

Chapter 9: England's Act, Scotland's Shame and the Limits of Law

Niall Hamilton-Smith and David McArdle

Introduction

For over a century, sectarianism and Scottish football have, in the minds of many commentators, been locked in a poisonous embrace (Flint & Powell 2011). Fixtures between the 'Old Firm' of Rangers and Celtic have long been associated with incidents of sectarian abuse and violence (Bradley 1995), to be discussed and recycled at length by Scotland's football-obsessed media (see Reid in this volume). However, until relatively recently the widespread perception that sectarianism was a 'problem' within Scottish football was not matched by any notable attempts on the part of government to deal with the issue directly, and only in the past twenty years has there been meaningful academic and policy debate about the issue (Kelly 2011). After the creation of the Scottish Parliament this debate culminated in legislation which sought to address the problem directly and, tentative though these measures were, they stood in marked contrast to a pre-Devolution policy best described as one of wilful denial rather than mere ignorance. As late as 1977 the McElhone Report on football crowd disorder, commissioned by the Secretary of State for Scotland, made no mention of sectarianism at all (Scottish Education Department 1977) even though sectarian disorder would have been manifestly apparent to anyone attending Old Firm games in the seventies.

Such a startling oversight requires explanation. Some commentators have argued that football policy at this time was largely dictated by the priorities of the English game (Bebber 2012) and that the media-exaggerated figure of the English hooligan (Poulton 2005) drove

security policies both north and south of the border which ignored the important particularities of context (Coalter 1985); an alternative explanation is that the issue was historically perceived as nothing more than a formulaic fan rivalry that bore no relationship to any 'real' discrimination or prejudice extant in wider Scottish society (Bruce et. al. 2004). Both explanations have merit and have helped inform this research into the authors' underlying argument: that taking legislation which proved an effective, but by no means unproblematic (Pearson 2012), response to a peculiarly English 'problem' and parachuting it into Scots law was always destined to create at least as many problems as it solved. The perception of sectarian behaviour as the province of the 'ninety minute bigots' who (to quote a former head of security at Rangers FC) 'shout something loud, but don't really mean it'¹ is still a view that is promulgated, albeit in a more refined form, by those who argue that legal responses to sectarian chants and epithets equates essentially to the criminalisation of harmless working class banter (Waiton, 2012 and in this volume). Others have argued that the banter is not merely 'harmless' but positively beneficial, acting as a putative safety valve or a 'release' for the sectarian tension and rivalries that exist outside football (Davies 2006 and this volume). A third group perceive in the political and media discourse a deliberate attempt to simplify sectarianism, characterising it as offensive behaviour that is confined to loutish football fans and otherwise alien to the values of Scottish people (Kelly 2011). Kelly argues, however, that this construction conveniently ignores the real basis of sectarian friction in the widespread and systemic discrimination experienced by Scots of Irish-Catholic descent - discrimination which, in the opinion of one of the Sheriffs interviewed in November 2010 as part of the authors' recent research (Hamilton-Smith et al. 2011) , cannot be simply dismissed as football men behaving badly:

[The response to] sectarianism in football is against a backcloth of the discrimination against Catholics in Glasgow, even in the legal profession. Lots of Catholics went into public sector work because they couldn't get jobs in the law firms, or worked in obviously Catholic firms. If you're my age and you grew up in Glasgow you'd still have a chip on your shoulder about all of that.

'The English Disease' meets 'Scotland's Shame'

Regardless of one's perceptions of the history, the reasons for the sudden change of focus at the turn of the new century can be more readily explained by a number of parallel but ultimately converging developments. These have been persuasively unpicked elsewhere (Kelly 2003), but broadly the mix of Scottish devolution and the flexing of 'executive' political power in Scotland have increased attention on the sectarian behaviours that are associated with the Old Firm; the attendant media publicity and the emergence of more vocal anti-sectarianism campaigners helped transform how sectarianism in football was publicly debated and officially addressed; and a very public academic debate (culminating in a controversial and high profile collection of essays provocatively entitled 'Scotland's Shame' (Devine 2000) contributed to the mix. The political class in Edinburgh responded to this growing debate, with the then First Minister, Jack McConnell, convening a National Summit on Sectarianism in early 2005 (Flint 2008) and, from this, the Scottish Executive developed an 'Action Plan on Tackling Sectarianism in Scotland' (Scottish Executive 2006) which included an explicit commitment to tackle sectarian disorder in football. However, whilst the Action Plan was full of promising 'actions', its Achilles' Heel, to which we will return, was that it largely ignored all the preceding tensions, disagreements and debates surrounding the nature, seriousness - and

indeed the very existence - of sectarianism and sectarian disorder, preferring to treat these phenomena as self-evident in both meaning and gravity without ever establishing that sectarian 'disorder' genuinely amounted to something more than low-level drunken posturing that came to an end when the final whistle blew.

