common law test applied properly achieves the same result – and accordingly are the standards that should be applied. As in *Foulkes*, "there must be a *sufficiently real*

[70] Speculatively, harm could have been caused by the rushing crowd, or more likely upon the emergency of Shimon Peres or upon forceful tactics by the police.
[71] *R (McClure and Moos) v Commissioner of the Police of the Metropolis* [2012] EWCA Civ 12, at [36].
[72] *per* Lord Brown n.52 *Laporte* [2006], [110]-[113]
[73] n.53 Fenwick [2009], 743.
[74] *per* Moses LJ in *R v Hicks* [2013] EWCA Civ 679, at [5].
[75] n.63 Glover [2018], 460.
[76] n.63 Glover [2018], 460.
[77] *per* Lord Bingham in n.52 *Laporte* [2006], [92].
[78] *per* Lord Bingham in n.52 *Laporte* [2006], [87].
[79] n.63 Glover [2018], 460.

and present threat….to justify the extreme step of depriving of his liberty, a citizen who is not at the time acting unlawfully".[80] Pressing the individual officer to grapple with a strict imminence test also preserves the distinction between the duty and the legal power, and prevents an over-reliance on the power to detain to prevent a breach of the peace which will only be deployed where a violent act is being prevented.

A.5 A right to security?

The maintenance of security "underpins, and is the foundation" of our civil liberties: these are two concepts that are "on the same side".[81] The ECtHR has equally held that a person's physical liberty is fundamental to protecting the bodily security of an individual.[82] Liberty has never been conceived of as unconstrained: Mill accepted that the right to take action to prevent crimes is "inherent in society".[83] How far can the state legitimately go to prevent crime when the preventative function of government is "far more liable to be abused"?[84] Yet security concerns do not require the state to always demand that certain conduct ceases: police tactics may involve less invasive measures such as monitoring, giving warnings, or regulating behaviour in non-punitive ways that impact upon liberty either directly or through the chilling effect.

The right to liberty can be more broadly circumscribed during times of crisis: there is no particular threshold for when this may occur, but – outside of exceptional circumstances - there must be an actual breakdown of public order.[85] Even amidst a non-international armed conflict, restrictions on liberty must be "temporary" and "abnormal".[86] The low-level civil disorder that rarely takes place around football matches does not reach this level of severity.

[80] *Foulkes v Chief Constable of Merseyside Police* [1998] EWCA Civ 938.
[81] *per* Lord Donaldson, *R v Secretary of State for the Home Department* [1991] 1 WLR 890, 906 – 907.
[82] *McKay v United Kingdom*, App No 543/03 3rd October 2006, 30.
[83] n.1 Mill (1869), 184-185.
[84] n.1 Mill (1869), 181.
[85] *per* Lord Scott *A and ors. v Secretary of State for the Home Department* [2004] UKHL 56, [144].
[86] *McVeigh and ors. v United Kingdom* App No. 8022/77 18th March 1981, [155]-[158].

A liberty-compatible concern for security of persons requires a human rights approach that can appropriately protect the liberty of individual persons, whilst providing a framework for determining appropriate tactics focusing on measures short of detention that don't just protect a dominant social group but enhance the universal notion of liberty for a wider range of acceptable behaviours.[87] This approach would help mitigate against senior officers' increasing prioritization of public security over individual liberty.[88] The ECHR, and subsequent interpretation from Strasbourg has reinforced these aspects of universality and fundamentality of the right to liberty even in the face of civil disorder of security threats as explored in the next section.

B. Liberty and security under the ECHR

B.1 Article 5 and the extended protection of liberty

The fundamental nature of liberty can be underlined by detailed provisions that flesh out, like no other right in the ECHR, the schemes of procedural and substantive protections alongside the consequences of breaching the right. Article 5 establishes a "positive right to liberty with limited exceptions".[89] It thus transforms the more limited legal protection discussed in Section A, with the 'threshold' protection of Article 5 being more pronounced than its "homologue" in common law.[90] Article 5 has clearly emerged as a standard-setting framework to secure the right to liberty having been transposed into the constitutions around the world.[91]

[87] I. Berlin, *Four Essays on Liberty* (OUP, Oxford 1969), 121, 136-137.
[88] I. Shannon, 'Convenient Constructs: How Chief Police Officers in England and Wales Understand the Right of Police to Exercise Power' (PhD, University of Liverpool 2018), 119; I. Loader, 'Policing, securitization and democratization in Europe' 2 Criminal Justice 2 (2002), 125-153, at 137.
[89] K. Starmer, *European Human Rights Law* (Legal Action Group, London 1999), 95.
[90] *per* Lord Mance in *Kennedy v Information Commissioner* [2014] UKSC 20, [46].
[91] D. Barrett, ''Drug Addicts' and the ECHR' (EJIL Talk, 3rd September 2018) <https://www.ejiltalk.org/drug-addicts-and-the-echr/> accessed 19th March 2019, including in 30 former British colonies.

Article 5 sets out a structured framework of the means by which a state can legitimately restrict the right without arbitrarily depriving a person of their liberty. As identified by the ECtHR, these elementary safeguards are in place because state action to deprive liberty is often arbitrary, unexplained and unlawful.[92] The procedural protections are an integral part of the substantive Article 5 protections; each deprivation of liberty must be in accordance with a procedure prescribed by law which acts as an overriding requirement.[93]

B.2 Limiting the right to liberty

Article 5(1) sets out the six legitimate grounds on which public authorities can rely to temporarily deprive an individual's liberty. Most contested and of most relevance to public order policing are:

> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

The list in Article 5(1) is exhaustive, with additional grounds not considered lawful such as facilitating police discretion.[94] To fulfil the criteria of lawfulness, measures taken under any of these grounds have to meet the "essential purpose" of Article 5(1), that of not being arbitrary.[95] The ECtHR has not formulated a universal definition of arbitrariness,[96] but will assess how closely linked the features of the detention are to the specific exception relied upon under Article 5(1), along with

[92] *Frumkin v Russia* App. No. 74568/12 5th January 2016, [147]-[151].
[93] n.89 Starmer (1999), at 95; *Khlaifia and ors v Italy*, App. No. 16483/12 15th December 2016, [115].
[94] A. Ashworth and M. Strange, 'Criminal Law and Human Rights' European Human Rights Law Review 2 [2004] 121-140, 128-130.
[95] n.45 Stark [2019], 382*; HL v United Kingdom* (2005) 40 EHRR 32, [119]-[124].
[96] *S.,V. and A v Denmark* App. No. 35553/12 22nd October 2018, [75].

considerations of legality of the specified power under national law,[97] and if there has been any bad faith or deception on behalf of the detaining authorities.[98] For example, where the detention requires reasons to be provided, the absence of reasons from the mind of the arresting officer indicates arbitrariness.[99] Similarly, bare reliance on a claimed necessity or "exceptional case" due to the fear of public disorder will not rebut what appears to be an arbitrary course of action,[100] no matter how "imperative" the perceived threat.[101] The notion of arbitrariness also includes an assessment of whether the detention was necessary to achieve the stated justification for detention.[102]

As discussed in previous chapters, the police have a choice of public order powers, criminal statutes, and common law powers at their disposal when policing fans, but the basis for choosing which power is vitally important for a lawful intervention limiting liberty. However, unlike the position in policing expression,[103] under Article 5 jurisprudence the police are prevented from switching to alternative grounds for deprivation of liberty once they have been identified. The ECtHR requires that at the time of acting both the purpose and the objective of the detention are the same, in order to scrutinise the accuracy of the belief held by the officer at the time.[104] If there is a contemplated secondary purpose for the detention, there is a possibility that the legal basis for a deprivation becomes blurred and uncertain.[105] Whilst there are pragmatic reasons to permit a balance to be struck, giving latitude to public authorities to exploit an "either or" approach would permit the police to artificially select the best available grounds for their case. To maintain the legitimacy of interventions contravening liberty – and to guard against arbitrariness - the most appropriate lawful basis should be selected in order that

[97] *VM v United Kingdom* App No 49734/12 25th April 2019, [93]-[100].
[98] n.96 *S.,V. and A v Denmark*, [76].
[99] *Navalnyy v Russia*, App No. 29580/12 2nd February 2017, [61].
[100] n.99 *Navalnyy v Russia* (2017), [61].
[101] *Al-Jeddah v United Kingdom*, App No 27021/08 7th July 2011, [98], [109]-[110].
[102] n.96 *S.,V. and A v Denmark*, [77].
[103] *Abdul v DPP* [2011] EWHC 247.
[104] H. Steiner, P. Alston, R. Goodman *International Human Rights in Context: Law, Politics, Morals* (OUP, Oxford 2008), 481-484.
[105] M. Baros, 'A developing gap in the application of articles 5 and 8 of the European Convention on Human Rights in the immigration context – the shifting nature of humanity' 23 Immigration, Asylum and Nationality Law 3 (2009) 264-280, 279.

police powers are applied consistently and predictably.[106] The structured legal analysis of interventions at the ECtHR provides a model to assist decision-making in achieving these aims.

B.3 Necessity and proportionality

The role of necessity and proportionality in assessing the legality of limitations under Article 5 is not clear from the text of the ECHR but these concepts are used by the ECtHR in their consideration of limitations under Article 5(1).[107] The structure of Article 5(1), with its tightly construed exceptions, means that deprivation of liberty must be a measure of last resort. A deprivation decision that is lawful and not arbitrary will likely be necessary and proportionate, or as analysed by Ashworth, detention should be carried out "appropriately" in accordance with clear powers lest it be seen as intrinsically problematic to resort to legitimate criminal sanctions when the need actually arises.[108]

Some recent cases have gone further in framing necessity as part of the specific grounds for limitation. In *Saadi* the ECtHR stated that assessment of arbitrariness includes an assessment of "whether detention was necessary" to achieve the objective.[109] Accordingly, detention in a prison cell was such a serious step that could be justified only if less stringent measures could not achieve the stated aim, and so detention simply on the basis of the level of alcohol intake without an actual threat to the public safety was an invalid limitation of Article 5(1).[110]

Article 5(1)(c) also expressly permits limitation where detention is reasonably necessary to prevent an offence. No cases have differentiated "reasonably necessary" from "necessary", but the qualifier of reasonableness appears to be an important safeguard against a potentially limitless power justified

[106] n.54 Channing, (2015), 21-22 M. James, G. Pearson, 'Public Order Policing and the rebalancing of football fans' rights' Public Law [2015] 458-475, 466.
[107] n.45 Stark, [2019], 382.
[108] A. Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 Law Quarterly Review 606-630, 613.
[109] *Saadi v United Kingdom* App. No. 13229/03 (2008), [70], although referencing Article 5(1)(e) the principle is framed as applying to all deprivations of liberty.
[110] *Hafsteinsdottir v Iceland*, 40905/98 22nd October 2002, [42].

only by an officer's subjective perception of a situation.[111] In respect of the term "offence", this seems to require an offence in which a penalty is at stake, though being detained to prevent a breach of the peace has also been found to constitute an "offence" under the ECHR due to the punitive nature of the process.[112]

Proportionality has been considered relevant to assessment of the limitation, including whether the decision maker had considered less restrictive alternatives before detaining.[113] Particularly in relation to pre-trial detention, the longer the detention continues the higher the threshold for justifying continued detention. Thus, there is a point in time when consideration must be given to alternative measures amounting to lesser forms of restriction.[114]

In respect of preventative detention in Article 5(1)(c), the principle of proportionality further dictates that a balance must be struck between the importance of immediately securing compliance with the legal obligation, and the importance of the right to liberty.[115] In this assessment of proportionality the Court will balance contextual factors including the nature of the obligation, including its underlying legislative objective and purpose; the detained person and the particular circumstances leading to detention; and the length of the detention.[116] Finally, the proportionality analysis is subject to the procedural protections, particularly Article 5(3) and 5(4). Providing that the mechanism to obtain redress in case of a detention is accessible and effective, there is a clear check on the legality (and proportionality) of a continued detention.[117] The situation where a person is detained for only a very short period of time has given rise to a contested line of case-law as the ability to bring a person before judicial authorities, or the ability to challenge legality whilst detained is limited and may never have even been envisaged in circumstances. These contested situations are common in public order policing and are subject to dedicated discussion in the next section.

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[111] n.60 Stone (2001), 2.
[112] *Benham v United Kingdom* App. No. 19380/92 8th February 1995, [56]; n. 37 *Steel and Others v UK*, App. No. 24838/94 23rd September 1988, [49]-[50].
[113] *Stanev v Bulgaria* (2012) App. No. 36760/06 17th January 2012, [43].
[114] *Jablonski v Poland* (2000) App. No. 33492/96 21st December 2000, at [84].
[115] n.109 *Saadi v United Kingdom* (2008), [70].
[116] *Vasileva v Denmark* (2003) App. No. 42792/99 25th September 2003, [39].
[117] n.85 *A and ors. v United Kingdom*, [217].

B.4 Preventative detention

Maintaining public order is not an express ground for interference in Article 5(1). Any use of preventative detention powers against football fans must be premised on one of the express grounds. This helps to safeguard the right to liberty, and ensures that the categories of permissible restrictions on individual liberty remain clear-cut. States have claimed wider bases for "necessary" administrative detention in response to evolving threats such as terrorism or riots;[118] however, this risks permitting detention on the basis of imprecise or purely speculative conduct, leading to an arbitrary detention for an unlawful purpose.[119] In public order operations the police can resort to two common forms of preventative detention: preventative arrest, and coercive cordoning as a form of temporary detention.

Typically, a scenario involving an officer detaining a fan to prevent a breach of the peace would qualify as conduct under Article 5(1)(c) where an offence can be identified. There remains debate about the correct ground for intervention where the breach of the peace is merely a possibility and detention is purely preventative to avert a potential harm rather than an imminent harm.[120] A flexible interpretation has developed to create an exception to the "purpose requirement" - to intend to bring the individual to a judicial process - where the individual is intended to be preventatively detained for a short period of time but this jurisprudential development is not clear-cut.

B.4.1 Detention under Article 5(1)(c)

A human rights approach to preventative detention under Article 5(1)(c) does not permit a policies to detain on the basis of a general policy or presumption towards an individual or a category of individuals who are perceived by the police "as being dangerous or having propensity to unlawful acts".[121] Therefore,

[118] C. Macken, 'Preventative detention and the right to personal liberty and security under Article 5 ECHR' 10 International Journal of Human Rights (3) (2006) 195-217, 196-197.
[119] S. Greer, 'Preventive Detention and Public Security: Towards a General Model', in A. Harding, J. Hatchard (eds.) *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff, Dordrecht 1993), 25.
[120] n.112 *Steel v United Kingdom* (1998), [55]; It is notable that breach of the peace is classified as an offence for the purposes of Article 5(1) despite not being a criminal offence under English law *see e.g., R v County Quarter Sessions Appeals Committee ex parte Metropolitan Police Commissioner* [1948] 1 Kings Bench Reports 260.
[121] *Ostendorf v Germany* (2013) App. No. 15598/08 7th March 2013, [66].

it is not permissible to have or act on a policy to detain those identified as "risk fans" purely on that basis. Coercive measures, including extra checks and escorting of fans, cannot be imposed simply because of an individual's membership of a group[122] or presence on a database.[123] Avoiding arbitrary decision-making also means that the necessity of the arrest must be within the knowledge of the actual arresting officer[124] and coercive action should not be directed by an inflexible general policy.

Formally, arrest under Article 5(1)(c) can only be pursued for the purpose of bringing the person before the competent legal authority – the "purpose requirement". Thus, the practice of purely preventative administrative detention without this purpose has been questioned. The requirement for detention to lead to a review of the merits of decision has been undermined by the introduction of a flexible interpretation of the purpose requirement, with two competing lines of jurisprudence emerging. One line of jurisprudence, culminating domestically in *Hicks,* identifies the possibility of permitting purely anticipatory detention to allow for "a period of calming"[125] or time to determine an appropriate method of processing the individual. This is orientated on a pragmatic and deferential approach to state exercise of power and applies irrespective of whether the anticipated conduct was criminal in nature or not. *Hicks* concerned the preventative arrest of a number of disparate individuals based on their varying levels of potential threat to orderly proceedings on the day of the Royal Wedding in 2011 which might cause a breach of the peace.[126] The evidence in respect of anticipated criminal offence was less than clear and no criminal charges for public order offences followed.[127] Although the individuals were detained for up to 5.5 hours, the Supreme Court concluded that this qualified as "early prompt release".[128] The express wording "to bring the person before court" was interpreted as implicitly conditional upon the detention continuing long enough for that to be a possibility.

[122] *Shimovolos v Russia* App. No. 30149/09, 21st June 2016, [56].
[123] n.122 *Shimovolos v Russia* (2016), [54].
[124] *Parker v Chief Constable of Essex* [2018] EWCA Civ 2788.
[125] *R (Hicks) v Commissioner of the Police for the Metropolis* [2014] EWCA Civ 3, [82]
[126] *R (Hicks) v Commissioner of the Police for the Metropolis* [2017] UKSC 9
[127] R. Brander, 'Public: Out of Order?' 162 New Law Journal (2012) 1311, 3212.
[128] n.126 *Hicks* [2017], [22] and [38].

