Managing the Unmanageable: The Offence of Riot in England and Wales

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Abstract

This article analyses the current context and the use of the public order offence of 'riot' held in s. 1 of the Public Order Act 1986. It examines the historical roots of the statutory offence and the difficulty of securing a conviction following times of public disorder due to the nature and interpretation of the wording in s. 1. The article identifies, and uses as an example, the perception that football disorder includes riotous football fans, although official Home Office statistics on football disorder highlight that the offence of riot is not utilised. The statutory offence of 'riot' is an underused tool, although the term 'riot' is freely used by the media to describe disorderly behaviour. The article projects to make a recommendation that the factors underpinning the definition of riot needs to be re-examined to enable the judiciary to interpret s. 1 in a manner that is more practicable.

Keywords
Public order, riot, violent disorder, football disorder

Introduction

In anticipation of the upcoming Federation Internationale de Football Association (FIFA) World Cup, the media will be littered with stories regarding spectator behaviour. England fans are deemed to engage in disorderly behaviour at

international tournaments more than their counterparts.[1] The popular press broadcast incidents of hooliganism in and around international football events, particularly advertising where hooligans may possibly engage in such disorderly conduct.[2]

The common theme linked to the media speculation and reporting of such disorder is the use of the word 'riot'. Parliament provides a 'large number of wide-ranging and sometimes archaic statutory powers',[3] deriving from a mix of statutory provisions, partly from the common law and partly from the royal prerogative, and is aimed at preserving order, protecting citizens and punishing those who are involved in serious disorder, like football hooliganism. An individual embroiled in acts of football disorder abroad can be convicted in the UK and served a football banning order. These arrests and orders are then submitted and statistics are produced on a season-by-season basis by the Home Office. The statistics can include the offence of riot, although it is absent, despite the portrayal of the behaviour being inextricably linked to that of a riot.[4]

There is a reluctance within the UK legal system to convict offenders of riot under s. 1 of the Public Order Act 1986. This could lend itself to the 'rushed'[5] enactment of the statute in the aftermath of a number of disturbances in the UK, and the behaviour of English football spectators overseas. This has left the various state institutions involved in the enforcement, investigation and prosecution of the offence of riot, struggling to prosecute and prevent riotous actions by groups of individuals due to the wording in s. 1. The practicality of using s. 1 has led to very few convictions of the offence of riot and most notably absent in the context of football disorder. The courts

[1] E. Dunning, P. Murphy and J. Williams, Football on Trial: Spectator Violence and Development in the Football World (Routledge: London 1990).

[2] J. Williams, E. Dunning and P. Murphy, Hooligans Abroad, 2nd edn (Routledge: London, 1989).

[3] D. Mead, The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (Hart Publishing: Oxford 2009) 84.

[4] J. Kerr, Rethinking Aggression and Violence in Sport (Routledge: London, 2004).

[5] L. H. Leigh, 'Peaceful Protest and the Limits of Police Intervention' (2007) 171 Justice of the Peace 260.

suffice with using public order offences such as violent disorder,[6] affray,[7] fear or provocation of violence[7] or 'breach of the peace'.[8]

Aforementioned, this piece will illustrate that Home Office statistics[9] on football-related arrests and banning orders[10] do not record the s. 1 offence in the 1986 Act, although the term 'football hooliganism' and rioting are often partnered when discussing football disorder. The scope of the offence in its present form therefore hinders the prosecution of offenders of riot. There is a need to address the emergence of the offence incorporated in the 1986 Act and how this framework was developed with football hooliganism in mind. The factors underpinning the offence will be analysed to highlight the difficulty of utilising the offence in order to serve convictions. Most significantly, this discussion will project to make recommendations in respect of amending s. 1 to provide a mechanism that can be operated to overcome these difficulties.

Mapping the Emergence of Riot

A series of disturbances in the 1980s erupted into major widespread disorders, whereby people 'watched with horror and incredulity of scenes of violence and disorder across their cities'.[11] These incidents of disorders which originated in Brixton in 1981 are probably one of the 'most significant events in British public order history',[12] coinciding with the miner's strikes in 1984–85. Alongside the political unrest, the reporting of hooligan incidents involving football violence increased in the mid-1980s. It was often said that English football spectators exported their hooliganism more readily than other countries. With football disorder no longer occurring over territories inside grounds but had moved to outside of the stadia.[13] This

[6] Public Order Act 1986, s. 2. 7.

Public Order Act 1986, s. 3.

[7] Public Order Act 1986, s. 4.

[8] R v Howell [1982] QB 416.

[9] Available via Home Office, 'Football-related Arrests and Banning Orders Statistics' (Gov.uk, 9 October 2013). Available at: https://www.gov.uk/government/collections/football-banning-orders (accessed 12 November 2017).

[10] These statistics are based on information provided by the UK Football Policing Unit, by collecting statistics from the 43 police forces in England and Wales, alongside the British Transport Police on the number of football-related arrests, and collecting information on football banning orders from the Football Banning Order Authority's records.