The most prominent commitment in the Action Plan for dealing with the perceived problems in Scottish Football involved transferring an English legislative initiative into Scotland with the avowed expectation that it would address sectarianism, and to that end the Police, Public Order and Criminal Justice (Scotland) Act of 2006 ss. 51-66 introduced Football Banning Orders (FBOs) into Scotland some six years after they had been promulgated in England and Wales. FBOs are court-imposed orders that ban individuals for a specified period of time from attending designated football matches and, in principle, other specified match-related locations such as railway stations or bars near to football stadia (Stott and Pearson 2006; 2008). Failure to abide by the conditions of these bans can be punished by imprisonment, but FBOs themselves are not conceived as a punitive aspect of sentencing in their own right – they are ostensibly a preventative measure that can be imposed in addition to any conventional criminal justice sanction. As they are putatively a preventative measure they can also be imposed on individuals who have not been convicted of any criminal offence at all, in circumstances where there is sufficient evidence – based on a civil standard of proof (i.e. on the balance of probabilities) - to demonstrate that there is a risk that an individual *might* be involved in some form of football-related violence or disorder in the future. In this respect, FBOs belong to that area of law that mixes civil and criminal powers and is often classed as 'hybrid' legislation, the most notable example being Anti-Social Behaviour Orders (Squires 2008). But in Scotland, applications for FBOs have almost always been made in the immediate wake of a criminal conviction; the number of civil applications made in respect of those who have not been

convicted of a football-related offence is in single figures and, in Scotland at least, that aspect of the legislation can almost be regarded as ‘dead law’ (Redhead 1995). In the criminal context FBOs are ordinarily requested by the police and that request is pursued by the prosecution in court; in both Scotland and in England and Wales, it falls to senior police officers in charge of match day operations to determine whether individuals who are to be prosecuted for match day offences should also be the target of an FBO. Outside of immediate match day policing operations Football Intelligence Officers (FIOs) have a key role in identifying individuals who should be targeted for FBOs, including proactively targeting individuals involved in football-related violence that occurs away from the confines of football stadia. Typically, FIOs direct intelligence-gathering efforts to build cases in support of applications and have a role in screening arrests generally to spot football-related prosecutions that other officers might have missed, or particular incidents that might have fallen outside of the ‘ambit’ of match-day policing operations (e.g. violence that might occur sometime after the game, in a bar, or on public transport) but which might still merit an FBO. Whilst the wording of the FBO legislation in Scotland is virtually identical to that of the Football Spectators Act 1989, s 14B (which applies only to England and Wales), the subsequent use and uptake of FBOs in Scotland has been markedly different and by mid-2010 – nearly four years after the enactment of the legislation– the low number of banning orders being issued had become a cause for political concern, and something of an embarrassment. An FBO evaluation was commissioned by the Scottish Government in the summer of 2010 to examine the reasons for this ostensible lack of progress in the use of FBOs (Hamilton-Smith et. al. 2011), the working hypothesis at the outset being that applications for orders were being made but – for reasons unknown – were not being granted by the courts². The evaluation therefore adopted a research design that primarily focussed on tracking cases from the point of arrest

to the point of court judgments to assess where attrition in the ‘pipeline’ of FBO applications was occurring.

Football Banning Orders in Scotland

Comparing FBO rates between the two jurisdictions was destined to be problematic because the contexts were so very different, but differences in how the legislation was framed and implemented provided at least a partial explanation for the greater numbers of FBOs in England and Wales. Superficially at least, a key departure in the drafting of the Scottish version of the legislation was the omission of the requirement, present in England and Wales, for the judiciary to explain why they chose *not* to impose an FBO on the back of a football-related conviction, when prosecutors had requested such an order. This appears to have communicated a clear expectation to the magistrates in England and Wales that granting an FBO in such cases was the desired and default position. No such expectation existed in Scotland or, if it did, it was never communicated to the Sheriffs (Hamilton-Smith et. al. 2011).