That "baffling"[129] reading is a teleological stretch based on a purposive reading of Article 5(1)(c) and forces the courts to transpose non-legal considerations into a legal assessment - giving too much deference to public authorities exercising extra-legal powers.[130] States have not amended the scope of permissible interferences in Article 5(1) which would be entirely possible through additional protocols despite their concerns about the restrictive scope of Article 5(1) interferences.[131]

The Supreme Court's reliance on the practical implications of not permitting purely preventative detention in *Hicks* is clear. Lord Toulson (writing his last ever judgment of the Supreme Court[132]) rejected the interpretation that required the police to hold specific evidence on imminent commission of disorder as that would risk making it "impracticable for the police to perform their duty to maintain public order and protect the lives and property of others."[133] The legality of any detention can be challenged, even after the detention ceases.[134] But that is a chocolate fireguard rather than a safeguard as it ignores the reality that many individuals impacted by a deprivation of liberty will not be able to effectively challenge decisions, let alone find grounds to establish arbitrariness when decisions to arrest are presumed to have been taken on a "good faith"[135] assessment of intelligence which will not be disclosed. The weak position of the detainee, in the face of the state's greatest power underlines the importance of taking a human rights approach to decision-making affecting liberty so as to avoid unnecessarily erring into arbitrariness in the pursuit of other legitimate objectives such as public order.

A contrasting approach to interpreting the requirements in Article 5(1)(c) was explored by the ECtHR in *Ostendorf* . Here, the court concluded upon a necessary, conjunctive interpretation of Article 5 with reference to the safeguard in Article 5(3), that everyone arrested or detained under Article 5(1)(c) must be

[129] As termed by the minority in n.96 *S.V. and A. v Denmark*, Joint Partly Dissenting Opinion [5]-[6].
[130] A. Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' 8 German Law Journal [2013] 1215-1278, at 1218.
[131] n.129 *S.V. and A v Denmark* (2018), [10].
[132] Described upon his death as a notably "deferential" judge, R. Falconer 'Obituary: Lord Toulson' 29th June 2017 http://ukscblog.com/obituary-lord-toulson/ accessed 1st October 2020.
[133] n.126 *Hicks* [2017], [29].
[134] n.126 *Hicks* [2017], [38].
[135] n.126 *Hicks* [2017], [31].

brought before a judge *and* shall be entitled to trial within a reasonable time,[136] with "trial" indicating that the detention for a preventative purpose could only relate to an identifiable of a criminal offence to justify the original detention.[137] Preventative detention under Article 5(1)(c) therefore forms "a whole with…sub-paragraph (a) and with paragraph 3"[138] and only refers to detention pre-empting the specific commission of "an offence" that is criminal.[139] That construction must be correct. As I have set out above Article 5 is construed tightly specifically to prevent states expanding the possible basis for interference with a core fundamental right. The interpretation is also consistent with the ECtHR's jurisprudence originating from *Lawless*, which identified that permitting the state to detain individuals who had not yet committed a criminal offence "merely of an executive decision" was "a conclusion repugnant to the fundamental principles of the Convention."[140]

Of the two contrasting cases *Ostendorf* appears to be instructive for football policing operations, as it concerned a Werder Bremen fan assessed as a lead "violence-seeking hooligan", who was detained after hiding in a female toilet cubicle in order to evade the Frankfurt police's instructions to join a walk-up to the stadium. The evidence of his prior conduct combined with evidence from his seized phone showing a pattern of calls exchanged with a Frankfurt fan, to establish that the individual was preparing to engage in violent disorder with home fans.[141] The work done by the police to ascertain the preparatory steps rather than rely upon intelligence, vindicated an assessment that preventative detention for the period of risk was reasonably necessary to prevent the commission of an identifiable criminal offence.[142] The link to a *criminal* offence acted as a constraint on the use of preventative arrest, requiring a sufficient level of evidence before action could be taken, thus safeguarding against arbitrariness, the essential interest of Article 5.

[136] "Trial" does not include judicial decisions on the lawfulness of a detention as that is explicitly provided for in Article 5(4).
[137] *Jecius v Lithuania* App. No. 34578/97 31st July 2000, [50].
[138] n.121 *Ostendorf v Germany* (2013), [68], [85].
[139] n.121 *Ostendorf v Germany* (2013), [66] and [85]; n.122 *Shimovolos v Russia* (2016), [55].
[140] *Lawless v Ireland (No. 3)* App. No. 332/57 1st July 1961, [14].
[141] n.121 *Ostendorf v Germany* (2013), [58]-[60].
[142] n.121 *Ostendorf v Germany* (2013), [80].

That position has to be reassessed in light of the Grand Chamber's thorough consideration in 2018 in another analogous case concerning football fans in *S.,V. + A v Denmark* detained for a period of over 6 hours contrary to Danish law, but released as soon as any risk of further clashes had dissipated without the police ever intending to bring the individuals accused of coordinating fights before a judicial body. Accepting that it was necessary to "clarify and adapt" the case-law,[143] the majority adopting the same pragmatic and teleological reasoning of the UK Supreme Court in Hicks that requirements should not unduly burden police officers who should be afforded a degree of discretion in taking "complicated" operational decisions.[144] To achieve this, the purpose requirement should be applied with a degree of flexibility based on an objective assessment of the force's conduct in promptly bringing the detainee before a judicial process or releasing the individual after a "short period of time" when either the risk has passed or the prescribed short time limit has expired.[145] The Court appeared content with this approach because of the safeguards within the structure of Article 5; the protection from arbitrariness, the ability to judicially review bad faith detentions,[146] and the fact that the facts constituting the risk of committing an offence must already be established at the time when the person is detained, thus requiring prompt release to mean "a matter of hours" rather than days.[147]

The minority in *S., V. and A* skewered the Court's approach to interpretation and persuasively set out the reasons why provisions guaranteeing personal freedom should be interpreted strictly and literally and not permissively expanding state power.[148] Yet, as a majority decision of the Grand Chamber subsequent ECtHR cases should apply their reasoning[149] and, combined with the UK Supreme Court decision in *Hicks* exceptional, short detentions with prompt release will be permitted so long as they are not arbitrary. Nevertheless, effective protection of the core of the right to liberty should not permit the legal fiction that preventative arrest of non-violent fans for several hours without judicial oversight is a permissible regular tactic. A true human rights approach to football policing would not regularly engage in tactics that have

[143] n.96 *S.,V. and A. v Denmark* (2018), [137]; The UK Supreme Court also identified the Strasbourg jurisprudence on Article 5(1)(c) was not "clear and settled", *Hicks* [2017], [32].
[144] n.96 *S.,V. and A. v Denmark* (2018), [116] and [123].
[145] n.96 *S.,V. and A v Denmark* (2018), [124]-[137].
[146] n.96 *S.,V. and A. v Denmark* (2018), [125]-[126].
[147] n.96 *S.,V. and A. v Denmark* (2018) [133].
[148] Joint Partly Dissenting Opinion n.96 *S.,V. and A. v Denmark* (2018) [5]-[6].
[149] *Eiseman-Renyard v United Kingdom* App. No. 57844/17 28th March 2019.

only been held to be compatible with human rights in extraordinary circumstances such as seriously disruptive ongoing disorder.

B.4.2 Detention under Article 5(1)(b)

Article 5(1)(b) offers further grounds to justify preventative detention in order seek fulfilment of a "specific and concrete" legal obligation.[150] legal obligation. Specificity is a context-dependent standard but it invariably requires an express direction from a police officer to cease an illegal activity, general legal rules concerning public order are not a sufficient basis to interfere with peaceful gatherings.[151] An obligation – such as to keep the peace by not fighting with other football fans - can only be considered specific and concrete if the place and time of imminent commission, as well as the identity of potential victims, has been "sufficiently specified".[152] In *Ostendorf* the instruction to join the escort to the stadium or risk arrest was sufficiently clear by identifying the place, time, and identity of potential victims – however broadly - "a brawl between… hooligans in the hours before, during, or in the hours after the football match in the city of Frankfurt or its vicinity".[153] The incongruent flexibility of the "specific and concrete" test giving definitional latitude to the place and time requirements is another instance of the courts deferring to police operational practicalities.[154]

Finally, the envisaged offence does need to actually be committed by the individual. It is sufficient if the person has taken "clear and positive steps" to show that they are not willing to fulfil the obligation.[155] For instance, Ostendorf evinced his intention to not stay with the group of fans to be escorted, engaged in preparatory acts and attempted to evade police officers and so it was reasonable to conclude that he was not willing to keep the peace.[156] In *Eisman-Renyard*, the ECtHR confirmed that the offence of breach of

[150] n.13 *Engel* (1976), at [69]; *Rozhkov v Russia* App. No. 38898/04 31st January 2017, [76].
[151] n.99 *Navalnyy v Russia*, [144]; *Lukanov v Bulgaria*, App. No. 21915/93 12th January 1995, [42]-[43].
[152] n.121 *Ostendorf v Germany* (2013), [93].
[153] n.121 *Ostendorf v Germany* (2013), [93].
[154] See further, T. Giergerich, 'The Struggle by the German Courts and Legislature to Transpose the Strasbourg Case Law on Preventative Detention into German Law' in A. Seibert-Fohr, M. Villiger (eds.) *Judgments of the European Court of Human rights – Effects and Implementation* (Max Planck, Routledge 2016), 211-213.
[155] n.121 *Ostendorf v Germany* (2013), [94]; n.126 *Hicks* [2017], [33]-[39].
[156] n.121 *Ostendorf v Germany* (2013), [96].

the peace was sufficiently concrete and specific in the circumstances, even though there was not an express, immediately prior iteration of the obligation in concrete terms.[157] The finding that the obligation was clear relied upon the "general factual background" of a Royal Wedding and the wider context of a severe terrorist threat level, meaning that the individuals must have known about their obligations as citizens not to threaten disruption of the wedding.[158] That however goes against previous jurisprudence, including *S.V. & A. v Denmark,* which identified that it is normal to expect a large police presence at any mass event, and broadening the "specific and concrete" test to allow for detention on the basis of vague expectations in such situations would be incompatible with the rule of law.[159]

As detention must be aimed at, or directly contribute to securing a legitimate objective, detention sought purely on the basis of data collection, or pure intelligence would not qualify as a concrete obligation and may qualify as punitive.[160] This is relevant for those arrested during football operations in England and Wales, where the practice is to make a record on the National Football Policing database with such information later used to show propensity in the prosecution of future offences or in the pursuit of football banning orders.[161] This analysis would be entirely different where the individual was subject to a specific football banning order not to commit certain crimes or prohibited conduct which would be sufficiently specific and arrest will be legitimately aimed at securing fulfilment of the banning order.

B.4.3 Balancing the community interest in Article 5

Finally, the assessment of a lawful detention also requires the court to assess the balancing of competing interests. In *Austin* the prospect of "unruly groups" colliding at a football match was raised *obiter* as an instance where the interests of the community should be prioritised.[162] Similarly in *S.,V. and A* the prospect of football fans fighting was termed such a "serious challenge" that ECtHR case-law had to "adapt" to

[157] n.149 *Eiseman-Renyard v United Kingdom* (2019), [43].
[158] n.149 *Eiseman-Renyard v United Kingdom* (2019), [43].
[159] n.96 *S.,V. and A. v Denmark* (2018), [83]-[86].
[160] *R(Mengesha) v Commissioner of Police of the Metropolis* [2013] EWHC 1695 (Admin).
[161] N. Hamilton-Smith, B. Bradford et al, *An Evaluation of Football Banning Orders in Scotland* (Scottish Government Social Research, Edinburgh 2011), 20.
[162] *per* Lord Hope in *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5, [34].

develop the flexible approach.[163] Broad conclusions such as these are not always determinative but they certainly obscure the developed law that the right to liberty to the individual is of fundamental importance and should be prioritised.[164] In balancing interests Courts will take this standpoint in conjunction with the even vaguer notion "of the interests of the community" framing disorder as seriously disruptive without the counterweight considerations of liberty. This creates a low threshold for interventions to detain individuals – not yet committing criminal offences - based on pragmatic considerations that allows for an unchecked expansion of executive power. For example, the majority in *Hicks* concluded that it was necessary to expand the interpretation of Article 5(1)(b) "which in another case might leave the police effectively powerless to step in for the protection of the public."[165] In both forms of preventative detention above we have traced the transformation of an analytical balancing exercise into judicial policy-making to expand the grounds available to police forces in Article 5(1). Strasbourg went even further in *Eismann-Renyard* by adding as relevant considerations, the positive duties of the police in Article 2 and Article 3 ECHR.[166] But even the positive obligation of the state to protect the public from ill-treatment, torture and death does not justify the courts reading-in an extraordinary basis for preventative detention that has never been agreed by the contracting parties.

Unfortunately, the ECtHR approach to balancing means that the Court does not require a correct decision in each case of balancing but rather a "fair balance",[167] with each situation assessed on its own facts. The complexities covered in this section shows the difficulty in determining universal standards, even with the benefit of post-hoc legal and appellate review, but the individual officer is on much safer ground where they can specify the actual disturbance to the public order, an identified danger to the safety of others, and the necessity of the detention[168] as well as releasing detainees as soon as the imminent risk has passed.[169]

[163] n.96 *S.,V. and A. v Denmark* (2018), [126].
[164] *Wintertwerp v the Netherlands* App. No. 6301/73 23rd December 1979, [39].
[165] n.126 *Hicks* [2017], [40].
[166] n.149 *Eisemann-Renyard* (2019), [124]-[125].
[167] n.149 *Eiseman-Renyard* (2019), [46].
[168] n.149 *Eiseman-Renyard* (2019), [46].
[169] n.96 *S.,V. and A. v Denmark* (2018), [171]-[172].

B.5 Detention short of deprivation: Cordons and containments

The authoritarian shift in public order policing has seen the growth of overly broad powers deployed as part of a 'risk-based' strategy to target populations deemed to pose a threat.[170] In public order policing, the "cordon" is a tactic relied upon to pre-empt or respond to a range of perceived threats. A cordon is a moveable human barrier (officers), used to create a sterile area, segregate groups, or control passage of persons or vehicles.[171] Football policing operations have contained elements of enforced segregation since the late 1960's as either a preventative or reactive tactic.[172]

The College of Policing APP identifies two broad categories of "absolute" and "filter" cordons,[173] but more detailed tactical guides give additional descriptors of such as "loose", "tight", "linked", or "wedge" cordons – indicating the flexibility of tactical options available to a commander.[174] Invariably the aim of a cordon tactic is to impose control over the movement of fans at key locations, for example at turnstiles.[175] Looser "filter" cordons are directed to achieve a different form of control and see officers encouraged to interact with fans which may allow greater opportunities for dialogue[176] such as just outside the turnstiles where officers encourage fans to finish off alcoholic drinks before security.[177]

Absolute cordons are also known as a "containment" and these terms are used interchangeably without due precision.[178] "Kettling" is a colloquial term adopted by the media to refer to absolute cordons which continue beyond a brief imposition.[179] In *Austin v United Kingdom* the ECtHR was

[170] L. Zedner, *Security* (Routledge, London 2009), 81.
[171] ACPO, 'Manual of Guidance on Public Order Tactics' (2006), at 51.
[172] n.112 James and Pearson (2015), 468; M. O'Neill *Policing Football, Social Interaction and Negotiated Disorder* (Palgrave Macmillan, London 2005), 85.
[173] ACPO, 'Manual of Guidance on Keeping the Peace' (2010), 104; College of Policing, APP, Public Order, Planning and Deployment, Tactical Options, 20.
[174] n.171 ACPO (2006), at 51.
[175] n.172 O'Neill (2005), 86-87.
[176] C. Stott, J. Hoggett, G. Pearson, 'Keeping the Peace: Social identity, procedural justice and the policing of football crowds' 52 British Journal of Criminology 2 (2012) 381-399.
[177] G. Pearson, A. Sale, 'On the Lash' 21 Policing and Society 1 (2011), 157-158.
[178] n.52 *Laporte* [2006] UKHL 55, [68].
[179] J. Gilmore, 'This is not a Riot: Regulation of Public Protest and the Impact of the Human Rights Act 1998,' (Phd, University of Manchester 2013), 154.

unanimous its assessment that the use of "containment"[180] and other "crowd control techniques" could give rise to an unjustified deprivation of liberty in breach of Article 5(1).[181] Therefore each deployment of the cordon tactic can engage Article 5, and should be assessed for its compatibility with the right to liberty.

B.5.1 Absolute containment in *Austin*

The House of Lords in *Austin* set out a novel interpretation of Article 5 that doctrinally diverged from previous Strasbourg jurisprudence, stating that a proportionate balance can underpin legitimate deprivations of liberty and that the purpose of the measure being implemented can be determinative of whether or not Article 5 is engaged by a police cordon.[182] Criticised extensively,[183] it is clear that the House of Lords were proposing a novel interpretation of Article 5 in cases that, according to Lord Hope, fell into a legal "grey zone".[184]

The Lords held that the Metropolitan Police's application of absolute cordons to different groups of people (amounting to 3,000 in total) during the 2001 May Day protests had dual aims: to prevent "risk" individuals adding to further unrest elsewhere in the city,[185] and to facilitate a safe controlled dispersal from the area.[186] This determination of a potential future risk, alongside the court's summary assessment of the "unusually difficult"[187] occurrences that day, were – confusingly - critical steps in

[180] R. Glover, 'The uncertain blue line – police cordons and the common law' [2012] Criminal Law Review (4), 245-260.
[181] *Austin v United Kingdom* App. No. 39692/09 15th March 2012, [60]; Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki,[7]-[8].
[182] D. Mead, *The New Law of Peaceful Protest* (OUP, Oxford 2010), 352-354.
[183] n.179 Gilmore (2013) at 167-174; D. Mead, 'Of Kettles, Cordons and Crowd Control: Austin v. Commissioner of Police for the Metropolis and the Meaning of 'Deprivation of Liberty' 3 European Human Rights Law Review (2009) 376-394; H. Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest' Public Law [2009] 737-765.
[184] n.162 *Austin* [2009], [20]-[21].
[185] n.162 *Austin* [2009], [39].
[186] n.162 *Austin* [2009], [8]-[9].
[187] n.162 *Austin* [2009], [43].

their conclusion that Article 5 rights of the individuals contained for more than 6 hours were not engaged by the absolute cordons.