[11] L. Scarman, The Scarman Report, 2nd edn (Penguin Books: London) 13.

[12] S. McCabe and P. Wallington, 'The Police, Public Order and Civil Liberties: Legacies of the Miners' Strike' (1988) 14 ILJ 145 at 165.

[13] Sir Norman Chester Centre for Football Research, 'Football and Football Hooliganism' (University of Leicester, January 2001). Available at: http://www.furd.org/resources/fs1.pdf (accessed 17 November 2017).

discussion will use football disorder to demonstrate the inability to convict offenders of riotous acts. On the face of it, the offence is an ideal mechanism for prosecuting violence and disorder witnessed in and around football stadiums.

Prior to the enactment of the Public Order Act 1986, there were already statutory and common law powers readily available for such disorders, such as the Public Order Act 1936. The 1936 Act 'was passed to deal with a particular problem of that day: the threat to freedom posed by the Fascist use of intimidation and violence'.[14] Nevertheless, the government took the view that the powers available in the 1936 Act 'were confused and fragmented and that there was scope for affording the police additional powers to prevent disorder before it occurred and to charge individuals with the correct offences'.[15] The sequence of events in the UK from 1974 to 1984, including the Brixton riots in 1981, the aforementioned Miner's strike in 1984–85 and football hooliganism,[16] led to strong recommendations to reform the law to provide the police with additional powers.

Lord Scarman,[17] following the Brixton riots, called for recommendations on the codification of the common law public order offences put forward by the Law Commission in 1983,[18] 'by giving an additional impetus to the need for a fresh look at the public order laws'.[19] Secondly, after the Heysel Stadium disturbances in 1985 involving Liverpool football supporters, the European governing body for football, Union of European Football Associations (UEFA), banned all English clubs from playing in Europe indefinitely. It was noted that football riots were deemed to be nothing less than outbursts of savagery, smearing the UK's reputation overseas and needed to be punished more severely.[20] It was with this background that the government published

[14] HC Deb 16 May 1985, vol. 79, col. 506.

[15] H. Fenwick and G. Phillipson, Text, Cases and Materials on Public Law and Human Rights, 3rd edn (Routledge: London, 2011) 1085.

[16] Law Commission, Red Lion Square Disorders, Cmnd 5919 (1975); Law Commission, Report on the Brixton Disorders, Cmnd 8427 (1981); Law Commission, Criminal Law: Offences Relating to Public Order, Cmnd 123 (1983); Law Commission, Review of Public Order Law, Cmnd 9510 (1985).

[17] Law Commission, Lord Scarman 'The Brixton Disorders', Cmnd 8427 (1982).

[18] Law Commission, Criminal Law: Offences Relating to Public Order, Cmnd 123 (1983) at para. 5.29—to abolish the common law offences of blasphemy and blasphemous libel. Abolish the offences of disturbing divine worship or devotions and striking a person in a church or churchyard. They refer to 'any distinct offence' since there is some doubt, on the authorities, as to whether they exist.

[19] C. Barnard and I. Hare, 'Police Discretion and the Rule of Law' (2011) 63 MLR 581.

[20] HC Deb 03 June 1985, vol. 80, cc. 21–33.

its White Paper in 1985, namely, Review of Public Order Law.[21] It was this that formed the basis for the new statutory legislation governing public order, namely, the Public Order Act 1986.

Recommendations were put forward to amend the offences of riot, unlawful assembly and affray. The amendments to the offences of riot, violent disorder—the successor to unlawful assembly—and affray did not affect the overall scope of the criminal law, but they were seen to restate the offences in a clearer, more modern language.[22] The Public Order Act 1986 now stipulates these offences in five sections[23] in order of seriousness, with ss 1–3 housing the three more serious public order offences, being riot, violent disorder and affray. The three offences do vary in some degree of seriousness and in the minimum numbers required, but are significantly linked in some way through the violence or threats used. The Act provided a new 'means for the police to control demonstrations and protests, and for much more stringent control and order maintenance outside of pubs and bars, in city centres and near football grounds on matchdays'.[24]For this reason, the 1986 Act was heralded as the 'new law against hooliganism',[25] providing a mechanism to control unruly football spectator's intent on causing violence and disorder. The proposed inadequacies of the law regulating and preventing riotous acts were seen to be not nearly so important in terms of controlling football hooliganism and maintaining public order, as the inability to actually enforce the law itself in order to secure convictions.[26] This inability was rebutted, suggesting that evidence illustrated that there were sufficient offences readily available to the police, and the courts could already impose heavy sentences and serve orders to prevent future public disorder.[27] Specific to football hooliganism, the new public order legislation would include an exclusion order, [28] aimed at individuals involved in public order at football matches who have been convicted of one of the new offences in ss 1–5. Alongside these public order offences, there was also the introduction of Schedule 1 that included additional offences relating to alcohol at sporting events.

[21] Law Commission, Review of Public Order Law, Cmnd 9510 (1985).

[22] See above n. 12 at 57.

[23] Public Order Act 1986, Part I.