Another key point of departure concerns how the legislation was resourced and implemented. The English legislation was supported by resources allocated to the UK Football Policing Unit, within which was embedded the Football Banning Authority.³ The Unit’s remit included providing guidance and best practice advice on matters relating to the policing of football and the issuing of FBOs, as well as acting as a central hub for sharing and disseminating relevant police intelligence (Hamilton-Smith and Hopkins 2012). In Scotland a considerably more limited level of resource (one civilian post) was available to support

Scottish police forces. Of equal influence was the use of pump priming monies in England and Wales, again administered through the Football Banning Authority, *to directly fund* – and in effect significantly incentivise⁴ – individual police forces to pursue civil applications for FBOs. Such applications typically necessitated the collection and development of evidence to demonstrate that an individual merited the imposition of an order in the absence of a criminal conviction. Again, no such resources were available in Scotland and, as alluded to above, civil applications (the costs of which would need to be met by whichever Constabulary was making the application) were not routinely pursued.

Whilst the volume of FBOs may have differed, the way in which FBOs were targeted did not. In both jurisdictions FBOs have predominantly been targeted at two overlapping types of cases: serious incidents occurring within stadia, usually involving violence or pitch invasions; and individuals who are involved in organising or engaging in acts of group violence and disorder against other ‘risk supporters’, whether in football stadia or not (Hamilton-Smith et. al. 2011). Beyond that, the focus has consistently been on the more ‘serious’ offences, with ‘seriousness’ being defined by levels of violence and repeat offending. This seems proportionate, but it is problematic in the Scottish context because, let us remember, the focus of the legislation was originally sectarianism - and individuals convicted of sectarian offences have been far less likely to have a banning order imposed upon them. Indeed, sectarian offences accounted for over 40 per cent of 300-plus convictions that were analysed because FBOs were sought, but they accounted for only 19 per cent of the cases where an FBO was actually granted (Hamilton-Smith et. al. 2011: 14): legislation that had been specifically introduced to tackle sectarian disorder at football has not primarily been used for the purpose intended.

A more detailed examination of a small random sample of sixty-one cases provides some insight into these figures. Twenty-six cases involved offences that had some clear

sectarian element but only nine of them led to an FBO on conviction. All but two of the twenty-six sectarian cases involved fans of one or other of the Old Firm clubs but only nine took place within the context of an Old Firm match (which leads us to believe that Rangers' demotion in 2012/13 will not, of itself, impact upon the number of FBO applications). In all the cases where an FBO was granted the relevant offence took place in, or immediately outside a football ground (compared to just over half of cases where an FBO was not granted). Furthermore, twenty-one of the twenty-six convictions involved police being proximate to the accused at the time of the offence with only one conviction resulting from a club steward reporting, or directing police to, an offender. The majority of these sectarian cases, regardless of whether an FBO was issued or not, could not be characterised as being generally 'serious' in conventional terms (e.g. they did not involve violence or particularly reckless conduct⁵). This might account for the low number of FBOs issued on the back of sectarian convictions, and would give succour to the contention that the policing of football in Scotland is framed and problematised within the framework of English-style 'hooliganism'. Whilst media and political coverage of sectarian disorder in Scotland often gives the impression that the 'disorder' is similar to the equivalent 'disorder' targeted by the FBO legislation in England, most sectarian 'disorder' does not in fact involve violence at all but rather consists of offensive 'utterances' and gestures. However, this cannot entirely explain the patterns observed here because some sectarian offences which lacked any particularly aggravating features *did* attract banning orders, whilst two of the more serious sectarian cases in this sample (one involving the assault of a police officer, the other involving multiple sexual assaults) did not attract FBOs.

Lost in translation?

It appeared that decisions made in courts, including Sheriffs' opinions on the appropriateness of using FBOs in respect of sectarian offences, provided some explanation for the limited and rather confused use of banning orders. But there was also a perception that, somewhere along the criminal justice 'pipeline', sectarian incidents were 'filtered out' and did not lead to an arrest or a criminal charge, so that the potential imposition of an FBO was never even considered by the court. Three possible explanations may be identified (see Hamilton-Smith et al. 2011 for further details):

Identifying and recognising the offence: Match day operations focus on travel routes and the area immediately around a football stadium within a limited time encompassing pre- and post-match fan movements. Outside that timeframe there was much less likelihood that incidents of disorder would be directly linked to football – and even if they were, it was less likely that the arresting officer would consider that an FBO application might be appropriate. In any event, attempting to impose FBOs against 'one of the herd' does not usually pass muster in the Scottish courts for the reasons explained below, and even if a ringleader can be identified much sectarian abuse is framed by a full awareness on the part of fans as to what does or does not constitute a phrase, banner, or gesture that will be regarded as sectarian (Howe 2010). Consequently, insults are carefully crafted either by dropping the insult in quickly at the end of an otherwise 'innocuous' song or piece of banter, or trying to 'tip-toe round' the law by conveying coded or oblique insults which do not contravene the law but are clearly understood by well-informed rivals.