Pointedly, the House of Lords found the analogy to football fans being held inside the stadium compelling, implicitly identifying a form of tacit informed consent that protestors and football fans should expect to have their liberties curtailed by police tactics.[188] Aside from this being a false analogy, there is no support in Strasbourg jurisprudence that a person can consent to forfeit their Article 5 rights.[189] In the claim before the ECtHR, this analogy and the focus on the purpose of the measure were not repeated by the judges in Strasbourg who focused instead on the proportionality aspect concluding that in the specific context an "absolute cordon was the least intrusive and most effective means to be applied".[190]

Far from giving public authorities "carte-blanche"[191] to impose far-reaching freedom-restricting measures such as absolute cordons in everyday operational policing,[192] the "specific and exceptional facts"[193] of *Austin* were the cornerstone of the majority's analysis.[194] The widespread riots in *Austin* amounted to an extreme case by public order standards and should not form the basis for best practice in more paradigm situations, such as policing rival fan groups. It is also relevant that this incident took place in May 2001, not long after the introduction of the HRA and well before the systemic reviews into public order policing that took place in 2009-10. Consequently, the approach of the police that was seen as exceptional in this case is clearly not a signifier of best practice in the era following *Keeping the Peace*,[195] *Adapting to Protest* [196]and the APP. The Austin case should not therefore be the

[188] n.162 *Austin* [2009], at [23] and [58].
[189] *Cheshire West and Chester Council v P* [2014] UKSC 19, [68] *per* Lord Neuberger: "*It involves turning that principle on its head to say that the absence of objection will justify what would otherwise be a deprivation of liberty"*.
[190] n.181 *Austin v United Kingdom* (2012), [66].
[191] n.182 Mead *(*2010), 354.
[192] A. Ashworth, 'Human rights: Article 5 – Application to measures of crowd control by police' 7 Criminal Law Review (2012) 547.
[193] n.181 *Austin v United Kingdom* (2012), [68].
[194] With reference to the "nearly 6,000 officers on foot…", at n.181 *Austin v United Kingdom* (2012), [19]
[195] n.173 ACPO (2010)
[196] HMIC, *Adapting to Protest* (HMIC, London 2009),

basis on which containments are assessment for their legality, instead the approach set out current policy and practice should be favoured.

B.5.2 Failure of the courts to engage with a human rights approach

The political context of the *Austin* decision further mitigates against it being a precedent-establishing case. The case reached Strasbourg in an age of resurgent Euroscepticism, with leading Conservative party politicians seeking to stoke disputes between the UK and the Council of Europe – often through exaggerated or fabricated stories[197] – as to the respective competencies of their national and regional judicial organs.[198] The UK took over as Chair of the Council of Europe in January 2011, with David Cameron proposing that the ECtHR stops acting as a "court of the fourth instance" and recalibrate with greater subsidiarity that treats decisions of national courts "with respect".[199]

Two weeks after this speech, the judges in *Austin* met to deliberate the judgment to be handed down. At the part of the judgment where the reader would expect detailed analytical engagement with the specific framework of Article 5(1), there are instead two lengthy paragraphs devoted to subsidiarity and the margin of appreciation to national courts.[200] With that context, it is understandable why the majority did not directly grapple with the House of Lords' mangling of the human rights analysis.

The key failing in the House of Lords' judgment is a repeated theme; a failure to stress the individualised assessment of the right to liberty, in adopting an approach of deference to police decision-making in an extreme situation.[201] This goes beyond the usual caution exercised over

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[197] M. Elliot, 'The UK Bill of Rights Commission' (UK Constitutional Law Blog, 18th April 2011) <https://ukconstitutionallaw.org/2011/04/18/the-uk-bill-of-rights-commission> accessed 9th September 2019.
[198] Z. Jay, 'Keeping Rights at home: British conceptions of rights and compliance with the European Court of Human Rights' 19 British Journal of Politics and International Relations 4 (2017) 824-860.
[199] D. Cameron, "Speech on the European Court of Human Rights" (25th January 2012) < https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights> accessed 9th September 2019.
[200] n.181 *Austin v United Kingdom* (2012), [61]-[62] and [66]-[68] "As the Government pointed out…the police had no alternative".
[201] n.162 *Austin* [2009], [39], [47] and [57], *contra* the Court of Appeal in the same case, *Austin and Saxby v Commissioner of the Police of the Metropolis* [2007] EWCA Civ 989, [61].

resource-allocation cases. The deferential "minimising approach"[202] of the House of Lords was based, as Lord Bingham put it, on the basis that assessment of risk and selection of tactics is "driven by policy" and not by law.[203] This emphasis on an "area of discretionary judgment"[204] predicated upon respective spheres of expertise, cannot be sustained if Article 5 was properly applied to the facts. The carrying out of appropriate assessments, the analysis of least restrictive tactical options, and the overall impact of police coercion on the rights of the individuals are all part of the proportionality assessment that the ECtHR says underpins Article 5 and the whole convention.[205]

Certainly, the competing demands of a large public order operation make it challenging for the police to keep the peace, but operational difficulties do not negate the fact that deployment of police tactics is a legal matter subject to legal assessment,[206] the performance of which is subject to a legal duty.[207] Often, as I discovered during my observations, tactics decisions are presaged in planning meetings and briefings, so the reliance on operational difficulties would not be appropriate in every case.

B.5.3 A human rights approach to containment

Absolute cordons can be compatible with a human rights approach where the tactic is deployed in exceptional circumstances, where there is no alternative.[208] A cordon cannot be pre-emptive and at the same time be required by the specific context.[209] Assessment of a breach will consider the type and manner of the implementation.[210] Therefore a human rights compliant tactic will consist of the

[202] n.183 Fenwick [2009], 751.
[203] *per* Lord Bingham, n.85 *A and ors v Secretary of State for the Home Department* [2004], [29].
[204] *R (Pro-life Alliance) v BBC* [2003] UKHL 23; F. Klug, 'Judicial Deference under the Human Rights Act European Human Rights Law Review [2003] 1125; *R (Brehony) v Chief Constable of Greater Manchester* [2005].
[205] See Section B.3 above
[206] n.183 Fenwick [2009], 737.
[207] s.6 Human Rights Act 1998.
[208] J. Murdoch, 'Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence' International Comparative Law Quarterly (1993) 494, 499.
[209] D. Mead, 'Kettling Comes to the Boil Before the Strasbourg Court: Is it a Deprivation of Liberty to Contain Protesters En Masse?' 71 Cambridge Law Journal 3 (2012) 474.
[210] College of Policing, Authorised Professional Practice (APP), 'Public Order', 'Core Principles and Legislation' (30th January 2020) < https://www.app.college.police.uk/app-content/public-order/> accessed 13th March 2020, [2.9].

minimal amount of coercion required for the cordon to be effective at restoring an exceptional loss of order. This means the cordon must be managed in order to facilitate the process for individual to leave the cordon as soon as is possible.[211] The Joint Committee on Human Rights assessed that it would be disproportionate to operate a blanket ban on individuals leaving a contained area as this "fails to consider whether individual circumstances require a different response",[212] and heightens the risk of an egregious breach.[213] The duration of a containment does not even need to reach the several hours in *Austin* before a breach occurs. Where there is coercion, a breach can arise in under an hour.[214]

Therefore the police must be extremely cautious with any absolute cordon that treats groups homogenously – "pooling liberties" rather than approaching liberty as an individual right free from any tenor of guilt by association.[215]As Laws LJ held, *every* interference with the personal autonomy stands in need of objective justification, as autonomy "marches with the presumption of liberty".[216] He added that liberty is such a "defining characteristic" of a free society that we "therefore need to preserve it even in little cases" such as where cordons are transient.[217]

The deployment of transient containments by the Danish police was praised in *S.,V.& A* where the "manoeuvre" tactics were a "careful approach" based around dialogue and less stringent measures to a avoid a confrontation, but when a containment was applied only the ring leaders were detained and the process of removing the 44 other fans started immediately demonstrating how the containment was released as soon as the risk had disappeared.[218]

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[211] n.215 Joint Committee on Human Rights (2009), [28]-[29].
[212] Joint Committee on Human Rights, *Demonstrating Respect of Rights: A Human Rights Approach to Policing Protest? Follow-up Report* (London, HMSO 2009) HL Paper 141-HC-522, [28]-[29]; OSCE, *Venice Commissions Guidelines on Freedom of Peaceful Assembly* (OSCE 2nd edition, Venice 2010), [160].
[213] n.52 *Laporte* [2007], [105].
[214] n.122 *Shimovolos v Russia* (2016) [49]-[50] for 45 minutes; n.23 *Gillan v United Kingdom* (2010), [57] for 30 minutes.
[215] n.182 Mead (2010), 354.
[216] *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123, at [21].
[217] n.216 *Wood* [2010], [22].
[218] n.96 *S.,V. and A v Denmark* (2018), [158], [163]-[169].

B.6 Positive obligations under Article 5

Beyond taking steps to prevent breaches of liberty and security it is difficult to substantiate positive duties incumbent on the police in respect of Article 5(1), certainly vis-à-vis deprivations undertaken by private bodies.[219] However there are ancillary obligations that have a positive aspect that helps prevent the police and others from breaching the core of the right. Article 5(5) explicitly requires a proactive review process[220] which is based on avoiding the costs of making unlawful mistakes.[221] Accordingly, in case where an unlawful deprivation of liberty has occurred, the onus is on the force to undertake a review and implement any necessary changes to ensure that the human rights standards are met on subsequent engagements with the public.[222] It is even more important to instil this reflexivity in public order policing where officers will face situations where it is necessary to make a judgment call about the necessity of detaining a group of potentially innocent individuals, whilst dealing with an ongoing or evolving threats to public safety. As will be discussed in more detail below in the context of *Austin*, *Laporte*, and *Gillan*, the larger the perceived threat, the less secure an individual's concern for his liberty.[223]

C. The liberty and security of football fans

C.1 Containments pre and post-match

[219] n.108 Ashworth (2017), 626.
[220] *London Borough of Hillingdon v Nearly* [2011] EWHC 1377.
[221] n.105 Baros (2009), 278-280.
[222] *A Local Authority v PB and* P [2011] EWHC 2675 (COP).
[223] n.108 Ashworth (2017), 626.

Exercising control over fans is a preoccupation of commanders, particularly at the outset of an operation. Once spotters identified the location of "risk fans" it was common for a unit to be deployed to "sit on" them,[224] invariably using a hastily arranged cordon to surround the fans to hold them in place.[225] Once the initial response had imposed a degree of control, the further police response evolved to either escalate the tactic to a formal containment, or de-escalate to less coercive means, such as a loose filter cordon.[226] The initial imposition of a cordon allows the commander time to deploy additional resources that were of a higher level of public order training,[227] or to await the arrival of a Bronze Commander to make a direct assessment of the situation on the ground.[228] The speed with which such containments were "put on" indicates the need for all officers to have sufficient training in the human rights implications of cordons. The assessment of legality and compliance with human rights cannot be left to Silver Commander and his tactical advisor, who may be unsighted and lack the contextual information that benefits officers on the ground.

When containments were imposed pre-match, the Bronze and Silver Commanders liaised and usually concluded that the individuals could be "marched" to the stadium in a containment and permitted to watch the match, whereupon they would be monitored by spotters. The exception to this was where criminal offences were directly observed – such as the fight between a dozen home and away fans that continued despite the arrival of three police cars, which resulted in arrests and disposal at a nearby police station.[229] A containment in that situation was clearly compliant with Article 5 despite the coercive element due to the intention to bring criminal proceedings.

The human rights implications of containment were clearly in the minds of officers who voluntarily recalled an incident for which the force has previously been criticised. Several experienced officers showed off their knowledge that cordons can be disproportionate in certain circumstances by referencing the incident, in which the force corralled supporters into a single location and then forced

[224] See further, Chapter 5 Section B1.3
[225] Observation, Silver Commander, Premier League Match 13, Phase 1.
[226] Conversation, Silver TAC, Premier League Match 13, Phase 1.
[227] Observation, Bronze 1, League 1 Match 4, Phase 1.
[228] Observation, Silver Commander, Premier League Match 13, Phase 1.
[229] Observation, Bronze 2, League 1 Match 6, Phase 1.

them back onto coaches to be escorted to their home city. The breach of law and human rights led the force to settle the legal claims.[230] However, the lessons of this incident have been misapplied. This disproportionate action was identified by officers as an example of how their practice has changed since: "we don't do that sort of thing anymore".[231] Unfortunately, the incident has become short-hand for holding that fans must not be prevented from travelling to the game without due cause: rather than upholding the legal position that officers' failure to individualise the risk assessment, combined with a lack of awareness of the fans' rights can lead to a disproportionate and unlawful response to a perceived collective threat. Two incidents illustrate that the misapplication remains prevalent.

First, at a derby match fans were held in a double containment to prevent a breach of the peace after previously escaping from a looser police cordon. The fans were directed by the Silver Commander to be "escorted" to the ground but reports were received from Bronze Commander on the cordon who was not convinced about the merits of the tactic:

> "Bronze 6 query if disorder and risk so high as to require a double cordon, then why escort to stadium? Silver [Commander] and Silver TAC discussed response on basis of their rights to attend the game if they are ticket holders, and risk of claims if they are prevented from doing so.[232]

In basing the decision on the presumed rights of the fans, the Silver Commander has conflated different considerations and erred on the side of caution to avoid accusations of unfair treatment or potential repeat of previous legal claims. The initial or continued legal justification of this cordon was not assessed beyond a broad assertion that it was proportionate to counter the risk of a breach of the peace developing at some point on the fans' journey to the stadium. The decision was made to "sit on" the fans now that they have been found.[233] The lack of individualised assessment of the risk of a breach of the peace also raised concerns:

[230] e.g., Conversation, Silver, Premier League Match 2, Phase 1; Conversation, Bronze 2, League 1 Match 4, Phase 2.
[231] Conversation, Silver Commander, League 1 Match 7, Phase 2.
[232] Fieldnote, Observation Silver Commander, Premier League Match 7, Phase 1.
[233] Conversation, Silver Commander, Premier League Match 7, Phase 1.

> "Shortly after [conversation above], Bronze 6 asking for extra support to filter fans without tickets and to detain "ringleaders". Told by Silver to do that at the ground where there are more resources and barriers to assist, doing in the middle of the streets could lead to a break-out of the contained fans"[234]

The failure to assess the position of individuals was a common failure when containments were observed. After a significant cup-tie, where one smaller team visited a Premier League team, renewing a rivalry for the first time in many years, away fans were drinking in the city centre when Bronze 2 imposed a cordon on "boisterous risk fans" who were a "danger if they carried on drinking" and had been served with a s.35 Dispersal Notice.[235] 22 fans were contained and forced to walk to the train station despite an assessment that between 8-10 were "risk", and 10-12 were just a "potential" risk. Clearly, Article 5 rights were engaged by the containment which was coercive and resulted in the fans' loss of liberty. Whilst the containment could have been justified on the second limb of Article 5 1(b), to ensure compliance with a lawful order, those discussions were not apparent in my observation of the Command Team. The lack of express reference to human rights throughout the containment, alongside the lack of individualised analysis at any time meant that the basis for engagement, as well as the necessity and proportionality of the measure was not accurately identified.

A more human rights-compliant practice was evident in cases where there was not the same level of spare resources to maintain a containment for an extended period. Following a keenly contested derby at the end of the season, a fracas developed between a dozen fans, instigated by abusive comments from away fans walking through the crowd of home fans towards their designated car park. This took place within sight of the only serial of TAU officers on duty who self-deployed to swiftly cordon the group of home fans initially in the immediate vicinity, then removing them 50 metres away from the car park.[236]

[234] Fieldnote, Observation Silver Commander, Premier League Match 7, Phase 1.
[235] Observation, Silver Commander, Cup Match 2, Phase 3.
[236] Observation, Bronze 2, League 1, Match 11, Phase 3.