[24] See Mead, above n. 3 at 242.

[25] HC Deb 13 January 1986, vol. 89, col. 795.

[26] Ibid. at 814.

[27] Illustrated in R v Muranyi [1986] 8 Cr App R (S) 176 with the life sentence of a football hooligan.

[28] Public Order Act 1985, Part IV.

The preventative measures including the exclusion of unruly football spectators were already available in the form of a 'binding over order'. A person who is bound over can be required to refrain from certain activities for a stipulated period and to be of good behaviour. This, similar to an exclusion order, can be imposed in addition to a conviction. The power to serve such orders derives from the common law definition of 'breach of the peace'.[29] The court must be satisfied that a breach of the peace involving violence or an imminent threat of violence has occurred, or that there is a real risk of violence in the future. Such violence may be perpetrated either by the offender or a third party as a result of the offenders' conduct.[30] With this in mind, such preventative order can be used across the range of public order offences, not just specifically to riot.

The Public Order Offences

With football disorder in mind, having tightened up the offence, it has now reduced the chance of securing a conviction of football fans that are involved in riotous acts. The definition of the offence was deemed to be housed in a tidier framework, which should remove some of the uncertainties at common law.[31] A riot is committed when

> 12 or more people together threaten or use unlawful violence for a common purpose in such a way that the conduct of them all together is such as would cause a person of reasonable firmness at the scene to fear for their personal safety.

It is immaterial under s. 1(2) whether or not the 12 persons use or threaten unlawful violence simultaneously. The common purpose element which must be evident for conviction of riot, which can be inferred from conduct[32] of the individuals participating in the offence, will, nevertheless, very much depend on the facts and circumstances

[29] The modern authority of breach of the peace was examined in in R v Howell. It was held, 'there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance'.

[30] Crown Prosecution Service, 'Binding over Orders' (CPS). Available at: http://www.cps.gov.uk/legal/a_to_c/binding_over_orders/ (accessed 2 December 2017).

[31] See HC Deb, above n. 26 at 797.

[32] Public Order Act 1989, s. 1(3).

of each case brought before the courts. Prima facie, the wording of this offence is how you could describe disorder witnessed outside of football stadiums when large groups of spectators, often with an affiliation for the same football club, are using or threatening violence.

The purpose of stating that 12 or more people committing grave and serious offences was highlighted as giving the courts greater sentencing flexibility and reflects the gravity of the offence of riot. Therefore, it is correct that it should be defined as one of the rarest and least prosecuted offences.[33] The creation of these offences was to aid in codifying the law and enabling the courts to convict individuals, in particular a small portion of football spectators who are intent on causing disorder at football matches. Although this can be seen to be practicable, one of the difficulties is that people might be caught up in a riot but not have committed an offence. It was postulated that all this section will do, at best, is to create new offences for which people involved in riots can be arrested, something that was already available.[34]For example, the use of binding over orders that are utilised in respect of the common law 'breach of the peace'.

Paying particular attention to football disorder, the choice to use such numbers to convict an individual of riot comes as a result of the statutory offence of violence disorder in s. 2 of the 1986 Act. Section 2 transformed from the offence of unlawful assembly in the 1936 Public Order Act, into one of violent disorder that now entails the involvement of three or more people. The use of this offence is more prominent amongst football spectators embroiled in acts of disorder[35] due to the smaller number of individuals needed at the scene of the incident. The previous common law offence of riot that illustrated 'three or more people'[36] were needed to commit the offence was abolished by this Act, distinguishing the seriousness of the offence from that of 12 persons needed, to that of three for violent disorder. Section 2 states that violent disorder is

> committed by each person who threatens unlawful violence for a common purpose and who intends to use or to threaten violence or is aware that their

[33] See HC Deb, above n. 26 at 821.

[34] Ibid. at 804.

[35] 2016–17 Football Banning Order and Arrest statistics illustrate that 21 per cent of the overall arrests are for the offence of violent disorder.

[36] Field v Receiver of Metropolitan Police [1907] 2 KB 859.

> conduct may be violent or may threaten violence[37]provided that the conduct of them all together would cause a person of reasonable firmness at the scene to fear for their personal safety.

It appears that the amendment of these two offences has created somewhat of a difficulty. It is therefore a possibility that those, particularly football spectators, are being convicted of what should be the offence of riot, but under the remit of the s. 2 offence of violent disorder. In light of these two statutory offences, there are some general factors that constitute to fully understanding how they can be used efficiently, particularly in times of football disorder. First, neither of the two offences needs someone to be actually to be put in fear for their personal safety. Sherr[38] describes this as more of a measure of a 'hypothetical person, objectively judged'. In I and Another (A.P) and Another v Director of Public Prosecutions,[39] Hughes J illustrated that

> the person of reasonable firmness...is a hypothetical person. He is often conveniently referred to as the 'hypothetical bystander'. He represents the standard by which the gravity of the behaviour is to be judged and he demonstrates that this public order offence is designed for the protection of the public.