Deciding whether to act (or not): Even if a clear sectarian offence was spotted, the interest in securing a conviction needs to be weighed against the risks entailed by making an arrest. As one Prosecution lawyer interviewed in November 2010 noted:

They talk about zero tolerance in relation to sectarian issues, but I don't know that's enforceable. When you go Parkhead or Ibrox and you hear on the terraces the bile and just the pure utter sectarianism, there is very little you can do to enforce the legislation; you've got five thousand folk singing some of these songs [...] It would cause a riot if you arrested some of these individuals.

This perception was substantiated by a number of the Sheriffs, police officers and club security managers who were interviewed. CCTV evidence could assist here, allowing officers to identify ring leaders after the conclusion of a match, though this depended not only on the appropriate use of the cameras, but also on an individual being easily identifiable. This could be straightforward if a club season ticket holder was sitting in their designated seat, but as season ticket membership was steeply in decline during the 2010-11 football season, this was becoming less certain. The decline in season ticket sales was also considered by some respondents to 'dampen' the enthusiasm of clubs to ban fans themselves,⁶ but it would be crass to simply characterise clubs as ignoring sectarian behaviour in favour of maximising their commercial returns. Overt displays of sectarian behaviour by large numbers of fans has led to clubs suffering adverse commercial and reputational consequences, with sponsors, TV broadcasters, and international football governing bodies, all taking a dim view of such incidents⁷.

Clubs are also increasingly responsible for the majority of in-stadia security in the form of stewarding. However, here clubs operate with limited capabilities. Stewards are usually employed by clubs themselves – many being drawn from their own fan base – and whilst a small minority are professionally trained, the majority are employed on a casual basis. Consistent with Moorehouse's (2006) previous research, there was a perception that these

stewards had a limited stake in confronting sectarian disorder. One Football Intelligence Officer interviewed in October 2010 illustrated these tensions:

You are getting guys who might be being paid thirty pounds a game, and they are [.....] supporters, and are they going to stick their neck out if someone's singing a sectarian song? And if the same steward patrols the same part of the ground week after week, which they do, and if they are seen to arrest someone what the reaction to them will be, I don't know. There is a level of tolerance about it.

This reliance on stewards has recently been increasing, as pressure on police resources has caused a reconfiguration in how matches are policed: officers have been moved away from policing in the stadia and either being held back outside the stadia or located in stadia concourses ready to be called upon by stewards if trouble occurs.

Effectively presenting the offence: If an offence was spotted, and if action were taken, weaknesses in process impacted negatively on FBO requests. Sectarian offences require careful documentation and effective communication because they are not usually characterised by a clear physical act of violence or the threat of it. A 'typical' sectarian offence may be a sudden gesture, a turn of words, a form of display or some other provocation, the offensiveness of which may be highly contextual and subjective; but it rarely amounts to a real or even a perceived threat of violence. Indeed, what might be characterised as 'criminal sectarianism' by one observer might be regarded by others as either just another example of the industrial banter inevitably attending the match day pageant, or (in the opinion of the defendant in *Walls v Brown*) an entirely proper means of expressing a perfectly

legitimate political opinion. If one accepts (in the words of one of the Sheriffs interviewed in November 2010) that “as an Old Firm fan your behaviour has to be pretty bloody dreadful before the police will feel the need to do something about it”, it becomes critical that the *actus reus* of the offence, and the impact of it, is properly evidenced in police reports and court papers so that Sheriffs know why this particular individual’s behaviour was so beyond the Pale and why an FBO might therefore be appropriate. But the limited resources available to facilitate and scrutinise FBO applications meant that many of these applications were in fact poorly evidenced, so that the full meaning and significance of sectarian offences was often not apparent to the prosecution, let alone to the court. When these weaknesses are allied to the enduring disagreements and ambiguities regarding what exactly constitutes a sectarian crime, conveying the ‘full meaning and significance’ of an offence is always contingent upon the steward or frontline officer’s immediate perception of its severity and, thereafter, upon how that narrative is conveyed to other decision-makers – up to and including the Sheriff - who will have their own opinions and will need to be clearly persuaded as to why this incident was so egregious as to merit prosecution and an FBO application.