Immediately the TAU Inspector made clear to the group that they will be permitted to leave as soon as "everything had calmed down".[237] Within 5 minutes individual assessments were being made with those not found to be engaged directly the in the fight being the first allowed to leave. Those more closely related had their details taken and allowed to exit the cordon last. Within 11 minutes the group had been contained and all released.[238] A single individual was then escorted to the police station to be charged with a minor public order offence. These highly trained public order specialist officers had a confident understanding of how the cordon tactic impacted upon the right to liberty of the individuals. As a result, the restrictions to prevent a breach of the peace (under Article 5(1)(c)) were imposed for only as long as they were needed. The TAU Inspector later confirmed that the cordon could have taken the fans further away from the site of conflict, and potentially all the way to the railway station. He considered it necessary to release the fans as soon as possible, as the incident was "relatively minor", leaving his officers able to respond to other incidents that may arise.[239]

C.2 Escorts

It is apparent that clear communication can affect the successful implementation of a cordon. In situations such as the one above, the statement of reasons and explanation of process can minimise the coercive impact of the cordon.[240] Where constructive engagement was had with fans who wanted to march to the stadium *en masse*, the resulting police tactic would often be to deploy a loose filter cordon with a number of officers spread around the group but with minimal[241] or zero coercion.[242] Commanders were not always precise about the terminology, which was not uniformly adopted from the training manual but couched in officers' experience and shared understanding of colloquial terms. This gave rise to instances of confusion about managing a filter cordon that was only meant to be giving communication and guidance and not

[237] Observation, Bronze 2, League 1, Match 11, Phase 3.
[238] Observation, Bronze 2, League 1, Match 11, Phase 3.
[239] Conversation, TAU Inspector, League 1 Match 11, Phase 3.
[240] Observation, Bronze 2, League 1, Phase 3 Match 11.
[241] Observation, Bronze 5 European Match 5, Phase 1.
[242] Observation, Silver Commander Premier League Match 4, Phase 1.

engaging in any coercive control over fans.[243] Such filter cordons do not engage Article 5 when they operate simply as segregation lines but of course those who attempt to contravene a filter cordon may be subject to detention.[244]

There was a noticeable self-awareness among senior officers who knew of my interest in the subject of cordons. One in particular was quick to correct the terms he used when instructing officers, changing from "containment" to an order of "a shadow cordon, a loose shadowing one only" in order to show that he understood the need to avoid coercive actions where no breach of the peace or other justification is present.[245] On the ground, deployment of cordons was a highly pragmatic exercise. Commanders did not linger on legal considerations because of the intense focus on resource logistics, allocation of responsibilities and briefing of the planned escort route.[246]

Officers also tended to raise the subject of consent to justify the use of cordons.[247] Consent is not a legitimate basis in Article 5(1) but plainly a cordon will lack coercion where there is valid consent. The nature of the cordon can also change over time as commanders escalate a response to heightened risk assessment. Accordingly, an initially voluntary "shadow cordon" that sets off from the town centre on a circuitous route to the stadium may be well below the level of restriction, but where the permeability of the cordon is decreased and opportunities for removing oneself from the escort become more limited the initial consent-based tactic may be replaced by more coercive measures.[248]

C.3 Hold-backs

A "hold-back" is a specially adapted cordon tactic that police implement towards the end of the game to contain fans within their allocated part of the stadium to reduce the risk of fans clashing once outside. The specific deployment depends on the stadium design and available resources generally

[243] Domestic Cup Match 3, Phase 1, Bronze 2.
[244] Observation, Bronze 1, League 1 Match 12, Phase 3.
[245] Observation, Bronze 3, Premier League Match 12, Phase 1.
[246] Bronze 3, European Match 3, Phase 1; Bronze 2, League 1 Match 3, Phase 1.
[247] Observation, Bronze 2 TAC, Premier League Match 14, Phase 2.
[248] Observation, Silver Commander, League 1 Match 4, Phase 1.

consist of a PSU serial blocking the steps and aisle immediately around the mouth of a vomitory. During the observed period this tactic was used primarily at European fixtures and was also considered a tactical option for Category C domestic fixtures too.

In respect of the practical implementation of the tactics the force recognised that the holdbacks were classified as a containment and so on each occasion appointed a "Cordon Bronze Commander" to consider the welfare aspects of those in the cordon and to oversee relief measures.[249] During observed hold-backs the containment officers permitted fans to use the toilet facilities, sometimes with an individual escort or more often a back-stop tactic of placing police at the final exit doors.[250]

For each European and Category C fixture the hold-back tactic was printed in the Operational Order as a contingency plan. The decision to implement the tactic took place at different times. The earliest determination occurred in the first few minutes of the game.[251] Bronze 1 and Bronze 2 engaged in a discussion about "the violent conduct" of a "significant portion of the away risk fans" and decided that a containment was necessary "to prevent a repeat of the same behaviour".

> "The Bronze commanders then briefed each Inspector who came into the relief room for their tea break. Each was told in terms of the violent conduct of the risk fans. Due to the resources requires to holdback 2,100 fans, officers were put in place 25 minutes before the end of the game. I check back in my notes and confirmed that the only reported "violence" was an away fan banging the boot of a car sat in traffic ~2 hours before kick-off. References to the history between the two sides was much more frequent"[252]

Accordingly, the determination of the necessity of the tactic was made around 90 minutes before it was implemented: it required the containment of 2,100 fans for around 30 minutes, and was based on the characterisation of an event neither of the two decision makers had direct knowledge of. This containment cannot have been based on a perceived necessity to prevent a breach of the peace as it

[249] Observation, Bronze 2, European Match 3, Phase 3.
[250] Observation, Bronze 2, Cup Match 3, Phase 3.
[251] Observation, Bronze 2, League 1 Match 4, Phases 1-3.
[252] Fieldnote, Bronze 2, League 1 Match 4, Phase 2.

ignored the faultless conduct of the fans during the game. Bronze 2 TAC confirmed this assessment of a lack of legality by responding to my query about applying the containment to the whole section of away fans: "it's better to be safe than sorry".[253]

More commonly the decision would be made at either the 20-minute briefing[254] with the Silver Commander or the half-time briefing of senior officers at the stadium.[255] Making a decision about the necessity of a hold-back at this point allowed consideration of additional information based on the spotters and commanders' assessment of fans' behaviour inside the stadium whilst also giving time to brief the officers and move them into place. That is not to say that every discussion about a hold-back ended in the implementation of the tactic. At a derby match in the cup, that permitted the away side to bring double the number of fans usually allocated, the Silver Commander had briefed senior officers about their ability to implement a containment if required.[256] At half-time this was discussed at length but despite a number of pre-match arrests, damage caused to toilet facilities at half time and coin throwing inside the stadium, the assessment was made that it would be "more proportionate to concentrate resources outside and to respond if an incident occurs". [257]

As a hold-back is a containment, the police are required to hold the fans for only as long as is necessary for the perceived threat to pass. How this is assessed qualitatively can depend on how the threat is framed when the initial decision to implement the tactic is made. Where the threat perceived is clashes between fan groups, the exact point at which disorder becomes unlikely is hard to judge but the case law guides the decision maker to look at reasonable outcomes[258] such as when it is likely that the bulk of the fans who might be tempted to engage in clashes have moved away from the stadium footprint.[259] In this respect, an order to wait until the streets outside the stadium have become "substantially clear of people"[260] or the "carriageway has totally emptied of people"[261] goes beyond

[253] Conversation, Bronze 2 TAC, League 1 Match 4, Phase 3.
[254] Observation, Silver Commander, Premier League Match 13, Phase 2.
[255] Observation, Bronze 2, European Match 6, Phase 2.
[256] Observation, Silver Commander, Cup Match 4, Phase 1.
[257] Conversation, Silver Commander, Cup Match 4, Phase 2.
[258] n.121 *Ostendorf v Germany* (2013), [80].
[259] Observation, Bronze 2, European Match 7, Phase 3, 23 minutes.
[260] Observation, Bronze 2, European Match 6, Phase 3, 48 minutes.
[261] Observation, Bronze 1, Premier League Match 8, Phase 3, 39 minutes.

what is proportionate under Article 5 and is based on a desire to make the streets "safe"[262] rather than to avoid disorder between two sets of fans.

The decision to release the hold-back is made by Bronze 1 inside the stadium in conjunction with Bronze 2 outside the stadium, which is the only operational decision that requires them to work closely together. During a hold-back the two Bronze teams will be in communication every few minutes prompting the other to assess the progress towards the perceived threat being cleared. Officers involved consider that the tactic is implemented "smoothly, we've done it so many times"[263] but there is clear tension in the air: neither commander wants to be responsible for an untimely release leading to an exacerbated situation.

> "The street outside the stadium had been slow to clear, mounted officers barking sharply at those lingering, many innocent tourists wanting a photo but perceived to be at risk once the away fans are released. Bronze 2 Commander looking left and right repeatedly, every radio signal interpreted as Bronze 1 agreeing to lift the hold-back. 22:27 – he asks a third time."[264]

A further notable feature that officers need to consider relates to the starting point of the hold-back. Due to the desire to prevent fans leaving early and side-stepping the containment, hold-backs are usually deployed when the match reaches 80 minutes. By the time of the final whistle, fans may already have been prevented from leaving or using the facilities for around 15 minutes.[265]

In a conversation regarding a force-wide review of the hold-back tactic, a senior officer who was an experienced Bronze Commander commented that this time "doesn't count because the match is ongoing… They're not really affected".[266] Case law does not support a conclusion that the contained persons must be aware of the extent of their situation though contextual factors are relevant to the assessment. Yet the simple fact that some of the group may be watching the game on the pitch does not mitigate the coercion that is present and that could be encountered at any time. The tactic is

[262] Observation, Bronze 2, European Match 6, Phase 3.
[263] Conversation, Bronze 1, European Match 6, Phase 3.
[264] Fieldnote/Observation, Bronze 2, European Match 6, Phase 2.
[265] Due to the aims of the hold-back it is not common practice to announce the hold-back until it has been put on.
[266] Conversation, Bronze 2, European Match 6, Phase 3.

designed to be impermeable and any fan who tries to escape will be dealt with as "clearly someone looking to cause trouble outside".[267] Thus, Article 5 is engaged from the initial implementation of the hold-back tactic, and this impacts on both the quantitative assessment of how long the containment is in place and the qualitative assessment of the conditions of the containment. For police to sustain the assessment that a containment is still justified 30 minutes after the final whistle, they must also consider the previous period in order to make an accurate quantitative or qualitative assessment. This becomes even more important where there is lengthy injury time or even extra-time. Fortunately, when this occurred the containment tactic was relaxed after ten minutes and some families with young children were permitted to leave.[268]

Whilst a bona fide containment aimed at avoiding disorder in the immediate vicinity of the stadium is an objective the police should pursue based on clear intelligence, the infringement of hundreds of fans' Article 5(1) rights for even a short length of time is not a satisfactory corollary to ensuring a situation of perfect safety.

C.4 Arrests and Evictions

As arrest is a paradigm example of a situation in which Article 5 is engaged,[269] every arrest requires either suspicion that a crime has been committed or breach of a lawful order such as a direction not to breach the peace.[270] When observed, officers proceeded on the basis of their powers of arrest under domestic law without reference to human rights or Article 5. Unlike other tactics, such as imposing containments, the lack of express justification grounded in human rights law is not a serious concern. This is due to well tested law that the basis for arrest in domestic law are ECHR compliant where the

[267] Conversation, Bronze 2 TAC, European Match 6, Phase 3.
[268] Conversation, Bronze 2, Cup Match 3, Phase 3.
[269] See at Section A.3 above.
[270] s.24 Police and Criminal Evidence Act 1984.

arresting officer believes in the necessity of arrest and the intention is to bring the individual before a competent authority.[271]

The same cannot be said for directed arrests. During the first half of a cup match the Bronze Commander and his TAC spent time with binoculars and CCTV cameras looking for a fan whose description had been provided by Bronze 2 outside the stadium in relation to an incident where a bottle was thrown at a set of opposing fans.[272] Once identified that PSU Inspector was instructed to lead a team of 4 officers to take the individual from his seat underneath the stand and arrest him. Whilst I did not observe who actually effected the arrest, it was not the officer who originally held the suspicion of a criminal offence. This practice, whilst pragmatic and efficient, does not comply with Strasbourg jurisprudence: the arresting officer cannot speak to the detail of what the accused is suspected of doing, having been ordered and given limited information by a superior.[273]

Arrests are not a feature of every match. Indeed, it is much more common for otherwise illegal behaviour to be overlooked.[274] The police are only likely to involve themselves if conduct goes beyond the routine disorderly behaviour, aggressive shouting, and abuse towards the opposition which they have come to expect as normal.[275] It is behaviour such as this that exceeds what the police say is 'normal' for football or that which allows people to just blow off steam. Pre-emptive detention of those who may pose a risk during a football operation on a mass scale, along the line of *Hicks* (above), was not observed, nor recorded as being a tactic deployed on other occasions, during the period of the study.

However, preventative detention did occur on occasions where intelligence against an individual was overwhelming, or they had already started to commit public order offences which were likely to continue. As in *Ostendorf,* the individual was detained in such a way that the process did show intention to bring the person before the relevant judicial authorities under Article 5(1)(c). Although in this case the detention for

[271] n.137 *Jecius v Lithuania* (2000), [50]
[272] Observation, Bronze 1, Cup Match 3, Phase 2.
[273] n.124 *Parker* [2018].
[274] Such as abusive insults that lead to arrest even outside the stadium, See Chapter 4 on Freedom of Expression for more.
[275] n.172 O'Neill, 69; Conversation, Planner, Cup Match 3, Phase 1.

an extended period lacked necessity. In the build-up to a cup match, an away fan was detained by officers for breach of the peace as they observed him shouting abuse at a home fan and threatening to punch him. When detained the officers deployed on a filter line outside the stadium asked Silver Commander where to take the detainee. Silver Command directed them to call the local area car to pick up the detainee and take him to the cells on the other side of town, 3.5 miles away. This was done so as to not waste the football operation resources on a time-consuming activity. Silver expressed his delight at the arrest to this TAC, "that'll do nicely that won't it, we can get him out of the way and he won't be able to go back and cause more trouble" and then in my direction, "he won't be seeing much of the game from there".[276] Later in the operation it was apparent that the fan was released with a couple of minutes to go before half-time after spending over 4 hours being processed for a release without charge (but with details recorded on the system). Detention to prevent a (further) breach of the peace engages Article 5, and under *Hicks* the Commander would be entitled to point to the contextual justification of the high-risk fixture, along with the individual's clearly expressed intention to engage in disorderly behaviour, as a basis for prolonging such a detention. The weakness of relying on the exceptional circumstances argument is that it fails to maximise respect for the right of the individual, as well engage with the particular facts of the case – which were not analogous to the ongoing riots in *Hicks*. Therefore, analysis would revert to a more typical failure to engage with the second limb of Article 5(1)(c) and show convincingly that the detention prevented the individual committing further offences of a specific type.

Arrests made at some stadiums can lead to prisoner processing and disposal at the ground – where the process can be completed and the individual released before the game finishes, or shortly thereafter as required. In observations this process appeared to run efficiently and even if fans were detained in the stadium's own cells then it was for only the most serious assaults and only until the prisoner van could arrive at the nearest exit.

More generally, within the stadium the stewards have primary responsibility to ensure the health and safety of those attending the fixture and have primary responsibility to carry out any ejections that are required by

[276] Observation, Silver Commander, Cup Match 2, Phase 1.

contravening behaviour.[277] The police are willing to support the work of stewards and this includes assisting with evictions.[278] Two forms of assistance were observed: where the officers stood at the bottom of the stand to provide visual authority and reassurance for those stewards "putting hands on" the fan in question, or being actively directed by the stewards to conduct their task on their behalf. Whilst the police force will probably be acting pursuant to the Special Police Services agreement between the force and the club, the police retain their duty to act in accordance with human rights whilst in the public eye. Whether Article 5 is engaged by an ejection will depend on the criteria assessed in *Gillan*, the coercive element and the contextual factors of the "detention". A coercive ejection that requires officers to physically drag an individual out of the stadium and continue detention in order to obtain details would be assessed much more like an arrest.[279] On the other hand, where the individual walks willingly with the officers, although coercion is present, it is unlikely to engage Article 5.[280] A final question arises as to the duty of care when officers eject an under-18 fan. On one occasion where this occurred during the game an officer waited with the minor until a parent drove to the ground to pick them up.[281]

D. Conclusion

In the above analysis I have demonstrated that the liberty of fans is easily curtailed by officers relying upon their common law duty to prevent a breach of the peace. Use of powers to prevent a breach of the peace is consistent with ECtHR jurisprudence and can be implemented in a human rights-compliant manner, indeed the rights of others may require officers to cordon or detain violent offenders. However, the legal standard for an imminent risk of serious disruption to public order is not met on many occasions where cordons, or detention such as escorts and hold-backs occur as a readily available contingency tactic, of which the necessity of such intrusive restrictions is pre-empted or

[277] n.172 O'Neill (2005), 67.
[278] n.172 O'Neill (2005), 68: O'Neill assessed that the reason why they are so keen is due to effect enforcement has in appearing to be an arrest but carrying with it none of the paperwork.
[279] Observation, Spotter, League 1, Match 7, Phase 2.
[280] Observation, Bronze 1, League 1, Match 12 Phase 2.
[281] Observation, Bronze 1, League 1, Match 12 Phase 2.

based on an exaggeration of the actual risk facing the public. Officers deploying cordon tactics did demonstrate some reflexivity in recognition of the potential for the tactic to engage Article 5, but a human rights approach would seek to maximally fulfil human rights of those temporarily detained, rather than extending the limitation on their liberty in an attempt to remove every possible risk from the streets before releasing fans. Finally, I analysed the role of the court's deference to officer's assessments of threats to public order and how courts have failed to require high standards, but the development of jurisprudence in conjunction with the ECtHR evolves and the political context of controversial decisions applying a low bar in Article 5 cases may not exist in future. In any case there is an objective justification for applying stricter standards to coercive tactics as maintaining the legitimacy of intrusive interventions is critical lest illegitimate cordons, escorts, or hold-backs actually contributed to a breach of public order.

CHAPTER 7 : ANALYSIS

A. Elements of a Human Rights Approach

A.1 Analytical questions concerning the Human Rights Approach

In the previous chapters I assessed the extent of the force's compliance with human rights standards by examining the compatibility of officer actions against the legal framework relating to three specific Convention rights. Compliance with normative human rights standards is one element of the broader research question – to what extent did football policing operations fulfil a human rights approach. That enquiry raises a further subset of questions, including: what are the features of a human rights approach? Further, this analysis will consider how the force did fulfil a human rights approach in certain limited ways and explore what prevents football policing operations from fulfilling a human rights approach on a more regular basis.

Those preliminary questions about the features and the parameters of the human rights approach are assessed first [**A.2-A.4**] before moving onto an analysis of three features of practice that were commonly present whenever the force met the required human rights standards and appeared to fulfil the human rights approach [**B.1-B.3**]. Finally, an assessment is made of the structural and operational limitations that prevented the force fulfilling the human rights approach on a more comprehensive basis. [**C.1-C.2**]

A.2 Defining the content of a Human Rights Approach?