With this in mind, neither of the two offences require a third party to present at the scene.[40] The Law Commission[42] before the passing of the 1986 Act stated that the offence should deal with persons using or threatening violence such as would cause a person of reasonable firmness present at the scene to fear[41]for his personal safety. The government agreed with this proposal for the purposes of riot and violent disorder.[42] Yet, for each of these offences in the Act, it negates the Law Commission's proviso by stating that 'no person of reasonable firmness need actually be, or be likely to be, present at the scene'.[43]

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[37] The mental element to this offence is laid down in Public Order Act 1986, s. 6(2).

[38] A. Sherr, Freedom of Protest, Public Order and the Law (Blackwell Publishing: Oxford, 1989) 88.

[39] [2001] UKHL 10.

[40] Public Order Act 1986, s. 1(4) and s. 2(3), 'no person of reasonable firmness need actually be, or likely to be, present at the scene'.

[41] Law Commission, Review of Public Order Law, Cmnd 9510 (1985) at para. 3.17.

[42] HL Deb 16 May 1985, vol. 463, cc. 1276–85.

[43] See Public Order Act 1986, s. 1(4).

With the aforementioned exclusion orders specifically related to football spectators. The order could be served if the court was satisfied that making such an order in relation to the accused would help to prevent violence or disorder at or in connection with prescribed football matches.[44] Section 31 of the Public Order Act stated that an exclusion order could be granted if

> a. involved the use or threat of violence by the accused towards another person and was committed while one or each of them was on a journey to or from an association football match; or b. involved the use or threat of violence towards property and was committed while the accused was on such a journey

Considering this and the rationale behind the creation of the statute, the absence of a third party with regard to a football spectator created a dilution of the necessary safeguards in the respect of the new offences of riot and violent disorder, each of which carries substantial penalties. [45] Particularly in light of the case of Kamara v DPP[46] that illustrated the essential requisite of a public order offence was the presence or likely presence of innocent third parties not participating in the illegal activities in question; it was the danger to their security which constituted the threat to public peace and the public element necessary for the commission of the offence. Nowhere are these protections more glaringly absent than in ss 1–2 of the 1986 Act. It can be said that both the new offence of riot and violent disorder are 'defined far too widely, in a manner which goes against those previous Government assurances'.[47] If the 'present at the scene' elements were to be included in these offences, it would create a more practicable mechanism for securing convictions of riot and violent disorder – particularly in relation to the acts of football disorder that will nearly always include an 'innocent' third party, most notably inside of the football stadium or in public places outside of the stadium, that is, town centres and train stations.

As these two offences can be committed in private as well as in public places,[48] it has been criticised as a 'strange omission for a series of sections dedicated to controlling

[44] Public Order Act 1986, s. 30(2).

[45] See HC Deb, above n. 26 at 807.

[46] [1974] AC 104.

[47] See HC Deb, above n. 26 at 807.

[48] Public Order Act 1986, s. 1(5) and s. 2(4).

public order'.[49] It has been suggested that the area needs to have a narrower and more rigid approach to be able to uphold a conviction of one of these offences.[50] With regard to football, as disorder takes place both inside and outside of the stadium. This should increase the ability to use the s.1 offence.

With the offences, notably riot, negating the third-party element that is usually seen incorporated into the factors of most public order offences, it illustrates the degree of difficulty of proving that there is a common purpose with at least another 11 people. In a football disorder context, especially with the common perception that disorder is created en masse by large groups of football hooligans in and out of the football stadia. In order to uphold a conviction of violent disorder or riot, it is for the courts to establish whether or not a person deliberately acted in combination with at least another 2 people (violent disorder), 11 people for the purpose of riot, or whether it is sufficient that at least 3 persons (violent disorder) or 12 persons (riot) are present together and are all using or threatening unlawful violence, whether separately or collectively. With reference to violent disorder, the Law Commission observed that

> in referring to the requisite minimum of three persons 'present together', there is no element of common purpose; nor it is necessary that the three should be acting in concert in the sense that they are doing the same acts or doing acts directed at the same object.[51]

The Court of Appeal in R v NW[52] was 'fortified'[53] by the views expressed by the Law Commission with regard to the interpretation of common purpose for a conviction of violent disorder. Moore-Brick LJ alluded that 'it has been recognised more than once by the courts that the Public Order Act 1986 is to be given its natural meaning and should not be interpreted by reference to the common law offences which it abolished'.[54] For that reason he added that

[49] See Mead, above n. 3 at 243.

[50] S. Chesterman, Private Security, Public Order: The Outsourcing of Public Services and Its Limits (OUP: Oxford, 2001).

[51] Law Commission, Criminal Law: Offences Relating to Public Order, Cmnd 123 (1983) at para. 5.29.

[52] [2010] EWCA Crim 404 (CA).

[53] N. Parpworth, 'Violent Disorder' (2010) 174 CJLW 533 at 2.

[54] See above n. 53 at 13.