Judicial perceptions of the FBO regime

Whilst these difficulties may have accounted for some requests either being overlooked in court or never getting to that stage in the first years of the FBO regime, significant steps were taken during the 2010-11 football season to improve police and prosecutors’ awareness of the procedures and the quality of reporting, and by no means could all of those early failures in court be simply attributed to poor paperwork or shoddy prosecution. Research interviews with the judiciary suggested that the very wording of the legislation proved most problematic in persuading them to impose FBOs, and no amount of

prosecutor training or awareness-raising had altered that state of affairs. There is no requirement under the Scottish legislation that reasons have to be given for not imposing an FBO and the Sheriffs (unlike most of their counterparts in the English magistracy) are professional criminal lawyers rather than lay people. Most gained over thirty years' experience in criminal prosecution or defence work before their elevation to the bench, and that experience has clearly informed their approach to the FBO regime. That said, not all situations where a Sheriff has refused to grant an FBO can be attributed to their difficulties with the wording of the legislation, and the case which most gives the impression that individual Sheriffs were not playing ball with the regime has become notorious in Scottish criminal justice circles and serves as a reminder that there will always be examples of judicial decision-making that defy explanation.

Defending the indefensible

This case arose from an incident in which one fan set fire to another who was wearing an inflammable fancy dress costume, to his severe injury. The men had been returning to Aberdeen by train after watching their team play in Edinburgh and the defendant, one Peter Wallace, had been 'mucking about' by flicking a cigarette lighter in the vicinity of the victim. His costume caught light and caused him serious burns which required extensive medical treatment.⁸ The case was heard in August 2010 and the Sheriff did not impose a custodial sentence (Wallace was admonished and ordered to pay compensation of £25,000) and also did not impose an FBO, despite Wallace having a previous football-related conviction and thus meeting the criteria for the imposition of an FBO under s. 51(3) of the 2006 Act. It is an extreme case, both in terms of the incident's severity and the perceived illogicality of the Sheriff's ruling, but it served to reinforce the generally-held

misconception at that time that Sheriffs in general were resisting FBOs even where the circumstances cried out for one.

But can *Wallace* really be explained in such simplistic terms? To recap, the relevant legislation is a *mutatis mutandis* application of the analogous Act of England and Wales and provides that before a court can impose a FBO, it must be satisfied that there are reasonable grounds to believe that doing so would help to prevent violence or disorder at or in conjunction with any football matches (2006 Act, S.51(3)).⁹ When proper weight is given to the language of s 51(3) then maybe that helps to explain both the decision in *Wallace* and the Sheriffs' apparent reticence to grant FBOs; but a still-finer grasp of the significance of the Act's language is available through consideration of the High Court's judgment in *Walls v Brown* [2009] HCJAC 59, which was the first occasion where a conviction leading to the imposition of a FBO (although not the imposition of the banning order itself) has been appealed in Scotland.

Here, in the course of a match between Kilmarnock and Rangers, the appellant- Walls (a Rangers fan) had repeatedly sung one particular line from the infamous 'Famine Song' and had shouted sectarian abuse. For many, the mere singing of the Famine Song of itself merits both a conviction and an FBO, but so far as the sentence in this case is concerned it is likely that his making 'gestures' in the direction of the home supporters, his inciting of other fans, ignoring repeated requests from stewards that he sit down and refusing to leave the ground when they asked him to do so were far more important than his sectarian singing. The totality of his actions led to a breach of the peace conviction, aggravated by religious prejudice under s. 74(2) of the Criminal Justice (Scotland) Act 2003¹⁰ and by racial prejudice under the s. 96(2) of the Crime and Disorder Act 1998.¹¹ He was placed on probation for eighteen months and given a two-year FBO.

Walls appealed by way of stated case, but the High Court of Justiciary upheld the conviction and confirmed that the Sheriff had been correct in her assertion that a breach of the peace may occur where the conduct complained of is ‘severe enough to cause alarm to ordinary people and threaten serious disturbance to the community’. The conduct of the appellant did amount to a breach of the peace because:

Even in the context of a football match...presence inside a football stadium does not give a spectator a free hand to behave as he pleases. There are limits and the appellant’s conduct went well beyond those limits... It is a legitimate inference that persons in the crowd are likely to be alarmed and disturbed by such behaviour and that it does have the potential to cause or threaten serious disturbance (*Walls v Brown*, paras 18-20).