Across the many observed interactions with the public, the vast majority of officers' actions complied with their legal obligations and did not impact upon fans' enjoyment of human rights. The number of operations where there was no direct engagement with human rights analysis was viewed as a benefit.

Senior Commanders conveyed their satisfaction about successful operations that were "straightforward",[1] that, "didn't give much to write about",[2] or expressed reflected disappointment that I – as the researcher- "didn't get to see any arrests this time."[3] However, delivering a human rights approach to policing football operations is not the same as delivering a match with zero arrests or supressing disorder: it requires more than dutifully repeating previously successful public order operations expecting similar legal considerations to be present.[4]

There is no singular definition of what the umbrella concept of 'a human rights approach' is or what it entails for public bodies. The confused concept originates in international development[5] and has been transplanted into more general international human rights law without adding conceptual clarity or any greater legal underpinning beyond achieving equality of treatment, and protecting minority groups.[6] At inception, parliament intended the HRA to make public authorities "habitually, automatically responsive" to human rights considerations in relation to "every procedure they follow… every practice they follow… in relation to every decision they take"[7] with human rights embedded in the policies, practices and organisational ethos of public authorities.[8] This institutionalised dimension of the "culture of respect for rights" requires both the positive and negative limbs of human rights protection to "shape the structures and practices of our public authorities"[9].

In the realm of public order policing, the Patten Report introduced the "focus" of a human rights-based approach to protest policing.[10] Ten years later the Joint Committee of Human Rights reviewed and

[1] Observation, Bronze 3, League 1 Fixture 6, Silver Command Briefing.
[2] Observation, Silver Commander, European Fixture 2, Phase 3. In reality, relevant data was obtained at every fixture.
[3] Observation, PSU Commander, Premier League Fixture 9, Phase 3.
[4] D. Bayley, *Democratizing the Police Abroad* (Washington, National Institute of Justice 2001), 22.
[5] C. Nyamu-Musembi, A. Cornwall 'What is the "rights-based approach" all about? Perspectives from international development agencies' November 2004 Institute of Development Studies Working Paper 234.
[6] M. Robinson 'What rights can add to good development practice' in P. Alston, M. Robinson (eds.) *Human Rights and Development: Towards mutual reinforcement* (Oxford, OUP 2005), 11.
[7] Lord Irvine LC, Evidence to the Joint Committee on Human Rights, JCHR HL 66-ii HC 332-ii, 19th March 2001.
[8] Equality and Human Rights Commission Report, A. Donald, J. Watson et.al. *Human Rights in Britain since the Human Rights Act 1998: a critical review,* (EHRC, Manchester 2012), 42.
[9] Joint Committee on Human Rights (2003) The Case for a Human Rights Commission, Sixth Report of Session 2002–03, 11-12; Equality and Human Rights Commission Report, A. Donald, J. Watson et.al. *Human Rights in Britain since the Human Rights Act 1998: a critical review* (EHRC, Manchester 2009), 8.
[10] Independent Commission on Policing in Northern Ireland, 'A New Beginning: Policing in Northern Ireland' (London, HMSO 1999), "Patten Report" [4.6].

endorsed the approach of the of the PSNI in ensuring respect for rights in policing contentious protest,[11] identifying how human rights sit at the "very heart of the conception, planning, execution and control over every aspect of the operations" from planning through to debrief.[12] In this way, a human rights approach consists of the deployment of human rights principles and human rights standards in a framework for decision-making that has a transformative potential on how the police interact with individual lives.[13]

A human rights approach is not always taken by the courts. As explored in previous chapters, a number of key cases have lacked a rigorous application of human rights norms.[14] However, in decisions such as *Laporte*, academic commentators have identified how the courts have expressly recognised the "constitutional shift" that the HRA has brought about, and deployed human rights law as a means to keep police discretion in check.[15] *Laporte* underlines the transformative potential of the human rights approach as a check on police power and the benefit embedding human rights in the very heart of the public order structure, and the planning and execution of decisions in practice.

On this interpretation of the concept, a human rights approach would be clearly identifiable from a single operation with the operation specifically focused on facilitating the fans' objectives. Unfortunately, the force studied did not come close to evidencing a consistent human rights approach to football policing operations. Human rights considerations did not systematically pervade the policy, procedures, and practices of the football policing operation, which was not structurally directed towards securing either rights-fulfilling processes or securing rights-fulfilling outcomes but instead prioritised other objectives based on a framework of risk that displaced human rights considerations.

[11] Joint Committee on Human Rights, 'Demonstrating Respect for rights? A human rights approach to policing protest' Seventh Report 2008-09 Vol I 3rd March 2009, 46.
[12] D. McCausland, 'Policing Parades and Protests in Northern Ireland [2007] European Human Rights Law Review 3, 211-219, 211-212; D. Bayley, 'Post-Conflict Police Reform: Is Northern Ireland a Model?' (2008) 2 Policing: A Journal of Policy and Practice 237.
[13] n.9 EHRC (2009), 41; K. Starmer, 'Monitoring the Performance of the Police Service in Northern Ireland in complying with the Human Rights Act 1998,' (2007) 1 Policing (1), 94-101.
[14] See e.g., discussion of *Austin* Chapter 6, Section B.3.
[15] H. Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest', [2009] Public Law 737-765, at 756; A. Smith, 'Protecting protest: A constitutional shift', (2007) 66 Cambridge Law Review (2), 253-255, 255.

Embedded rights must be delivered correctly, comprehensively and consistently in practice in order to be effective. Accordingly, the delivery of a human rights approach requires full commitment of all public order units charged with interacting with the public, not just specialists. Whilst individual officers have embedded rights within their own practice, and some public order units, such as Liaison Teams, had a greater capacity to achieve this objective, human rights law and authoritative guidance have not transformed the football policing operation into a process that is engineered towards the maximal fulfilment of fans' rights: not all of the decisions were taken with officers keeping human rights considerations clearly and directly in mind.[16]

A.3 Observed features of the Human Rights Approach to policing football

As outlined at the start of the thesis, this research did not intend to set out a comprehensive theoretical framework of a human rights approach to policing public order. This study is limited by its ethnographic analysis. However, my observations do reveal occasions when a human rights approach was identifiable. Through analysing the practices of the observed force, the core elements of what a human rights approach to policing football consists of can be identified along with examples of good practice from which conclusions can be drawn. This analytical approach reflects the iterative quality of the empirical ethnographic study[17]: the key findings in this analysis arose directly out of the practice of officers I observed, who are in turn judged by standards recognisable to their practice.

The critical elements of a contextually-appropriate human rights approach to football policing are those which I analysed as clear markers of a contrasting approach by officers: an approach that actively protected and respected fans' rights,[18] as part of both the process and outcome of the policing football

[16] D. Irvine *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart, Oxford 2003), 23.
[17] See Methodology, Section C.3.
[18] Human Rights Committee, General Comment No. 31 (2004), [2].

operation,[19] rather than the majority of practice observed where rights where not an operative consideration for the officers observed.

Throughout the previous chapters I have placed a great deal of emphasis on the importance of including human rights within decision-making process. Where officers themselves expressly engaged with human rights discourse it was linked to a process of choosing between options: to intervene or not, to select from amongst a range tactical options, or in reviewing whether to continue with a chosen tactical option. In particular, some individual TAC advisors and PLTs displayed strong analytical skills, and internalised human rights into their analysis of situations, thus embedding them within the decision-making process to the extent that they habitually informed the exercise of executive function as required by the human rights approach.[20] TAC advisors' specialist training and expert knowledge further benefitted this process by introducing greater consistency, reflexivity, and human rights reasoning for decisions. These crucial aspects were successful features of operations that met the human rights approach.

In addition, some Silver Commanders (as well as TAC advisors and PLTs) combined a great deal of experience in public order policing, with detailed applied knowledge of human rights law. These officers benefitted from enhanced training,[21] and demonstrated an awareness of how individual officer's interactions contribute to the protection of rights.[22] These officers recognised and appreciated that fans qualified for the protection of rights, they engaged in decision-making that facilitated the assembly and expression of fans, and skilfully engaged in structured balancing in assessing competing claims or the necessity of police intervention.[23] This was most clearly identifiable in European fixtures where a

[19] H. Miller, R. Redhead, 'Beyond 'rights-based approaches'? Employing a process and outcomes framework' (2019) 23 International Journal of Human Rights (5), 699-718.
[20] V. Conway, Human Rights and Policing in Ireland in S. Egan (ed.) *International Human rights: Perspectives from Ireland* (Bloomsbury, Dublin 2015), 341-343; EU Agency for Fundamental Rights *Fundamental rights-based police training* (European Union, Luxembourg 2019), 72.
[21] HMIC *Adapting to Protest* (HMIC, London 2009), 11 and 20-22.
[22] n.23 HMIC (2009), 33.
[23] *Ramsey v Police Service Northern Ireland* [unpublished] (2020); *Bubbins v United Kingdom* 17th March 2005, [146]-[148].

structurally different approach to the operation is taken from planning through to debrief with re-orientation of priorities focused on fulfilling the wishes of visiting football fans.[24]

Accordingly, in Section B I will consider two key features arising from the observations: first the adoption of a consistent approach to incorporating human rights in the decision-making process, and secondly, the deployment of officers with specific and contextual knowledge to implement human rights compliant decisions.

A.4 Taking process-review of human rights decision-making seriously

Requiring officers to focus on the process of decision-making is an essential feature of a human rights approach. This is a departure from the view of those academics who subscribe to a narrow outcome-focused framing of minimalistic human rights compliance following an incomplete interpretation of two cases *Denbigh* and *Miss Behavin'*.[25] In contrasting, fulfilling a human rights approach requires procedural compliance with human rights standards for three primary reasons. First, procedural propriety is plainly relevant to the outcome of a police officer's decision. Considerations of process and substance are not "mutually exclusive" in a society that wishes to fully integrate human rights and empower the police to internally and continually appraise its own its own role in the balance between citizen interests and state interests.[26] The focus on outcomes has arisen because in high-profile cases such as *Miss Behavin*, the appellate courts consider a *de novo* review of the factual balancing of human

[24] n.13 Bayley (2008), 233.
[25] T. Poole, 'Of headscarves and heresies: The Denbigh High School case and public authority decision making under the Human Rights Act' [2005] Public Law 685; *per* Lord Bingham, *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100, [31] judicial enquiry should focus on "the practical outcome, not the quality of the decision-making that led to it".
[26] A. Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: Outcomes, Substance and Process' (2014) 130 Law Quarterly Review 235, 247-249; R. Masterman, 'Process and Substance in Judicial Review in the United Kingdom and at Strasbourg: Proportionality, Subsidiarity Complementarity' in J. Gerards and E. Brems (eds.) Procedural Review in European Fundamental Rights Cases (Cambridge, CUP 2017), 242-271, 266.

rights considerations outside the scope of appellate review.[27] It is for that reason that these courts decline to pierce the cloak of deference granted to an expert and proximate decision-making. That does not mean that first instance courts should restrict themselves in the same manner, nor does it negate the importance of public authority decision-makers implementing procedural compliance with human rights whilst striving for compliant outcomes.

Second, the HRA indicated clear parliamentary intent to impose procedural duties on decision-makers.[28] In specific public order terms, the process of decision-making was implicated as a fundamental part of improving human rights compliance, hence the HMIC reviews set out decision-making flow chart diagrams[29] and the APP which states that decision-making should "demonstrate" consideration of relevant human rights principles.[30]

Finally, procedural legitimacy is generated by the reasoning and justification of a decision.[31] How can the police's interventions be assessed for compatibility with the relevant standards of Convention rights without at least a fleeting, low-level requirement that they have engaged in a structured assessment of alternative measures and balancing considerations?[32] It would be obtuse to condone a decision taken on an irrational basis that just happened to result in a human rights-compliant outcome,[33] and rights-compliant outcomes that are incidental can still deliver benefits.[34] However, it would be equally absurd to conclude that the police met a human rights approach where there was no express consideration of

[27] per Baroness Hale in *Belfast City Council v Miss Behavin' Ltd*. [2007] 1 WLR 1420, [37], this is particularly the case where the public authority has recognised the application of rights to the situation and delivered prima facie decisions justifying a decision, see also Lord Neuberger, [91].
[28] D. Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act' [2012] Public Law 61-84, 63 and 72; *Doherty v Birmingham City Council* [2008] UKHL 57, "public authorities are bound to take account of human rights….as a normal part of their function".
[29] HMIC, Adapting to Protest – Nurturing the British Model (HMIC, London 2009), at 18, 21-22, and 31.
[30] College of Policing, APP, Public Order – Core Principles and Legislation accessible at https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/ accessed at 28th June 2020.
[31] B. Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) 31 Leiden Journal of International Law (1), 355-361; D. Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act' [2012] Public Law, 61-84, 84.
[32] See e.g., the necessity to consider alternatives to arrest under s.24 PACE 1986 in *Shields v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281, [12]-[15].
[33] T. Hickman, Public Law After the Human Rights Act (Oxford, Hart 2010), 228.
[34] See discussion Section C.2 below.

individual human rights at all, even in cases where the swift cordoning of fans identified as a "risk" groups was ultimately justifiable.[35]

B. Analysis of the force's human rights approach

B.1. A consistent approach to incorporating human rights considerations in the decision-making process

The rule of law is predicated on the consistency of law, as Bingham explained, it must be "*so far as possible* intelligible, clear and predictable".[36] The qualifier "as far as possible" recognises the uncertainty that can arise out of the interpretation and application of legal rules, particularly as the appropriate human rights analysis is contextual, subjective to individual officer's judgments.[37] Officers are encouraged to adopt a consistent approach to decision-making in public order.[38] Where an officer consistently addresses the human rights considerations derived from applicable Convention rights, the court "will give due weight" to individual judgements[39] even where those determinations may arguably have been equally justified being resolved another way.[40] Consistently incorporating human rights considerations improves the quality of decision-making without resorting to legal proceedings as engaging in this analysis enhances global (police and public) awareness of expected standards of behaviour.[41] This also leads to more human rights-compliant outcomes by limiting opportunities for the

[35] See discussion Chapter 6, Section C1.
[36] T. Bingham *The Rule of Law* (London, Allen Lane 2010), 40.
[37] Lord Mance, "Should the Law Be Certain?" (2011), available at https://www.supremecourt.uk/docs/speech_111011.pdf, accessed 9th January 2020.
[38] HMIC, Policing Public Order (HMIC, London 2011), 8, and 23, in assessing uses of force and interoperability of procedures for Mutual Support purposes.
[39] *per* Baroness Hale, in *Belfast City Council v Miss Behavin' Ltd*. [2007] 1 WLR 1420, [37]; *DB v Chief Constable Police Service of Northern Ireland* [2017] UKSC 7.
[40] *per* Lord Mance, in *Belfast City Council v Miss Behavin' Ltd*. [2007] 1 WLR 1420, [44].
[41] *R v Misra and Srivastava* [2004] EWCA Crim 2375, [34]; *R v Rimmington* [2005] UKHL 63, [33]; Jack Straw, Joint Committee on Human Rights, Minutes of Evidence, 14th March 2001, HL 66-I, [17].

types of arbitrary decision-making identified in the previous chapters such as the decision to cordon fans not identified as a risk in a public house miles from the stadium,[42] or the refusal to facilitate walk-ups organised by home fans.[43]

B.2 The benefit of consistently incorporating human rights considerations in the planning and execution of decision in practice : European fixtures

A consistent approach to planning the structure, format, and tone of a matchday operation was identifiable in the subset of operations deployed for fixtures in European competitions. Both fans and police officers mutually benefitted from operational plans drawn up afresh for each fixture based on fan groups' interests in assembling and expressing as a collective. The fans' interests were treated as highly relevant human rights considerations from the earliest stages of the planning phase. This led to liaison-based tactics identified as an appropriate strategy for fulfilling the twin core objectives of maintaining public order and fulfilment of fans' rights.

Planning for European fixtures was marked by early initial engagement of overseas clubs representatives and identified fans groups by the planning officers, which was based on the planning officers' explicit overlapping intentions to give effect to European fans' desire to "congregate safely…and to show off and have a drink or do what matters to them"[44] - in essence to freely assemble and express themselves while also contributing to the objective of pragmatic crowd management to avoid incidents of disorder.[45] Thus the operation recognised that European away fans had a relevant claim to these rights which had to be accommodated alongside other priorities.

The exact substantive tactics selected to achieve these dual priorities varied due to the different objectives of European away fans and intelligence assessments, but the approach to incorporating

[42] See discussion Chapter 6, Section C.2; Fieldnote, Silver Commander, Premier League Match 6, Phase 1.
[43] See discussion Chapter 4, Section C.2.
[44] Fieldnote, Planner, European Match 3, Phase 1.
[45] See fieldnote, Chapter 4, section C.1.; P. Waddington *Liberty and Order: Policing Public Order in a Capital City* (UCL Press, London 1994), 61-66.

human rights considerations into the development of the tactical plan remained markedly consistent. In part this was due to the enhanced structure of these operations and the use of specialist personnel and units who fluently handled rights-compliant decision-making.[46] Accordingly, where one cohort of away fans did not express any desire to walk-up in early liaison meetings, a contingency plan was nevertheless implemented "just in case" to facilitate any smaller groups of fans not part of the larger organised group who wanted to walk-up to the stadium *ad hoc*.[47] By individualising the rights assessment, the planning officers displayed an awareness of the importance of freedoms to the individual fan, rather than presuming shared intentions.