> the expression 'present together' means no more than being in the same place at the same time...a group of people using or threatening violence in the same place at the same time, whether for the same purpose or different purposes, are capable of creating a daunting prospect for those who many encounter them simply by reason of the fact that they represent a breakdown of law and order which has unpredictable consequences.[55]

The decision in R v NW shed a light on the meaning of 'present together' for the purposes of the offence of violent disorder contrary to s. 2 of the Public Order Act 1986, but not for the purposes of the offence of riot. It denoted that the phrase 'present together' is nothing more than being present at the same time in the same place, giving the phrase its ordinary and natural meaning. For that reason, if this principle were to be applied in a football disorder context, involving crowds en masse, it should help, not hinder a conviction of riot under s. 1.

R v NW also clarified the earlier decisions in R v Mahoof[56] and R v Morris,[57] whereby those committing the offence of violent disorder will be acting with a common purpose if the prosecution is able to convince a jury that 'other persons who were using or threatening unlawful violence were in fact present at the material time'. The need for a defined common purpose for committing the act whilst not needing a third-party presence is a strange omission. The nucleus of public order offences is the offenders' conduct and the potential effect of that conduct.[58] By stating that 'no person of reasonable firmness need actually be, or be likely to, present at the scene' deters from the statute's desired effect. If there was a necessity to have a reasonable person, albeit a hypothetical person, to be present, this would realistically have 'an important evidential value when it comes to any trial'[59] involving an s. 1 offence. Significantly, instances of football disorder, a third party not involved in the acts of disorder will almost certainly be present in and around the stadium. Although it has been noted that football hooligans now organise rival fights away from the stadium and out of sight of the police.[60]

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[55] Ibid. at 19.

[56] [1989] 88 Cr App R 317 (CA). 58.

[57] [2005] EWCA Crim 609 (CA).

[58] J. Beggs QC, G.Thomas and S. Rickard, Public Order: Law and Practice (OUP: Oxford, 2012).

[59] Ibid. at 84.

[60] J. Allan, Bloody Casuals: Diary of a Football Hooligan (Famedram Publishers Ltd: Ellon, 1989).

Accordingly, to be liable of the more serious offence of riot contrary to s. 1 of the Public Order Act 1986, the prosecution must prove that the accused himself actually used rather than merely threatened violence. As illustrated in R v Chapman,[61] 'it is to be made crystal clear to everyone that...each individual who takes an active part by deed is guilty of an extremely grave offence by being engaged in a crime against the peace'. Offences of this nature were illustrated in the enactment of the statute when considering acts of disorder involving football spectators. Particularly the organisation and instigation of violence amongst a collective group of spectators with an affiliation to one particular club.

Collective groups embroiled in football disorder was perceived as being 'savage' and needed to be punished severely.[62] With this in mind, L. J. Rose in R v Najeeb & Ors[63] stipulated that 'nobody is to be sentenced for mere encouragement by presence to threaten violence...but measured on principal factors...the duration of his presence and what unlawful acts of violence he did whilst there'. In proving that the accused himself actually used unlawful violence and the violence of the group was used for a common purpose can be quite difficult. Particularly as the prosecution has to show that the accused intended violence or were aware that their conduct might be violent. The test of the effect on a person of 'reasonable firmness' is the standard of 'disorderliness'[64]; therefore, as s. 1 necessitates the use of 'unlawful violence', it indicates that a person of reasonable firmness would recognise the seriousness of the offenders' actions and fear for their personal safety. 'In theory this seems a reasonable standard to apply'[65] to offences of riot and violent disorder, although the law as it currently stands does not take into consideration this third-party element.

In the case of R v Muranyi,[66] it was only because of the 'considerable evidence from the prosecution to support it' that the court was able to establish the 'intention was directed principally by the applicant'. This case, and the only case concerning riot for the purposes of football disorder, involved the defendant taking a leading part in and

[61] [2002] EWCA Crim 2346 5. Stated in the Crown Court on 23 November 2001.
[62] See above n. 52.
[63] [2003] EWCA Crim 194 (CA).
[64] R. Costigan and R. Stone, Civil Liberties and Human Rights, 11th edn (OUP: Oxford, 2017) 412.
[65] Ibid. at 412.
[66] [1986] 8 Cr App R (S) 176 (CA).

instigating a large-scale riot in which football supporters were attacked. The 24 other defendants involved in this case were not prosecuted and it was the evidence collected against Muranyi that illustrated he was 'a deliberate organiser of football violence and the ringleader'.[67] If the 'common purpose' element of the s. 1 offence can 'inferred from conduct',[68] in the Muranyi case there were more than the 12 individuals present together for the purpose of the offence. The individuals all had an affiliation with the same football club. They were gathered together under a common purpose by the organiser to be involved in violence, and that violence was directed towards another group of football spectators. Acts of disorder such as this should satisfy the offence of riot. However, the difficulty of establishing the intention of each individual offenders' conduct and the potential effect that the conduct could have on the absent, hypothetical third party highlights the impracticality of the law in order to secure a conviction. It appears in this case that the court could only interpret the wording of s. 1 in line with the organiser of the violence.