Walls is notable in part for the significant role played by the wider actors – especially the stewards - in successfully securing both the conviction and the FBO and echoes the need for coherent thinking. The testimony of a police Superintendent to the effect that he, like most fans, knew the words of the rest of the Famine Song (which had not been sung by Walls), that he found those words offensive and that ‘sectarian and bigoted chants could have an impact on parts of a football crowd...were they to take offence’ (para 2) were combined with evidence from a Kilmarnock FC steward and a Rangers FC steward to the effect that they were ‘bothered’ by the potential for an adverse reaction from the crowd around him. There had in fact been no such adverse reaction - to the contrary, Walls had successfully exhorted some of them to join his refrain and the Kilmarnock fans were ensconced at the other end of the ground; but the stewards’ evidence as to the totality of his behaviour took him

comfortably beyond the bounds of what was acceptable, even in “the context of a football match”. It was clearly sufficient in law for the Sheriff to convict and for the High Court to uphold her decision.

In addition to the contribution of the police and the stewards the Crown’s being able to adduce evidence that Walls successfully encouraged others to follow suit would have been an important aspect of the FBO application because the s. 51(3) requirement that a banning order would ‘help to prevent violence or disorder at or in connection with any football matches’ will always be met if it can be established that the defendant was a ringleader and on this occasion Walls clearly had been a ringleader of sorts. However, he also had long list of convictions for violent offences, which included at least one football-related offence, and he had served a period of imprisonment for possessing a knife. That prior history alone could have sufficed for s 51(3) purposes even if he had not actually incited anyone successfully. In that regard the Sheriffs’ approach in *Walls* reflected what other Sheriffs repeatedly indicated during the interviews: the phrasing of s 51(3) means that strong arguments for imposing a banning order will always arise where a defendant has prior relevant convictions and any behaviour which carries even a threat of violence is also likely to attract an FBO; and in the absence of those features the prosecution may still be able to adduce cogent evidence of a clear link between the defendant’s activities on the day and the s. 51(3) requirements that removing him from grounds is likely to contribute to a reduction in offences relating to football matches.

Walls’ conviction for breach of the peace reflected his sectarian bile, his conduct towards the stewards and his repeated gesturing and posturing towards the other fans, while the consequences of what he specifically said were his ‘aggravated’ convictions under the 1998 and 2003 Acts. Thereafter, the two-year FBO was appropriate given his extensive

criminal history and his attempts to incite his fellows; but his singing of the Famine Song was probably the least significant aspect of the case and, contrary to the media's reporting of it¹² probably had no bearing on the Sheriff's decision to impose a FBO.

Both at first instance and on appeal *Walls* is a case which pays due heed to the limitations of s. 51(3) and the difficulties it presents for those who would routinely seek banning orders for sectarian offences, but as an example of clear judicial thinking it stands in marked contrast to the decision in *Wallace* and some of the key banning order judgments from England (*Gough v Chief Constable of Derbyshire* [2002] QB 1213; Pearson, 2002). That certainly does not mean the Scottish judiciary regards sectarianism as an insignificant issue, but it is difficult to convince them that granting a FBO against a particular individual who uses sectarian language will be appropriate when they are surrounded by up to 50,000 other people who know what they are going to hear when they choose to attend the carnival (Vice 1997) that is Scottish football. That does not mean that no offence has been committed in those circumstances, but it does mean that a FBO cannot be easily reconciled with the phrasing of the legislation in the absence of other factors.

In reading *Walls* one also gets the impression that this was a case in which the police, the stewards, the club and the prosecution had worked closely together in order to present a coherent argument for an FBO in respect of a repeat offender who merited little sympathy. This need for appropriate liaison should be considered in the light of the Association of Chief Police Officers in Scotland's assertion that approximately seventy Sheriffs (out of about 150 across Scotland) had attended one of two FBO training events for Sheriffs which had been held since the 2006 Act came into force. If those figures are correct, and if the Sheriffs' recollection of those training events (as recounted to the authors) is accurate, it means that almost half of Scotland's Sheriffs had been explicitly advised to expect a clear steer from the

Crown if it considered a FBO to be appropriate. If that perception has thereafter been communicated to other Sheriffs it should be held even more widely. One can therefore understand why Sheriffs are not more easily disposed to grant an FBO in circumstances where the anticipated degree of robustness has not been forthcoming. Certainly there have been occasions where they have been granted *ex proprio motu*, but one Sheriff interviewed in December 2010 indicated that ‘if you’re suddenly confronted by one of these (FBO) applications in a busy court, well, a bit of guidance wouldn’t go amiss.’ The absence of joined-up thinking on the part of the police and the Crown is more likely to strike the court as an indication that an FBO is not considered necessary by them, rather than act as an incentive to act unilaterally.