Officers also acknowledged the essential role of the police in securing the freedom to assemble and express in the pre-match phase, which was made clear during a planning meeting where the strength of the human rights justification underpinning the planning process was also revealed:

> The Transport authority representative challenged Silver urging alternatives to the 'walk-up' – "Can you not put them onto buses or something… we need to make things easier for ordinary commuters." Although Silver considered the point…he replied "No, it doesn't work like that. These fans have the right to choose and it is our job to keep them safe while they do that. They won't be forced onto busses".[48]

This was typical of other commanders who consistently asserted that police facilitated walk-ups were the best way to achieve the dual operational objectives in a rights-compliant manner, even if they had misgivings about "becoming known as a soft touch" for agreeing to facilitate fans' intentions.[49]

Analysing human rights as conducive towards the achievement of other objectives even had the beneficial impact of positively facilitating assembly and expression of fans in the fixture where the intelligence assessment rated the match as 96/100 on the national risk assessment scale, with a concerning number of ticketless fans.[50] Despite this, the communicated desires of the fans to congregate

[46] See Section B.1 below.
[47] Bronze 2, European Match 8, Phase 1.
[48] Fieldnote, Silver Commander, European Match 8, Silver Planning Meeting 8 days before fixture.
[49] Fieldnote, Bronze Commander, European Match 8, Phase 1 in discussion with the Silver Commander.
[50] ACPO *Guidance on Policing Football* (ACPO, London 2010), 32-33, 40-41

and march to the stadium *en masse* were considered in the planning phase, with a wholly bespoke operational tactic to deal with ticketless fans. This shows that the police's role was not a purely functional cog to transport fans to a stadium to allow a fixture to take place. All fans who wanted to travel to the stadium were facilitated in the walk-up as it was "their right" to travel to the city to enjoy the atmosphere.[51] The coercive limitations directly required to address risk – tight cordons only at the stadium perimeter, and a hard filter cordon to address ticketless fans where targeted measures assessed for their necessity and proportionality.

B.3 How liaison-based strategies facilitated the human rights approach

The consistent deployment of liaison-based strategies in the planning phases in turn facilitated other key units of the operation in later phases to sustain the human rights approach to policing European away fans.

As identified throughout the discussions on assembly and expression, the deployment of Liaison Teams provided the opportunity to maintain a line of communication with the fan groups over the multiple days bookending a fixture, gave a direct means for Commanders to consider the intentions of fans as part of the decision-making process,[52] and enabled reflexive tailoring of the operation to respond deftly to changing circumstances. This flexibility was evident in wide range of situations such as Liaison Teams advocating for the Bronze Commander to trust a *capo* to stand on street furniture to lead a crowd in song,[53] or the Bronze Commander stalling a walk-up on the approach to the stadium, near a busy junction with blocked roads to allow fans to engage in specific chants as a pre-match ritual carried out on the immediate approach to the stadium.[54] Even in the high-risk fixture, above, liaison-based strategies were crucial. Following the walk-up, those without tickets were then encouraged onto waiting

[51] Fieldnote, Police Liaison Team, European Match 3, Phase 2.
[52] J. Hoggett, O. West, 'Police Liaison Officers at Football: Challenging Orthodoxy through Communication and Engagement' (2018) Policing: A Journal of Police and Practice, at 25, "…addressed a communication gap created by a lack of engagement by PSU officers…."
[53] Fieldnote, Bronze 6, European Match 7, Phase 1.
[54] Fieldnote, Bronze 2, European Match 8, Phase 1.

buses to take them back to venues in the city centre where the force had arranged for designated venues to allow fans to watch the match:

> Multiple Mutual Support PSUs were waiting in the city, they deployed expecting "1,000" risk fans, lots of vans in a show of strength…. PSU Sgt asked PLTs about "tension" and "trouble" with a reference to fan arguments with bouncers. PLTs quickly calmed situation, "fans had bit to drink, but just want to watch the game… they were sound on the bus back". PLTs took control negotiating entry of the fans into bars and prevented PSUs from getting involved in minor disputes which required quick diffusion rather than escalation. [55]

Thus, the recognition of different objectives of different groups of fans led to the force providing the operational capability to facilitate a continuation of fans' assembly and expression. This expands upon previous research focused on Liaison Officers as the primary tactic for delivering a constructive, legitimate football operation from a crowd management perspective,[56] which can help the individual operations become more human rights-compliant.[57] I did not find Liaison Officers to be a velvet glove of disguised surveillance and control.[58] Some of the individual Liaison Officers were less suited to the soft skills required in the role, but even these officers engaged fluently with human rights considerations in practice. Thus, even where culturally transgressive elements were present within the fan groups,[59] such as street drinking, pyrotechnics, and loud chanting this was pro-actively accommodated through the PLTs.

Further benefits can be analysed. Simply by being an available tactical option, PLTs enabled the entire operational plan to be tailored towards facilitating fans' rights from the framing of the operational

[55] Fieldnote, Police Liaison Team, European Match 3, Phase 2.
[56] C. Stott, O. West, M. Radburn, 'Policing football 'risk'? A participant action research case study of a liaison-based approach to public order (2018) 28 Policing and Society (1) 1-16; C. Stott, J. Hoggett, G. Pearson, 'Keeping the Peace': social identity, procedural justice and the policing of football crowds (2012) 52 *British Journal of Criminology* (2), 381-399.
[57] C. Stott, C. Scothern, H. Gorringe, 'Advances in Liaison Based Public Order Policing in England: human rights and negotiating the management of protest? (2013) 7 Policing a journal of police policy and practice (2) 212-226.
[58] J. Gilmore, W. Jackson, H. Monk, 'That is not facilitating peaceful protest. That is dismantling the protest': anti-fracking protesters' experiences of dialogue policing and mass arrest' (2019) 29 Policing and Society (1) 36-51, 40.
[59] G. Pearson, *An Ethnography of English football fans* New Ethnographies (Manchester University Press, Manchester 2012), 3-5.

objectives in the planning phase, through to implementation. Thus, even where the particular Liaison Officers rostered for the duty lacked skills, or were deployed in ineffective locations, the simple presence of this tactical option in the operation caused other units such as Bronze Commanders to complement the dialogue-focused functions prioritised for that operation.[60] PLTs also improved the quality of information of Silver Commanders who gratefully received information about "the feel" of the crowd, but this dialogue was bi-directional. For example, on one chaotic fixture the topics of conversation and the level of concern about police tactics and led to Silver Commanders disseminating useful information through PLTs about changes to the pick-up points for tickets which were successfully passed on.[61] This was a marked difference from the communication of data about the fans during domestic fixtures, which was largely quantitative data from Spotters' assessments of how many fans were in a pub and typified by antagonistic interactions with fans.[62] I did not find that the PLTs acted as "micro-politic decision-makers"[63] in their own right, instead they were a fundamental part of the operational jigsaw that allowed Silver Commanders to have "eyes and ears"[64] in the crowd to judge the legitimacy of potential tactics and inform additional considerations into the decision-making process. In this way, the planning of liaison-based strategies, along with the actual deployment of Liaison Officers, contributed to a consistent approach in decision-making and facilitated the human rights of fans in this limited category of fixtures.

C. Operational limits on the implementation of a human rights approach

[60] See e.g., Fieldnote, Chapter 5, section B.1.3 Bronze Commander assisting non-conformist expression of subset of fans.
[61] Silver Commander, European Match 2, Phase 1.
[62] See Section C.3 below on the focus on "risk fans"
[63] A. Kilgallon, 'Police interaction and Notting Hill Carnival' (2020) 30 Policing and Society (1) 28-44, 43-44.
[64] Silver Commander, European Match 2, Phase 2.

C.1 Failing to recognise that fans qualify for rights

The success of operations in relation to visiting fans in European matches, and the beneficial role of proactive liaison in their planning and operational phases throws into question the contrasting failure to give the same weight to the same considerations in respect of home fans, or at all in the planning of domestic fixtures. The failure to consistently incorporate human rights considerations in the decision-making process led to an inconsistent application of rights. More significantly, there was merely a formalistic recognition of human rights in the operation which prevented officers from implementing measures to fulfil their positive obligations in domestic fixtures and home fans generally.

C.1.1 The formalistic framing of human rights limited understanding of the applied rights in context

Beyond references in the "Gold Commander's strategy" and "applicable law" sections of the operational order, and fleeting references during the main briefing (powerpoint slide), I observed little recognition of human rights in any other aspect of domestic operations. To some extent this is understandable, the APP for Policing Football also does not expressly refer to human rights – national policy does not accurately reflect the legal obligation. Unlike intelligence assessments which were tailored for each operation, the adjacent references to human rights in the operational order and briefing were formulaic, constant and unchanging. This formalistic incorporation of human rights in domestic operations met the minimal standards required by policy, but was not effective at drawing officers' attention to their fundamental role in protection and realising the fulfilment of fans' human rights. The lack of contextualisation in briefings concerning domestic fixtures starkly contrasted with the briefings for European fixtures which set out the potential expressions of fans, the need to both tolerate and facilitate assemblies, and linked to the police's tactics.[65]

[65] Observation, Silver Commander, European Match 3, Briefing.

In domestic fixtures, human rights were not regularly referenced in the tactical plans which were specifically tailored to address risk factors arising out of intelligence reports, but which did not expressly reflect recognition of the rights of the specific visiting fans. One notable exception concerned information regarding special commemorations such as minute applauses or fans beaming their mobile phone lights at a certain minute.[66] More systematically, human rights were not regularly referenced in discussions about standard public order tactics prior to or during their implementation, nor in discussions about the conduct of fans generally. This demonstrates the low level of importance that human rights took in comparison to other objectives. Only in respect of containments and hold-back contingencies were there specific references about the necessity and proportionality of the coercive measures.[67]

My analysis of this failure to recognise fans' rights was compounded by the latent misunderstanding of how human rights applied in the context of football operations which was revealed by multiple conversations, most clearly when officers inquired about my research. A common question was "what human rights are you looking at with football then, right to life and stuff like that?"[68], which indicated a lack of applied understanding of the specific (limited) number of rights an operation will regularly engage – and which were contained in each briefing and operational order. Another common refrain explicitly denied the existence of rights of some fans. One relatively experienced Bronze Commander made the crude distinction "I understand how normal fans have rights, liberties and the like, I'll have that. But not violent fans".[69] This portrays a fundamental misunderstanding about the universality of rights, and the appropriate structured analysis required to legally justify the implementation of legitimate tactics to counteract violent behaviour.[70] Such misunderstanding of the legal obligation is symptomatic of the failure to expressly recognise how the rights of fans are realised through the football policing operation.

[66] Observation, Bronze 2, Cup Match 5, Briefing.
[67]But as identified in Chapter 6, Section C.3 these were often imposed without a legitimate basis.
[68] Observation, Loggist, League 1 Match 3, Phase 2.
[69] Observation, PSU Commander, Premier League Match 14, Phase 1.
[70] Although considering the varied treatment about how rights are engaged in cases like *Hicks* and *Austin* confusion about the appropriate human rights analysis is understandable. See discussion Chapter 6, Section B.4

Existing police research considers the inconsistency of training in public order policing for PSUs, which has previously been assessed as insufficient at delivering essential practices[71] and failing to reflect national policy such as on key crowd-management principles.[72] In contrast to Commanders in the PSNI who receive bespoke training on implementing human rights law in the context of protest operations,[73] public order training of PSU officers focused on responding to major incidents such as prison riots which is not "ideal for learning about the context of rights within football policing."[74] My findings show how these deficiencies in training are not ameliorated by the force using the tools at their disposal such as briefings to operationalise what the human rights obligations mean for officers in the context of football policing. Specific steps are required because the lack of appreciation of the basic relevance of rights for indicates that human rights are not an ingrained part of officers' practice and counteracts the view of one Senior Commander that specialised human rights training was not required because "that's part of the day job".[75]

The lack of understanding about how football operations engage and affect the rights of fans further extended to a complete failure to recognise the police's positive obligations in domestic fixtures. This can be explained by a combination of reasons: structural differences in how domestic operations are planned, the pervasive focus on identifying and supressing 'risk' fans and risky behaviour, and a lack of understanding of the various types and means of exhibiting fan culture.

C.1.2 Structural differences in the policing of domestic fixtures

The planning process for domestic fixtures differs in that planning does not focus on dialogue with visiting supporter groups but is instead mediated through officers specialised in intelligence and risk

[71] A. Kilgallon 'Performance and Dialogue – An Ethnographic Study into Police Liaison Teams' (Phd, Leeds 2019), 166-167.
[72] J. Hoggett, C. Stott, 'Crowd psychology, public order police training and the policing of football crowds' 33 Policing: An International Journal of Police Strategies and Management (2):218-235, 226-230.
[73] R. Martin, 'A Culture of Justification – Police Interpretation and Application of the Human Rights Act 1998' in J. Varhaus and S. Stark (eds.) *Frontiers of Public Law* (Hart, London 2020)), 6, 24-25,
[74] Conversation, Bronze 2, League 1 Match 4, Phase 2.
[75] Interview, Senior Commander 2.

assessments. This compounds a focus on risk - sets the tone for the remainder of the operation - and fails to account for the way in which the operation engages the rights of all fans. The lack of dialogue with fans was apparent from my observations of planning meetings for a high risk domestic derby fixture:

> At station for interesting meeting between representatives of the two main fan groups but the meeting turned out to be very perfunctory. I spent only 20 minutes sat down - including the cup of tea. Large match and big operation but the two late middle-aged reps were not reflective of the fan groups I observe. Police set tone for the fixture, no coin throwing, enforcement against those chanting regarding a particular incident. A hold-back of some form was "likely" ….Reps agreed to pass on official communications ended very amiably. One-way messaging, not a dialogue.[76]

The benefits of formally engaging fans groups in this manner was minimal. Moreover, it reveals the top-down focus on control - one-way imposition of ground rules - without any opportunity for discussion about the fans' interests and objectives. Whereas for even a highly risky European fixture the planning discussions would focus on facilitating the fan assemblies and a walk-up, for this domestic derby - of a similar risk profile – the focus was on how to communicate about the "likely" imposition of the containment tactic.[77]

The lack of genuine dialogue in the planning process meant the information that led to the development of the tactical plan was based solely on the risk-focused intelligence assessments. As the planning process was highly centralised within the Force Events Section, it was common for the same officer to conduct the risk assessments, compile the Operational Order, amend the standardised powerpoint for the briefing, and even in some cases deliver the briefing to PSU officers. This emphasised the operational focus on identifying and suppressing risk fans as key structural features of the operation. The tendency was for officers to base these strategic documents upon previous templates. Whilst it was

[76] Fieldnote, Premier League Match 13, Pre-match Silver meeting with fans groups.
[77] Observation, Silver Commander, Premier League Match 13, Planning Meeting

"a bit more complicated than copy and paste",[78] it still meant that the process lacked sufficient reflexivity to address its weaknesses.

Where the planning officer was also a DFO or Spotter whose specialist operational role - legitimately - focused on intelligence gathering concerning risk fans,[79] it is easy to see how the structure of the planning an operation caused this focus based on future potential threats, rather than potential future engagements with human rights. These findings support research that has found that a football operation set up to focus on risk will be likely to deliver underwhelming outcomes that undermine the importance of human rights.[80] My findings indicate additional structural weaknesses in the planning of domestic fixtures where there is an overreliance on intelligence specialists focused on risk-assessments in developing core features of the operation.[81] These core features – the Operational Order, briefing powerpoint, and briefing – are the principle means of operationalising human rights in practice and present the opportunity to fulfil the transformational potential of human rights. Currently, these elements fail to improve officers' substantive knowledge and understanding of human rights in the football context, with risk factors being at the very heart of conception, planning, and execution of domestic fixtures.