Each case regarding incidents of serious public disorder needs to be carefully considered on its own facts and merits before deciding the appropriate level of charge prosecutors should receive. The actus reus of an individual contrary to both s. 1 and s. 2 of the Public Order Act 1986 is based on the nature and effect of the outbreaks of violence and lawlessness at the time of disorder. In order to establish the intention of an individual, the statutory interpretation of violence with regard to riot and violent disorder is illustrated in s. 8 of the Public Order Act 1986. It verifies that any violent conduct 'includes violent conduct towards property as well as violent conduct towards persons...and it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct.' With s. 1 being the most serious of public order offences, charges under s. 1 should only be used for the most serious cases usually linked to planned or spontaneous serious outbreaks of sustained violence.[69] Similar to the case of Muranyi, a situation that still occurs in around football matches in England and Wales on a seasonal basis.

[67] Ibid. at para. 177.

[68] Public Order Act 1986, s. 1(3).

[69] Crime Prosecution Service, 'Public Order Offences incorporating the Charging Standard: Riot' (The Crown Prosecution Service, 1 November 2010). Available at: http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Riot (accessed 25 October 2017).

The Crown Prosecution Service's Charging Standard[70] outlines the forms of conduct that should fall within the scope of the offence of riot, by introducing five specific characteristics. The characteristics, however, make no specific reference to football-related disorder although the 1986 Act was created on the backdrop of football hooliganism in the 1980s. One such characteristic for the courts to consider is 'the scale and ferocity of the disorder whereby severe disruption and fear is caused to members of the public'. This particular factor incorporates the 'right for society to live free from fear without criminals breeding fear in residents and leaving destruction in their wake'.[71] Although all characteristics in the Charging Standard do not have to be considered together to result in a charge of riot, the nature of them are usually entwined by the actions of the individuals. For that reason, inciting fear into members of the public is frequently created by 'the violence used in the disorder which has a significant impact upon a significant number of non-participants for a significant length of time'.[72] This significant impact on individuals could be seen to link with the 'reasonable firmness' test that is currently missing from the s. 1 offence; therefore, the practicality of using these Standards alongside the s. 1 offence will create difficulty in convicting a football spectator.

Riot and Alcohol

The seriousness of the characteristics in the Charging Standard can be completely quashed if rioters raise a defence for their actions before the courts. The Public Order Act 1986 makes special provision for the possibility of a plea of intoxication.

> A persons whose awareness is impaired by intoxication shall be taken to be aware of that of which he be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was solely by the taking or administration of a substance in the course of medical treatment.[73]

For the purpose of s. 6(5) of the Public Order Act 1986, 'intoxication' means any intoxication, whether caused by drink, drugs or other means or by a combination of

[70] Crime Prosecution Service, 'Public Order Offences incorporating the Charging Standard' (The Crown Prosecution Service, 1 November 2010). Available at: http://www.cps.gov.uk/legal/p_to_r/public_order_offences/ (accessed 27 October 2017).

[71] HC Deb 11 August 2011, vol. 531, col. 1136.

[72] See above n. 63 at 5.

[73] Public Order Act 1986, s. 6(5).

means.[74] Thus, as with other offences where the required mental element is recklessness 'self-induced' intoxication, this provides no defence in these public order offences. Therefore, 'he will be treated as unimpaired, as aware of that which he would have been aware of had he not been intoxicated'.[75] There needs to be a degree of certainty when drafting the indictment for an s. 1 offence involving intoxication. It can be perceived that only the defendant 'intended to use violence, rather than merely being aware that his conduct may be violent'.[76]In doing so, this would be alleging a crime of specific intent.[77]

The possible defence of intoxication for the purposes of s. 1 riot further highlights the problem with the wording of the offence, as a person cannot form a common purpose recklessly. This is most prominent amongst football supporters, with 'drunkenness' of fans being the most often reported cause of violent disorder by the media.[78] Although there is much academic research on the link between alcohol consumption and football disorder,[79] and how intoxication may not be the sole reason for spontaneous acts of violence. For the purposes of A s. 1 offence and the possible defence of intoxication, there needs to be a clearer explanation of the meaning or common purpose to secure a conviction of riot by incorporating the person of 'reasonable firmness' to be present.

Where there are seemingly spontaneous outbreaks of violence, similar to that witnessed amongst football spectators, with different motivations coming into play amongst different individuals, the establishment of the common purpose held in the offence of riot in s. 1 of the Public Order Act will very much depend on the facts and circumstances of any given case. The difficulty of sharing this common purpose with at least another 11 people is particularly visible in the defence of intoxication, as 1

[74] Ibid.

[75] General principle held in DPP v Majewski [1977] AC 433 (CA).

[76] P. Thornton, The Law of Public Order and Protest (OUP: London, 2010).

[77] Meaning either willingly or knowingly became intoxicated, to which a plea of self-induced intoxication may apply. See W. Wilson, Criminal Law, 5th edn (Pearson: London, 2014).