The court’s unwillingness to impose a FBO in *Wallace* remains difficult to reconcile with the requirements of s. 51(3) and the *Walls* guidance, but the following argument can be advanced: in *Wallace*, the Crown had accepted there had been no intent to injure (although the defendant’s behaviour was clearly culpable and reckless) and a £25,000 compensation order clearly reflects the severity of the incident because a custodial sentence would have been the only realistic alternative. But the guilty plea had been tendered, and accepted, on the basis that there had been no intent to injure. In those circumstances, perhaps the Sheriff was of the opinion that a FBO imposed in response to a fleeting act of stupidity, no matter how breathtaking the act or how serious its consequences, could not help reduce football-related violence or disorder as s. 51(3) demands. But that said, Peter Wallace had a previous conviction for a football-related offence, and in the light of *Walls* his previous conviction alone should have established the link between the offence and the s. 51(3) requirement. Perhaps the fact that the incident took place some time after the match, on public transport and a considerable distance from the ground, weighed more heavily on the Sheriff’s mind

than it should; but even allowing for the benefit of post-*Walls* hindsight and the most generous interpretation of the law and the facts, it is not an easy decision to explain.

Conclusions

Whilst legal practitioners and football officials may hold conflicting views as to the substance of sectarian conflict and discrimination in broader Scottish Society, they have all acknowledged the need to prevent sectarian disorder within the specific confines of Scottish football. Given that degree of common ground, the failure to successfully progress sectarian-related FBO applications clearly had more to do with weaknesses in how the legislation was phrased, or how it was implemented and resourced, than with outright hostility or misunderstanding. The lack of attempts to adapt the legislation to the particularities of the Scottish context meant that that it was predominantly concerned with the folk-devil of the violent ‘English-style’ football hooligan rather than the ninety-minute bigot. When applications did reach the courtroom, there was no evidence to suggest that any unwillingness on the part of the Sheriffs to grant FBOs can be definitively ascribed either to inadequate judicial training or judicial resistance. Rather, there was a widely-held perception that the language of the law had to be approached with caution in the context of what was a Draconian sanction. A measure which smacked of an obligatory punishment would never pass muster with the Scottish judiciary (for whom the concept of mandatory sentencing is entirely alien); and the slippery English judicial logic of *Gough* and other cases – to the effect that hybrid sanctions are not punishments at all but merely preventative measures that can be imposed without a great deal of reflection– would always excite suspicion among those wary of anything which smacked of “an English Act with a kilt on” (to quote one of the Sheriffs interviewed in February 2011). Faced with the judicial obligation to do justice on the merits

in every individual case, those who would advocate the widespread imposition of FBOs in Scotland are likely to remain disappointed and, at a time when there is support for a Europe-wide approach to the exclusion of “known or potential trouble-makers” (Council of Europe, 1985: Article 3(4)(d)), the risks of adopting a one-size-fits-all approach to superficially-similar offences that occur in jurisdictions with their own sporting cultures and judicial thinking should not be disregarded.

The March 2011 match between Celtic and Rangers¹³ precipitated yet more media comment and political debate and the knee-jerk passing of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012¹⁴, which added nothing new to the existing law on offences committed at football grounds but led to more resources being invested in policing and the preparation of FBO applications. In the immediate aftermath of that game, there were several occasions when banning orders were imposed, and imposed for longer, in circumstances where, prior to March 2011, they might not have been imposed at all or would have been of much shorter duration¹⁵ and, as a harbinger of that development, one of the Sheriffs interviewed in January 2011 had commented that:

We’re not like academics – we don’t live in ivory towers. We read the papers and we know what goes on in the real world. If something were to happen which made us feel there was a greater urgency for banning orders, you would see more of them.