C.1.3 Limited facilitation of away fans

Risk assessment and intelligence analysis are important aspects of the operation, and can be used as a basis for the force to facilitate fan assemblies and expressions, as identified by the few occasions where this was done in respect of away fans at domestic fixture. At one cup match a PSU were specifically deployed to communicate to fans about the location of specific away pubs which the planners in liaison had arranged to open early, serve breakfasts and provide space for away fans to put up flags within a

[78] Observation, Planning Officer, Premier League Match 1, Phase 2.
[79] E.g., Observation, Bronze 1, League 1 Match 3, Briefing.
[80] C. Stott, G. Pearson, O. West, 'Enabling and Evidence Based Approach to Policing Football in the UK' (2019) Policing: A Journal of Policy and Practice <https://doi.org/10.1093/police/pay102> accessed 1st October 2020, 15-16.
[81] n.59 Stott, Hoggett, and Pearson (2012).

short walk to the stadium. This facilitation was partly achieved through the risk assessment which communicated that the "fans had an early start and a long journey" for an early kick-off and they would want somewhere to base themselves and "know where they are".[82] At another fixture the risk assessment indicated that a large number of active and "vocal" young fans (under-18) were attending the first local derby between the teams for 10-years and congregate in the town centre. Officers prevented young fans entry to pubs but were specifically instructed to search for the fans as the facilitated walk-up was to commence to "make sure they don't miss out". [83]

Notably both of these examples were in relation to away fans and similar facilitation was not observed in relation to home fans. Two main themes emerged from my discussions querying this anomaly which, "it's different, fans don't congregate all together…they come from all directions and a locals"[84] and, secondly, "fans don't want it"[85]. These justifications reveal how officers misunderstood the varieties of fan culture, and how any potential facilitation is stymied by the lack of dialogue to discern what the specific fans being policed actually. The lack of knowledge about fan culture was apparent from my observations of a self-organised home fan walk-up from a pub around 1 mile from the ground which, despite being a noisy and visible presence for consecutive fixtures, was still lacking from the operational order and briefing with no specific tactical plan to address or facilitate these fans.[86]

Nonetheless, when an attempt at engaging this group of fans was made, the second justification above about the presumed wishes of fans received some support:

> Both Spotters and PLTs attempted to engage in constructive dialogue with identified leaders who each shied away from conversations as they refused to take responsibility for organising the walk-ups, led to an uneasy situation where fans which had previously been ignored by the bewildered PSUs they passed were now surrounded by them in an ad hoc manner that

[82] Observation, Bronze 2 Cup Match 3, Phase 1.
[83] Observation, Silver Commander, League 1 Match 6, Phase 1.
[84] Conversation, Bronze 2, Premier League Match 14, Phase 1.
[85] Conversation, Bronze 6, European Match 5, Phase 3.
[86] Observation, Bronze 3, Premier League Match 12, Phase 1.

satisfied neither objective of facilitating the fan assembly, nor providing protection to prevent crime or disorder.[87]

The geographic justification may also be a persuasive justification due to the lack of similar self-organised walk-ups by home fans, but this could also be a result of the lack of offer of facilitation and the chilling effect of large-scale public order deployments in the vicinity of the stadium. Furthermore, the timing of the attempted engagement above is critical as it took place at the fixture immediately preceding the highest-risk local rival match that season and Commanders expressed a desire to "get a grip of that situation" as they did not want any surprises to occur during that risker fixture.[88]

Any justification based on the potential risks of facilitating home fans is undermined by the successfully facilitated assemblies implemented for European away fans that epitomised a human rights approach. It can be difficult for officers to adopt new methods of working, particularly where the new tactic is risky as it exposes vulnerability.[89] Yet research has consistently found that fan gatherings are non-violent, with a non-violent intent and peaceful crowds policed in a manner they perceive as legitimate do not suddenly engage in violent behaviour. [90] Indeed, this finding could also be made by the force itself by accurately analysing their experiences policing European fixtures. Other researchers have drawn a distinction between European and domestic fixtures and highlighted the focus on risk with domestic operations.[91] My findings demonstrate three reasons that partially explain why the same benefits are not extended to home fans or domestic matches. Each of the reasons; structural differences in the operation, an undue focus on risk, and a misunderstanding of fan culture, combine, but these attempted justifications are challenged by the *ad-hoc* facilitation of away fans that occur during some operations, partly arising out of risk-assessments for purposes initially linked to risk but which indicate

[87] Fieldnote, Observation, Bronze 2, Premier League Match 14, Phase 1.
[88] Observation, Silver Commander, Premier League Match 15, Planning meeting
[89] n.45 Waddington (1994), 52-55; I. Shannon Phd 'Convenient Constructs: How Chief Police Officers in England and Wales Understand the Right of Police to Exercise Power' (University of Liverpool, 2018), 184.
[90]G. Armstrong, M. Young, 'Fanatical Football Chants: Creating and Controlling the Carnival (1999) 2 Culture, Sport and Society (3) 173-211, 187-190; C. Stott, G. Pearson *Football 'Hooliganism', Policing and the War on the 'English Disease'* (Pennant, London 2007); n.59 Stott, Hoggett, and Pearson (2012).
[91] J. Hoggett, O. West, 'Police Liaison Officers at Football: Challenging Orthodoxy through Communication and Engagement' (2018) Policing: A Journal of Police and Practice <https://doi-org.eres.qnl.qa/10.1093/police/pay032> accessed 1st October 2020.

how the force can meet the positive obligation of the police to facilitate the assembly and expression within the current structural limits where the operation is focused on risk.

C.2 Risk and the rights of the majority

C.2.1 "Risk" as contrasted with the "majority"

As "risk" supporters is a defined term, there is an overreliance of it when an officer wishes to make an authoritative assessment of fan behaviour. By using such concepts officers fail to acknowledge the wide array of fan subcultures that exist, and how different forms of assembly and expression have different subjective importance to individuals which cannot be aggregated or abrogated by generalisations or projected assessments of the value of lawful behaviours. I observed officers misconstrue fan behaviour as indicative of "risk" fans with regularity, it was such a common feature that I observed Commanders reflexively interrogate the use of the concept.

Officers expected football fans to conform to certain patterns of expected behaviour based on past experiences and their own subjective views. This was particularly acute in respect of PSU officers and Bronze Commanders who deployed other broad categories as descriptors of varying accuracy. A common theme concerned the concept of "normal fans" which appeared to consist of "families"[92] as well as fans in replica kits who spent time purchasing merchandise, and arrived in plenty of time.[93] This was contrasted to fans with supposedly unusual behaviour portraying a fundamental misunderstanding of the variety of different cultures within football:

> "Bronze Loggist agreed with Bronze Commander's dismay at fans arriving late, "I don't understand why they do that. They come late, leave early, and then spend most of the rest of it watching on the telly on the concourse"[94]

[92] Observation, Silver Commander, League 1 Match 4, Phase 2.
[93] Observation, Bronze 6, Premier League Match 12, Phase 1.
[94] Observation, Bronze 2, Cup Match 3, Phase 1, two minutes after kick-off.

Misrepresentative assessments of whole groups of fans were frequently made based on the identification of or behaviour of a few individuals in or around that group. Categorisations were then extrapolated to the whole group and affected the way they were policed. This is identifiable from the examples of lower league visiting fans attending a large club for a cup game who were assessed as "risk fans" for simply expressing a desire to have a drink after losing 3-0. This assessment then affected how they were policed, with the group issued dispersal notices for reacting "suspiciously" after being followed into bars by officers.[95] On other occasions Bronze Commanders who were told that a certain group consisted of "risk" fans would alter their deployments to introduce stricter cordons, or to seek to disperse congregations of fans, on the premise that it was better to be "safe rather than sorry".[96] Even without specific risks being identified, individual's human rights were engaged in a potentially harmful manner and at no point in these processes did I observe any consideration of that impact on the fans' rights – security and control to supress disorder displaced any human rights considerations.

Fans falling short of the risk category took on a variety of descriptors, "potential", "drinkers", or "ASB". The focus on extrapolated categories of "risk" and "ASB" also affected strategic decision-making. After unexpected clashes between opposing fans in the town centre prior to a Category A fixture, Commanders expressed concerns that they were "under-policing" fans of that club, and "ASB" element was growing.[97] The force agreed to significantly increase the level of resources allocated to the next fixture in a "show of strength" even though the formal risk assessment also categorised that fixture as low-risk.[98] At that fixture, the Bronze Commander outlined that there was a small number of ASB fans connected to the club, but for several weeks all fans attending fixtures at that club were more heavily policed.

Fortunately, Senior officers even recognised that the vague descriptions conveyed by the use of such categories that they were "rendered practically meaningless". [99] At the same time the

[95] See fieldnote Chapter 6, Section C.1
[96] Observation, Bronze 6, Premier League Match 14, Phase 1.
[97] Observation, Silver Commander, Premier League Match 6.
[98] Observation, Silver Commander, League 1 Match 5, Phase 2.
[99] Observation, Silver Commander, Premier League Match 6, Phase 1.

categories remain in heavy usage, despite the concept of "risk fans" being subject to academic criticism. Building on this research, my observations have identified that other categorisations of fans have become institutionalised and effectively displace human rights considerations as the freedoms and liberties of the individual are subjected to the desire for control. The categorisation of broad groups therefore limits the implementation of a human rights approach in practice.

C.2.2 Risk and the "rights" of the majority

The strategic deployment of resources to police "risk fans" was justified by some Silver Commanders on a human rights basis, usually in conversation with the Silver TAC. Any impact on the rights of "the minority of idiots" was justified by the objective of protecting the "rights of the majority" where "others" included anyone from shoppers,[100] to local residents,[101] "normal fans", or simply a general claim in respect of the wider community. Unfortunately this analysis lacked any specificity as to the actual rights affected by fan expression and assembly which - as demonstrated in the respective chapters above – cannot be limited on the basis of mere disruption or inconvenience.[102] This overly simplistic dichotomy between the supposedly peaceful majority and a minority risk group is used by officers at the expense of recognising the value of rights to individuals, and the vast array of fan cultures that can exist within one match-going football crowd.

Appropriate balancing between the rights of fans and the rights of others was observed during the facilitation of European away fans. The facilitated congregations in urban centres were located adjacent to major shopping streets. The displays of soaring chants, bright flares, and large assemblies visitors to the city drew a steady stream of curious local residents who were not afraid to interact with the fans.[103] The associated walk-ups also involved significant traffic jams in the wider area. Thus, the regular facilitation of European away fans engaged in an appropriate assessment of the

[100] Observation, Silver Commander, European Match 4, Phase 2.
[101] Observation, Silver Commander, League 1 Match 9, Phase 3.
[102] Human Rights Committee, General Comment No. 37 (2020), [7]-[15].
[103] See Chapter 4, Section B1.

balancing of the rights of others in a way that undermines the reliance of impact of unspecified "others" in limited fan conduct that does not have such a significant impact.

C.2.3 A human rights approach to assessing risk can increase the legitimacy and helps achieve operational objectives

My analysis of how risk infuses operations with considerations that displace rights has been contrasted with findings that an appropriate human rights assessment can assist in creating rights-compatible outcomes. It is noteworthy that in a whole range of high-risk operations from large European night clashes,[104] to local cup derbies where hold-backs were not implemented,[105] I have demonstrated that undertaking a human rights assessment of interventions can also contribute to the delivery of a successful operation on the police's own terms: an operation free from disorder and with a low number of arrests.

The human rights approach requires decision-making to be clear and consistent, based on legal principles and objective assessments of risk and threats. This corresponds with the "no surprises" approach – a phrase adopted by some Commanders- consisting of an operation based on clear communication and "deploying with de-escalation as the primary tactic" with a low-level visible presence.[106] The similarities between this understanding of the "no surprises" approach and the human rights approach indicate that it could be a useful tool in incorporating enhanced processes in future reviews of policing in the force.

The strategic link was exemplified most clearly in two closely linked observations where the same domestic away fans visited different clubs within a two-week time period. The visiting club had a large travelling support, with detailed reports from other forces about a number of risk fans who regularly "went over the line" to confront stewards, opposing fans, and police officers. On the first occasion clear

[104] Cross Ref Analysis Section B.1
[105] Cross ref Chapter 7, Section C.4.
[106] E.g., Observation, Silver Commander, Premier League Match 15, Briefing.

communication in the local press about arrangements, combined with low-level policing during the build-up to create an atmosphere without confrontation. Although there was one incident of a bottle being thrown at police officers, officers did not overreact and a single ejection from the stadium was all that was required.[107]

Two weeks later and a few miles away my fieldnote reveals a contrasting approach:

> Pre-emptive cordon put on group of 25 identified risk fans pre-match. On camera looks like more cops than fans. Unclear justification from Bronze 3 about what this group did, except positive ID of two previous FBO holders….Holdback required due to pitch invasions and clashes. Multiple ejections, sizeable number of away fans already outside undermining the hold-back tactic….Running skirmishes observed, with Spotters detaining fans…. Call made for all resources to gather to cordon fans back to train station.[108]

This fieldnote identifies the quick resort to a coercive pre-match containment - which appeared to be pre-planned, without a legitimate objective, and not necessitated by an imminent risk of public disorder.[109] The analysis of what was required for "security" displaced rights considerations and the same fans who reacted positively to low-level policing engaged in multiple confrontations with some of the same officers two weeks later. This demonstrates the view that the fans held about the legitimacy of the pre-emptive tactics, which at no point were reviewed to ensure their continued legality, and which in reality had a deleterious effect on the rights of other fans and the neighbouring community. Though the appropriate human rights analysis may raise practical difficulties for the police, there is ever increasing evidence of the benefits for public order policing[110] to which this research also contributes.

My findings reflect other research based on interviews of officers and observation of training days that identify how officers struggle to engage in the appropriate structured balancing analysis

[107] Fieldnote, Observation, Bronze 2, League Match 8, Phase 2 and Phase 3.
[108] Fieldnote, Observation, Bronze 1, League 1 Match 9, Phase 1-Phase 3.
[109] See Chapter 6, Section B.2 a historic record on a database is not a legitimate basis for intervention under Article 5.
[110] C. Whelan, A. Molnar, 'Policing political mega-events through 'hard' and 'soft' tactics: Reflections on local and organisational tensions in public order policing' 29 Policing and Society (1) (2017) 85-99.

in public order situations and this prevents human rights being truly embedded in police practice.[111] This has been confirmed in empirical observations of officers engaging in the use of their discretion in making arrests.[112] Policing naturally focuses on the trouble makers as the everyday focus on crime control seeps into public order policing which is set up to exercise control over groups of people.[113] That is enhanced for those officers in intelligence focused roles, or Command roles with front line responsibility for responding to threats they perceive and to ensure public safety.[114] My findings add to this layered understanding by providing insights into practical examples of structured balancing in the field, and by revealing insights into why officers are unable to accurately engage in human rights analysis in football operations that are focused on risk and protecting the falsely projected rights of others. Finally, I have analysed the clear link between incorporating a human rights approach and achieving the force's other competing objectives such that a "no surprises" approach that consistently incorporates human rights considerations and human rights-compliant tactics will assist the police in delivering public order operations which also ensure public safety.

[111] R. Martin, 'A Culture of Justification – Police Interpretation and Application of the Human Rights Act 1998' in J. Varhaus, S. Stark (eds.) *Frontiers of Public Law* (Hart, London 2020), 6, 24-25,; K. Bullock, P. Johnson, 'The impact of the Human Rights Act 1998 on policing in England and Wales' (2012) 52 British Journal of Criminology (3) 630-650, 635-637.
[112] G. Pearson, M Rowe, E Turner 'Policy, Practicalities, and PACE s.24: Police Understanding and Subsuming of Necessity in Decision-Making on Arrest', (2018) 45 Journal of Law and Society (2) 282-308.
[113] n.45 Waddington (1994).
[114] M. O'Neill *Policing Football, Social Interaction and Negotiated Disorder* (Palgrave Macmillan, London 2005), 123.

CHAPTER 8 - CONCLUSION

This chapter will synthesise the key findings from thesis, identify how the research question has been addressed, and consider the implication of my findings. I will finally identify pertinent areas of research that arose during the research but which could not be addressed herein due to the constraints of this study.

A. Findings

I have covered the main human rights that were engaged during the observed operations within each respective chapter, identifying the applicable legal framework, considering the relevant legal debates, and identifying how general human rights law applies in the context of football policing.

Chapter 4 concerned the right to a freedom of assembly (Article 11), identifying the problem that police officers failed to conceptualise the gathering of fans as constituting an assembly in the planning process, or during the conduct of the football operation. This was in stark contrast to the analogous position of protestors, in respect of which these same officers commanded protests operations where the right to freedom of assembly is expressly referend in the respective APP, and the right is used as a "core guiding principle"[1]. The failure to translate lessons from Adapting to Protest into the very similar football policing operations is in part due to policy failures, and the lack of a specific policy review focused on football and the rights of fans. However, the legal protection of social assemblies has advanced in recent years due to *Friend*[2] and the Human Rights Committee General Comment 37[3] expanding the scope of the right, alongside academic commentary that reinforces the conceptual

[1] Observation, Bronze 2, League 1 Match 5, referring to an upcoming protest operation.
[2] *Friend and ors. v United Kingdom* App Nos. 16072/06, 27809/08 24th November 2009, 50.
[3] Human Rights Committee, General Comment No. 37 (2020), [7], [48].

coherence of assembly including social aspects.[4] Therefore, there needs to be a greater recognition of the subjective importance of assembly for fans, and the football policing operations should be reorientated to recognise the police's dual duty to protect fans' rights to assemble and the positive obligation to facilitate such assemblies before facing a potentially costly and embarrassing legal challenge on this basis. Social assemblies can still be limited if they are not peaceful, and the police may be afforded a greater margin of appreciation when interfering with social assemblies on the basis of what they determine to be a threat to public order, in accordance with a human rights assessment of the intervention.

Secondly, in respect of the positive obligation to facilitate assembly, this thesis sets out a detailed analysis of the basis for this duty applying to football policing operations based on legal analysis, policy, and as part of the force's commitment to ensuring that their operations fulfil human rights in practice. The force did facilitate assemblies in respect of European away fans, but seemingly as an implication of pursuing other objectives. Yet this practice was a paradigm example of the correct approach which should be extended to assemblies of home fans at European fixtures and wholesale to domestic fixtures where fan gatherings are only rarely respected and protected. The dialogue approach adopted for European fixtures not only delivered the benefits of using Liaison Officers, but also encouraged other units to engage with fans in a proactive manner, and the public order benefits of the whole operation being based on fulfilling the wishes of fans cannot be underestimated.

Effective enjoyment of the associated Article 10 right to freedom of expression (Chapter 5) is one key reason why fan assemblies must be facilitated. The right to express oneself as a fan, within sight and sound of the intended audience, is a fundamental right that applies to a range of fan behaviour which includes disruptive and unruly behaviour which I analysed as "high-amplitude" expression that was subjectively important for fans but which may nevertheless affect or impact others. This type of expression is engaged by Article 10 and must be both protected and facilitated.

[4] D. Mead, *The new law of peaceful protest: rights and regulation in the Human Rights Act era* (Hart, Oxford 2010).

Expression does not need to be peaceful, it needs to be compatible with a democratic society and respect the rights of others, and a mere claim of nuisance is insufficient to deprive fans of the right. During the course of facilitated assemblies I observed a number of planned facilitations of fan behaviour, and a high degree of tolerance for behaviour that broke criminal law but was not dangerous - low-amplitude - and did not affect the rights of others. I conceptualised this form of expression as "low-amplitude", in that it took on a subjective importance for the fans, but was not concerning to officers who were otherwise preoccupied with identifying risky behaviour. Exemplifying this was the willingness of some Bronze Commanders to engage in dialogue with fans permitting *capos* to lead chants despite this requiring traffic to be stopped for longer, or arranging for flags to be hung on private property around the pubs where fans were congregating.