[78] P. Marsh et al., Football Violence in Europe (The Amsterdam Group: Amsterdam, 1996).

[79] See, P. Marsh and S. Frosdick, Football Hooliganism (Willan: Milton, 2005); G. Pearson, An Ethnography of English Football Fans: Cans, Cops and Carnivals (Manchester University Press: Manchester, 2012); J. Williams, 'Who Are You Calling a Hooligan?' in M. Perryman (ed.), Hooligan Wars: Causes and Effects of Football Violence (Mainstream: Edinburgh, 2012) pp. 37–53; and C. Stott and G. Pearson, Football 'Hooliganism': Policing and the War on the 'English Disease' (Pennant Books: London, 2007).

person cannot form a common purpose recklessly. The assumption that alcohol consumption is somewhat linked to football disorder[80] could provide a reason as to why the offence of riot is not utilised by the prosecution.

The levels of intoxication by an individual football supporter may be such as to prevent the defendant forming the necessary mens rea of the offence, whereby the individual does not have to have foreseen any consequence, or harm, beyond that laid down in the definition of the actus reus of the offence. Therefore, including this possible defence, and the other elements of the offence of riot being of difficulty to establish, prosecutors consider charging individuals with other serious offences of public order, notably, violent disorder contrary to s. 2. The Law Commission stated,

> the element of common purpose in the proposed offence of riot amounts in substance to a further mental element of intent. We would therefore expect that, if there was sufficient evidence to indicate that a defendant accused of riot was too intoxicated to have the common purpose, he could not be found guilty of riot. Nevertheless, if his intoxication was self-induced, he could be convicted as an alternative of violent disorder.[81]

Riot: The Violent Act

An additional factor regarding s. 1 and s. 2 that is of equal importance, particularly in a footballing disorder context, is that only one person need to actually use this unlawful violence towards a person or property. Others who may have been collectively involved in serious disorder need only threaten unlawful violence, meaning, a single person in a disorderly situation can still be charged with riot or violent disorder. This could be the underpinning factor to the case of Muranyi; however, other individuals who may have been involved in encouraging, planning,

[80] See R, Giulianotti, 'Scotland's Tartan Army in Italy: The Case for the Carnivalesque' (1991) 39 The Sociological Review 503–527; R, Giulianotti, 'Football and the Politics of Carnival: An Ethnographic Study of Scottish Fans in Sweden', (1995) 30 International Review for the Sociology of Sport 2; A. King, 'Football Fandom and Post-national Identity in the New Europe' (2000) 51 The British Journal of Sociology 419–442; P. Gow and J. Rookwood, 'Doing It for the Team – Examining the Causes of Contemporary English Football Hooliganism' (2008) 2 Journal of Qualitative Research in Sports Studies 71–82.

[81] Law Commission, Criminal Law: Offences Relating to Public Order, Cmnd 9510 (1983) at para. 6.28.

directing or coordinating others carrying out the violence can still commit an s.1 or s. 2 offence by aiding, abetting, counselling or procuring and are charged as joint principals.[82] Although this was not upheld in the Muranyi case, if the courts and the wording of the statute provide obstacles to prove the intention of 12 or more persons together to uphold a conviction of the s. 1 offence of riot, it is questionable as to how the aiders and abetters are not convicted of the three lesser, summary offences in the Public Order Act 1986, such as 'causing fear or provocation of violence' contrary to s. 4; 'intentionally causing harassment, alarm or distress' under s 4A; or 'causing harassment, alarm or distress' held in s. 5.

In addition to the actus reus of the offences of riot and violent disorder, it is also required that there is proof of the mens rea of the accused at the time the offence is committed. Section 6(1) of the Public Order Act 1986 states that 'a person is guilty of riot only if he intends to use violence or is aware that his conduct may be violent' and 'a person is guilty of violent disorder or affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence' contrary to s. 6(2). Where football spectators supporting the same football team, gathering together at the same time under a common purpose to be involved in violence with a rival group of supporters, this should satisfy s. 6(1).

Section 6(1) was criticised in Najeeb, particularly regarding 'the use of the test of a "persons reasonable firmness", which mirrors the use of "objective" tests of "reasonableness" throughout the
Public Order Act'. It was noted that

> a judge is bound to know what the defendant did intend or foresee in terms of what they think they must have intended or foreseen, and this in turn is likely to influence what they think as the 'reasonable person' would have intended or foreseen in those circumstances.[83]

Giving that the offences of riot and violent disorder need not have a person of reasonable firmness to be present at the scene, the question of conviction then becomes a one of proportionality. It is therefore a question for the courts to not cause

[82] Ibid.

[83] See above n. 65 at 176.

a tension of the construction and interpretation of mens rea, but establish the level of 'individual responsibility'[84] to ensure the punishment does not supersede the offence that has been committed. It appears that the courts do not want to cause this tension, therefore rely on convicting under an s. 2 offence of violent disorder.