That match may turn out to be the ‘something happening’ that the proponents of banning orders must have longed for – a one-off event, perhaps akin to the England riots of August 2011, which prompted a sea-change in judicial thinking and, just as the England riots

precipitated sentences comfortably outside the definitive guideline ranges (Roberts 2012), led the Sheriffs to see beyond the legislation's drafting even to the extent of imposing FBOs in cases where their use was not merely unexpected but was manifestly inappropriate and needed to be rectified on appeal.¹⁶ Maybe judicial responses to 'that' match will ultimately be seen as far more significant than the new legislation, the increased resources for the banning order industry, the more robust requests for FBOs in those cases that did reach the courts or Rangers' well-documented demotion to the lowest level of the Scottish professional game; and while those recent cases are no more than *sotto voce* indications of the judiciary responding differently in the wake of this particularly discrediting incident, when there are more decisions to analyse there will certainly be merit in considering whether this was indeed just a passing judicial phase. If it was not, there will be a need to reconsider our understanding of how popular and political discourse - which in this case emanated from what was a largely media-driven debate - is capable of influencing the juridical field's collective interpretations of the language of law.

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¹ BBC Panorama Programme 'Scotland's Secret Shame', Broadcast 27th February 2005.

Transcript available at:

<http://news.bbc.co.uk/1/hi/shared/spl/hi/programmes/panorama/transcripts/scotlandssecretshame.txt> (last accessed 16 October 2012).

² This hypothesis was fairly public, with for instance *The Scotsman* reporting on 13 April 2009 that nine out of ten FBO applications made by the police were being turned down by the courts ('Nine in ten thugs dodge stadium ban').

³ In spite of its name the UK Football Policing Unit only supports police forces in England and Wales.

⁴ James and Pearson (2006) would argue that these arrangements artificially inflate the number of FBOs issued in England and Wales and led to the widespread application of FBOs on the basis of flimsy and circumstantial evidence.

⁵ Though one might legitimately argue that sectarian provocation within the context of a heated Old Firm encounter should be categorised as ‘reckless conduct’

⁶ In addition to legally-enforceable FBOs, clubs could themselves issue their own club-bans preventing fans from attending games played at home, and these could range from a single match ban to a lifetime ban.

⁷ For example in December 2011, UEFA fined Celtic £12,700 for its fans’ pro-IRA chants at a EUROPA league match (<http://www.bbc.co.uk/sport/0/football/16137728>, last accessed 28 October 2012). One month later fans displayed a banner critical of the governing body (“Fuck UEFA”) at another EUROPA league match, resulting in a further fine. That first fine was roughly in line with those imposed by UEFA in respect of racist chanting, but (as a useful indicator of where UEFA’s priorities lie) it was less than half that imposed on a club whose players had returned to the pitch thirty seconds late after the half-time interval (<http://www.bbc.co.uk/sport/0/football/19975032>, last accessed 28 October 2012).

⁸ See <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-11084526> (last accessed 16 October 2012).

⁹ (2) Instead of or in addition to any sentence which it could impose, the court ... may, if satisfied as to the matters mentioned in subsection (3), make a football banning order against the person.

- ▶ (3) Those matters are—
- ▶ (a) that the offence was one to which subsection (4) applies; and

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- ▶ (b) that there are reasonable grounds to believe that making the football banning order would help to prevent violence or disorder at or in connection with any football matches.
 - ▶ (4) This subsection applies to an offence if—
 - ▶ (a) the offence involved the person who committed it engaging in violence or disorder; and
 - ▶ (b) the offence related to a football match.
 - ▶ ...
 - ▶ (6) For the purpose of subsection (4)(b), an offence relates to a football match if it is committed—
 - ▶ (a) at a football match or while the person committing it is entering or leaving (or trying to enter or leave) the ground;
 - ▶ (b) on a journey to or from a football match; or
 - ▶ (c) otherwise, where it appears to the court from all the circumstances that the offence is motivated (wholly or partly) by a football match.

¹⁰ “For the purposes of this section, an offence is aggravated by religious prejudice if—

- ▶ (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim’s membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or
- ▶ (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

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- ▶ (3)Where this section applies, the court must take the aggravation into account in determining the appropriate sentence...

¹¹“An offence is racially aggravated for the purposes of this section if—

- ▶ (a)at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim’s membership (or presumed membership) of a racial group; or
- (b)the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group”

¹² http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7786133.stm (last accessed 16 October 2012).

¹³ See <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-12664550> (last accessed 16 October 2012).

¹⁴ For full details of the bill see <http://www.scottish.parliament.uk/help/29678.aspx> (last accessed 16 October 2012).

¹⁵ See for example <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-13361478> and <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-15333744> (last accessed 16 October 2012).

¹⁶ See <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20094243> (last accessed 28 October 2012).