Police interference to prevent criminal or dangerous expression will generally meet the necessity and proportionality tests, but the risk of harm or criminality needs to be specified and individualised in order for any limiting intervention to meet the human rights approach. In contrast, rather than being concerned with individual rights, the expression of groups of fans was the main focus of officers in the build-up to a match during Phase 1 of the operation. Fans were collectively labelled by risk category, and the link between that category and their actual behaviour was observed to be inconsistent. Risk assessments by Spotters, PSU Commanders, and Bronze Commanders were prone to exaggeration and led to an over-reliance on coercive tactics to address behaviour viewed as unusual or overly boisterous. In these situations it was common for officers to intervene without establishing the necessity to act, though human rights analysis concerning the necessity of protecting the rights of the community, or other "normal" fans was sometimes raised as a post-hoc justification. Latitude has to be given to the difficulty of engaging in a detailed legal analysis in dynamic public order policing situations, but the desire to supress potential disorder first, and then consider all the relevant considerations afterwards typifies the failure to fully embed human rights-compliant decision-making in the minds of officers, and indicates the distance to travel before a human rights approach is achieved across the force.

In considering the Right to Liberty of fans (Chapter 6), I addressed the range of coercive tactics deployed by the police to control fans from filter cordons to arrest and detention. The different structure of Article 5 means that it is not so easily balanced against concerns for the rights of others, and interference has to be on a specific basis to achieve a specific purpose. In observations, the right to liberty was rarely an explicit consideration. Measures were imposed on the basis that they were deemed necessary in broad terms, without specifying a legitimate ground for intervention as set out by Article 5(1), or by reliance on the general power to prevent a breach of the peace which is only lawfully exercised where violence is imminent. On many occasions detentions took place, or cordons were imposed pre-emptively and out of convenience or due to a lack of required resources.

Not every tactic limiting the movement of fans will engage Article 5,[5] but the extent of coercion and the punitive nature of a threatened sanction are relevant considerations to determine the applicability of the right. A repeated failure to keep measures under review also disproportionately interfered with the liberty of fans, this was most notable with coercive walk-ups to and from the stadium, along with holdbacks. Notwithstanding this assessment, officers benefit from discretion afforded to assessments under the broad common law power to prevent a breach of the peace which was the source of the majority of officer's interventions to limit expressions of fans, with varying degrees of legitimacy..

The force did conduct a systemic review into the implementation of the tactic of holding away fans back in the stadium, but concluded that the average holdback time of 32-minutes was compatible with their human rights obligations. That may be accurate in terms of the minimal standards required by domestic courts due to deference and the high threshold of engaging Article 5, but it is not a conclusion that supports a human rights approach. A quantitive assessment is insufficient analysis, particularly as it was clear from my observations of the holdback that the rights of fans were secondary considerations for officers implementing this containment for security reasons. A more

[5] R. Glover, 'The uncertain blue line — police cordons and the common law' 4 Criminal Law Review [2012] 245-260; D. Mead, 'Of Cordons, Riots and Deprivations of Liberty: A Case note on Austin v Commission of the Police for the Metropolis', Norwich Law School Working Paper 09/03, 8th May 2009.

robust role for rights needs to be considered in such cases of public order preventative detentions not implemented on a legitimate basis.

Overall, I concluded that the force followed a human rights approach only where doing so coincided with other operational objectives which were prioritised. The purely formal incorporation of human rights into the operation meant that no contextualisation was given to how rights apply to fans at any point in time, from planning, briefing, through to deployment and the operation itself. Knowledgeable and experienced Silver Commanders along with specialist units such as TAC advisors and PLTs were adept at including human rights considerations into the decision-making process but other units rarely expressed human rights considerations, even when fully aware that a researcher on human rights was observing their conduct. With the exception of the policing of European away fans, the force did not fulfil a human rights approach and only met the minimal standards required to recognise and incorporate the rights of fans into operations. The pervasiveness of risk, and the structure of the operation that is focused towards controlling groups of fans, or the gathering of intelligence to feed into future assessments of risk means there is little space for accommodating individualised assessments of how the policies and practices of the many different parts of the operation interfere with fans' human rights. Although the operations were generally carried out competently, with the force almost always achieving their goal of avoiding large-scale disorder, and although the force faces competing pressures and financial constraints, there is an opportunity for significant improvement in its adoption of strategies and tactics that will better fulfil the rights of football fans without damaging successful outcomes in terms of public order.

B. Research Question

The research question outlined in Chapter 1 posed a number of enquiries. I have demonstrated how the human rights of fans are protected during football policing operations over the preceding chapters. The precise rights of football fans are explored in the respective sections, and through analysis of my

fieldnotes I have identified how human rights considerations were handled by different units and ranks within the public order operations across a variety of different contexts. In concluding upon the concept of a human rights approach in general, I have a few final remarks to reinforce the findings above.

The process of making decisions is a critical area of enquiry for human rights because the focus of realising the benefits of rights relies in practice on compliant conduct in addition to compliant results. It has been 22 years since the HRA was brought into transform the policies, procedures, and practices of the police, and 12 years since the Joint Committee on Human Rights concluded upon the necessity of a human rights approach in order to enhance the legitimacy of public order operations.[6] Football policing is long overdue the benefits of a review and the police should remove barriers that prevent the positive changes in protest policing from being implemented in respect of other public order operations.[7] This study has explored how the human rights approach can underpin football policing and act as a complementary tool to aid the legitimacy of operations.

In response to concerns raised by officers about the over-reliance on human rights analysis, it is important to highlight in conclusion that a maximalist view of human rights protection does not preclude the use of force or coercion where that is lawful and necessary. It simply subjects the decision to use those tactics to the lens of human rights law first, and through that lens, requires cogent justifications of actions that affect the intangible but very real rights of football fans. This approach, nonetheless, leaves a degree of discretion to the decision maker, and takes into account their level of knowledge of at the time of making decisions on tactics.[8] Both domestic courts and Strasbourg recognise the difficulties that police officers encounter in public order operations and appreciate that a workable legal framework of human rights must be adaptable in order to be effective in a dynamic factual context, against the background of institutional constraints such as imperfect intelligence, resource limitations, and the pressures of competing demands on the police force.

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[6] Joint Committee on Human Rights, *Demonstrating Respect of Rights: A Human Rights Approach to Policing Protest? Follow-up Report* (London, HMSO 2009) HL Paper 141-HC-522, [131].
[7] C. Stott, S. Reicher 'How Conflict escalates: The inter-group dynamics of collective football crowd 'violence' 32 Sociology 92 (1998), 353-377.
[8] *Austin and others v United Kingdom*, App Nos. 39692/09, 40713/09, 41008/09 15th March 2012, [56]; *DB v Chief of the Police Service of Northern Ireland* UKSC 7 (2017), [42-47] and [65-67].

Adopting a consistent approach to human rights does not prevent officers from deploying coercive tactics when required. The structured approach to lawful interference with fans' rights exists as a normative framework to allow pertinent threats to the security of match-going fans, to be an appropriate basis for lawful and proportionate interference with certain rights. Following the structured approach to interfering with rights, as assessed in Chapters 4-6, achieves a sufficient level of consistency and certainty for both fans and police reflecting the "no surprises approach" already used by some Commanders. A human rights approach can thus provide the structured and balanced framework through which to finally embed rights within the policies and practices of officers, rather than pandering to the "imperative of order maintenance alongside a political need to be seen to respond to individual events".[9]

The practical consequence of a human rights approach to policing assembles would be to instil additional planning considerations and safeguards into dynamic decision making that would result in fans being treated more favourably on the basis of actual assessments of identifiable behaviour and a standalone assessment of the threat of that behaviour to public order and the rights of others. As identified throughout, criminal conduct including violence can still be prevented, prosecuted, and contribute to sanctions short of convictions.

The first step to achieving a human rights approach is a recognition that individual football fans benefit from the protection of rights, that the football operation is likely to engage their rights at some point through either the negative or positive obligation. This study contributes to achieving that step by delineating the application of human rights law to football policing operations.

C. Implications

[9] n.4 Mead (2010); n.6 Joint Committee on Human Rights (2009), [70].

This research should cause the force to reassess its approach to football policing. Reviews of tactical options such as the effectiveness of Mounted Officers and hold-backs have been undertaken and the learning process within the Force Events Unit arising out of successful operations and debriefs display a willingness to engage critically in order to continually improve football policing operations. I would expect there to be a desire to go beyond the minimal standards set out by domestic courts relying upon deference to the assessments of the public order commander, and attempt to embed practices that better fulfil the human rights approach. Achieving this would be to meet the requirements that are already in place in force policy, but which are not achieved in practice. It would also meet the requirements of international law, even if those aspects have not been explicitly extended to apply to the sub-category of football policing operations.

It is well established that, to date, the HRA has failed to embed human rights-compliant practice in other areas of policing or practice by other public bodies. It is difficult to identify an area of policing that has been able to achieve a human rights approach without a thorough policy review. Accordingly, a national review of football policing is required to achieve this goal and permit football fans to benefit from transformational promise of the human rights act. An authoritative review along the lines of "Adapting to Football" would not be sufficient to remove the regulatory framework that surrounds football policing, from punitive legislation and sanctions such as football banning orders on complaint. Therefore, fans will also benefit from adopting human rights advocacy and the rhetoric of the emancipatory potential of human rights in order to achieve substantial legislative and policy changes.

Positive changes in the legal framework are identifiable, most notably the move towards protection of social assemblies under *Friend* and Human Rights Committee General Comment 37. Further critical legal analysis or legal challenges that overturns the politically-compromised decisions in *Hicks* and *Austin* would also benefit both fans and the police as this legal reform would clarify the requirement to specify precise threats, and the extent of the obligation to review coercive tactics in a timely manner clarified. Whilst some legal claims are made by football fans to avail themselves of rights, a

significant change in the law may have to wait for a more sympathetic applicant than *Ostendorf or S.,V. & A.*

D. Further Research

The limitations of this study mean that some avenues of interesting investigation were left insufficiently explored. Other lines of enquiry arose and one question that troubled me in my analysis was determining the extent to which the police, as a public authority, are bound to follow Strasbourg jurisprudence given that s.3 HRA refers only to Parliament, and s.6 HRA is not a sufficiently expansive obligation. Courts consider themselves bound by clear line of jurisprudence of the Grand Chamber - though they will also regularly rely on individual judgments in making other determinations - but the obligation on public authorities to do the same is unclear. A human rights approach, properly implemented, might impose an obligation on the public authority to meet the highest possible standards of human rights under either common law or the ECHR, but this precise finding was outside the scope of this study as the ethnographic data did not speak to this question.

The paucity of cases concerning the rights of football fans has a number of potential explanations but there has been not qualitative or quantitive research on this question. Barriers to claiming rights exist in respect of other communities but the particular position of fans as a policed community, subject to specific legislation, that also benefit from clear human rights, would be a great interest. Linked to this is a research question concerning the future shape of a dedicated football law review, and an assessment of which legislative provisions might remain in a refreshed, human rights compliant legal framework for the policing of fans.

Finally, this study was not able to complete a detailed ethnographic study of the role of intelligence in building up the football operation built on risk, and assess whether human rights considerations concerning Article 8 are present in the decision-making process of Spotters, Intelligence Officers, and their commanding officers. Given concerns raised in previous cases concerning the retention of

intelligence gathered in public order operations, and the limited opportunity given to me in this study, this would be a further rich seam of enquiry for a researcher in a similar position.

APPENDIX 1: RECOMMENDATIONS TO THE FORCE

The following recommendations is intended to be read with the full thesis to assist the force in understanding the areas of practice that are affected by human rights and which require detailed consideration to implement changes that will improve practice and outcomes for both the police and football fans.

1. The force should conduct a wide-ranging review of the standard matchday operation to consider the following factors:
    a. Which policies are referenced in organisational documents and do those same policy documents consider the implementation of measures to protect the human rights of football fans and facilitate the free expression and assembly of football fans.
    b. What processes are in place to review the implementation of human rights standards, and assess operations based on their successful implementation of strategies to protect and fulfil human rights obligations.
    c. How are the lessons learned from operations disseminated and how reflexivity about human rights compliance can be enhanced.
2. Football Policing Operations should consider adopting a human rights approach rather than an approach which references rights a formality. This would have a number of structural implications:
    a. The Gold Strategy would make clearer, the extent and range of human rights obligations
    b. Commanders would be selected on the basis that they had a high degree of knowledge about the implementation of human rights norms within the context of football policing, and could demonstrate that they are able to engage in strategic balancing of human rights considerations during an operation

c. The Tactical Plan should be developed with every tactic assessed for its potential implementation in a human rights compliant manner including

    i. That each plan expressly identifies the relevant human rights that might be affected by its implementation.

    ii. That the tactic selected clearly identifies and expressly refers to a legitimate objective (Art 10(1)/Art 11(1) or a lawful basis in fulfilment of Art 5(1).

    iii. Contingency tactics are clearly delineated and only adopted once the human rights analysis has been conducted afresh during the course of the operation.

    iv. A method for reviewing Tactical Plans against human rights standards is adopted. For example, when arrests are recorded in the debrief, the number of positive facilitations with the rights of fans should be recorded alongside the number of human rights breaches.

d. Communication about human rights cases that potential affect the selection, use, and review of public order tactics is improved and incorporated into the matchday operation

    i. Communication of key legal principles should be achievable in Pre-Briefings of Silver Briefings.

    ii. TACs could curate a specific page of the Operational Order with recent cases, principles, or current advice on human rights compliant implementation.

e. Human Rights considerations should be highlighted in a specific section at briefings and debriefings which is tailored for the individual operation.

3. A human rights approach should also be implemented in order to embed the concept of facilitation in football policing.

a. Facilitation of European away fans should continue in accordance with force practice and concerns raised by other bodies about disruption or impact on the rights of others should be assessed in accordance with the appropriate human rights analysis.

b. Facilitation of home fans during European fixtures should be assessed. This objective could easily be accommodated within the current practice of the force. Note that this does not mean that home fans need to receive the same treatment, engagement with fans is part of fulfilling the positive obligation.

c. Facilitation of all fans at domestic fixtures is a key area of concern that requires addressing in structural and operational terms.

    i. The current low-level facilitation present in the justification for continuing to police low-risk Cat A fixtures is a solid basis to build on.

    ii. Fan groups should be engaged constructively. Force should not be limited by talking to one official fan group, when other relevant groups can be identified.

    iii. Facilitation should be recognised as a contributing factor to achieving other objectives, including the prevention of crime and disorder.

    iv. Facilitation should recognise that coercive powers remain available to the force and there is no obligation to facilitate violent individuals.

    v. The presence of potential risks or threats of public order does not obviate the force's obligation to positively facilitate the assembly and expression of all individuals.

    vi. Interventions that necessarily arise during or following positive facilitation should meet the legal tests for such tactics.

4. Certain specific tactics should be reviewed as the research identified concerns regarding their implementation:

a. Hold-backs should be reviewed to ensure that they are implemented in accordance with the standards set out by the ECtHR.

    i. They should only be imposed when a lawful basis has been identified in Article 5(1), and a legitimate objective in Article 10(1) and Article 11(1).

    ii. They should only be imposed for as long as the imminent necessity exists.

    iii. The hold-back tactic should not be disproportionate in its scope. This includes targeting wherever possible, and limiting the scope.

    iv. Reviews of the tactic should be frequent, with detailed consideration given to a fresh analysis of the necessity and proportionality requirements. This means that consideration should be given to lifting the hold-back prior to the streets surrounding the stadium becoming completely empty, but the final decision depends on the context.

b. The same legal review should be conducted for other containments such as walk-up cordons.

APPENDIX 2: OBSERVATIONS

Teams	Competition	Match	Observing
Redacted to protect	Premier League	1	Silver
anonymity of the force	European	1	Silver
	Premier League	2	Silver
	League 1	1	Silver
	League 1	2	Silver
	League Cup	1	Silver
	European	2	Silver
	FA Cup	2	Bronze 1
	Premier League	3	Bronze 2
	European	3	PLT
	League 1	3	Silver
	League Cup	3	Bronze 1/2
	FA Cup	4	Bronze 2
	European	4	Bronze 2
	League 1	4	Bronze 1
	Premier League	4	Bronze 2
	Premier League	5	Bronze 2
	Premier League	6	Bronze 2
	League 1	5	Silver
	League 1	6	Silver
	FA Cup	5	Silver
	League 1	7	Spotters
	European	5	Bronze 6

	European	6	Bronze 6
	League 1	8	Silver
	European	7	Bronze 2
	League 1	9	Bronze 1
	Premier League	7	Bronze 2
	League 1	10	Spotters
	European	8	PLT
	League 1	11	Bronze 1
	Premier League	8	Bronze 3
	League 1	12	Bronze 2
	Premier League	9	PSU Sgt
	League 1	13	Silver
	European	9	Silver
	Premier League	10	Bronze 2
	Premier League	11	Silver
	League 1	14	Silver
	League 1	15	Silver
	Non-League		Silver
	European	10	Bronze 6
	League Cup	6	Silver
	European	11	PSU Sgt
	Premier League	12	Bronze 2
	European	12	Bronze 6
	League Cup QF	6	Silver
	Premier League	13	Silver
	European	13	Bronze 6
	Premier League	14	Bronze 2

	European	14	PLT
	League 1	16	Bronze 2
	Premier League	15	PSU Sgt
	Premier League	16	Silver
	League 1	17	Bronze 1
Other Events			
Training day			
Interview of Silver Commander			
Training day			
Interview of Gold Commander			
Interview of Gold Commander			
Premier League	16		
League 1	17		
European	14		
Cup Fixtures	6		
Total fixtures	**53**		
Category C/C(IR)	12		
Category B	27		
Category A	12		
Non-policed/Spotters only	2		