In view of the other offences against the person or against property that are available to use within the English legal system, it is argued whether there would be a significant gap in the law if these two offences did not exist.[85] With existing offences which could be used to criminalise individuals for the destruction of property, that is, Criminal Damage Act 1971,[86] Lord Diplock illustrated there is a need for 'higher legal authority for the power to arrest as well as a large range of powers to deal with these breaches of the law'.[87] The Law Commission[88] in 1983 had the view that there is certain 'seriousness to mob violence or threats which if exposed to members of the public can increase a sense of unease for their safety'. This being a factor that underpinned the creation of factor underpinning the creation of the 1986 Act due to the number of outbreaks of violence in the early 1980s and the behaviour of English football spectators overseas. The 'reasonable firmness' element linked to a third party, that is, members of the public, is absent from the offences of riot and violent disorder. As illustrated by Lord Scarman, it is 'preferable',[89] not essential, for these offences of public order to be in place. For that reason, s. 1 of the Public Order 1986 may have been included to create a sense of ease around public safety at that time, rather than being a practical mechanism.

Conclusion

It has been illustrated that s. 1 is a vague instrument that had been drafted swiftly in the attempt to manage serious public disorder. Consequently, the courts hesitatingly use this offence to raise a conviction at times of football violence and disorder. The view of the characteristics in s. 1 poses challenges in upholding sufficient evidence

[84] Ibid. at 179.

[85] R. Card, Public Order Law (Jordans: Bristol, 2000) 56.

[86] Section 1, damage to property without lawful excuse.

[87] Albert v Lavin [1982] AC 546.

[88] See above n. 83.

[89] See above n. 12 at 507.

from those whose duties are preventing, prosecuting and judging the offence in question.

It has been demonstrated that the scope of s. 1 to uphold convictions requires enhanced clarity regarding the wording and structure of the offence. It is sensible to retain the hierarchical nature of ss 1–3, nevertheless in order to secure a conviction of riot, when incidents of such nature do occur involving football violence, there is a need to provide clarity of the fundamental factors underpinning the offence.

The need for 12 or more persons causes considerable difficulty in being able to prosecute. The previous offence of riot provided the presence of three or more people was necessary. Although the offence by virtue of the 1986 Act was introduced to combat 'wide-spread and large-scale disorder',[90] the charge must be considered within the public interest. Football banning order and arrest statistics are released each season with the purpose of notifying the public of the attempts to curtail football violence and disorder. The purpose of these orders is to identify individuals whom pose a potential risk to public safety in connection with a regulated football match. It is apparent that the public, alongside the relevant authorities, take considerable interest in acts of football violence and disorder and how this can be prevented and prosecuted.

A football banning order can be served on conviction of a relevant offence.[91] An s. 1 offence of riot is considered relevant by virtue of Schedule 1 of the Football Spectators Act 1989. An individual convicted of this offence can receive a maximum penalty of 10 years' imprisonment. If an individual were to receive this penalty, the longer the duration the football banning order can be.[92] It is advisable that the offence of riot should involve six or more persons to be present, particularly in the context of football violence. Groups of football fans usually involve two distinct fan groups; therefore, collectively, under the new proposition, there could still be more than 12 persons present. This would increase the likelihood of securing a conviction and satisfying the public interest surrounding the curtailment of football violence and disorder.

[90] See above n. 19 at 325.

[91] Football Spectators Act 1989, s. 14(1).

[92] Football Spectators Act 1989, s. 14(F)(3) 'where the order is made under section 14A above in addition to a sentence of imprisonment taking immediate effect, the maximum is ten years and the minimum is six years'.

In consideration of the public interest element of the conviction, it would be advantageous to also necessitate a reasonable person to be present at the scene in the wording of the offence. By introducing a reasonable firmness test to establish fear from a hypothetical persons' perspective, it is a strange omission that this is absent from the offence, particularly in terms of football violence and disorder. If a conviction of an s. 1 offence must be within the public interest, it surely must be necessary to establish whether or not the offence itself would create fear in the reasonable bystander.

Finally, the common purpose element of the offence also needs particular consideration. It is possible to refer to the Field v Receiver case to determine how 'common purpose' should be interpreted, particularly as the common law principle of 'breach of the peace' is still used by the police and the prosecutors, 'There should be a reasonable ground to apprehend a breach of the peace, and as riot is an unlawful assembly which has actually begun to execute its purpose by a breach of the peace'.[93] The initial gathering of the individuals and the commencement or instigation of a breach of the peace could help establish the formation of the riot and whether there was a common purpose amongst the 12 individuals. Within the context of football violence and disorder, it could aid in the establishment of whether the groups of football spectators were gathered with a common purpose to be involved in violence and disorder.

It is therefore proposed that the s. 1 offence of riot housed in the Public Order 1986 to decrease the number of persons present from 12 to 6 and to establish the common purpose of these individuals by utilising the assessment provided in the case of Field. To uphold a charge of riot, there also needs to be the inclusion of the reasonable firmness test that is included in other public order offences. With this change, it would be interesting to see whether there would be the inclusion of this offence within the annual release of football banning order and arrest statistics.

[93] See above n. 37 at 861.