The Price of Passion: The Banishment of English Hooligans from Football Matches in Violation of Fundamental Freedoms

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BY GEOFF BECKHAM*

Introduction

International football is the world’s most popular team sport.¹ The first recorded football game took place in Derby, England, in A.D. 217, at a celebration of victory over Roman soldiers.² The game developed over centuries, its legacy eventually spreading to the United States where it is more commonly referred to as soccer. Every four years, the World Cup celebrates the glory of international football competition in a month-long tournament of champions.³ Participants endure two grueling years of qualification matches against regional nemeses. The victor is revered as the world’s greatest football-playing nation.

However, as often as the football community exults in worldwide camaraderie, its image is repeatedly scarred by the inexplicably violent behavior of its supporters.

I. The Hooligan Epidemic

An indescribable hysteria surrounds football, stigmatized by a particular form of violence termed “hooliganism.” Ultimately, hooligans are passionate fans. Violent encounters often arise when hordes of fans travel over large distances to support their local

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2. Id.
3. Id.
football club where they are met by equally fervent rivals. Whereas competing loyalties once clashed only in cheers and songs echoing throughout the stadium, police now combat street-wide brawls that cause harm to people and property.

The unfortunate catastrophe of football-related violence is scattered across all continents, but the greatest intensity of reproach undoubtedly falls upon English fans. England achieved its undesirable notoriety in 1985, when its fans were blamed for rioting at a European Cup Championship in Belgium that left thirty-eight spectators dead. While conducting further investigations, Federation Internationale de Football Association (FIFA) levied the harshest available penalty on English clubs. The governing body assessed a "death penalty" on English soccer, a worldwide ban from all competitions, lasting for an indefinite term. FIFA eventually relaxed the punishment, limiting the ban to all European competitions.

Today, the violence persists, and measures must be taken to combat hooliganism as the threat to public safety continues to grow. English authorities say police are bracing themselves for encounters with "a new breed of 'intelligent' football hooligan—sophisticated and with the ability to organise trouble away from the glare of publicity, using the Internet and mobile phones." These sophisticated criminals serve to complicate the development of effective policing strategies. Authorities speculate that professionals become involved because they find their work mundane and desperately desire a method of

5. The European Cup is a quadrennial competition amongst all football nations of Europe. The tournament is staggered against the more prestigious World Cup competition (i.e. one of the competitions occurs every two years). The European Cup is referred to as Euro [year], e.g. Euro 1996, Euro 2000.
7. International football competition is regulated by the Fédération Internationale de Football Association (FIFA), which was founded in 1904. FIFA sponsors the quadrennial World Cup competition; its membership is larger than that of the United Nations. Soccer, supra note 1.
10. Id.
12. Id.
expressing their aggression.\textsuperscript{13}

The hooligan reputation impacts the United Kingdom in a multitude of ways.\textsuperscript{14} "It is one of the ironies of modern English football that—both politically and financially—more rides on the behaviour of the fans than on the performance of the players."\textsuperscript{15} In response to the violent reputation of English supporters on the international football scene, governmental officials realized that existing legislation was insufficient to quash the ever-present violence.\textsuperscript{16} In 1989, Parliament enacted legislation aimed at eliminating the threat to public safety caused by hooligan activity.\textsuperscript{17}

Despite the legitimacy of public safety concerns, the arbitrary enforcement of the legislation is a concern.\textsuperscript{18} Furthermore, recently enacted measures proactively pursue hooligans to a degree that violates fundamental concepts of civil liberty.

\section{II. English Domestic Law}

\subsection{A. Football Spectators Act 1989}

The Football Spectators Act 1989 (Football Act) is the original body of public safety legislation governing disciplinary and criminal proceedings brought against hooligans.\textsuperscript{19} The purpose of the Football Act was to prevent violence and disorder at or in designated football matches.\textsuperscript{20} The statute sought to control "the admission of spectators at designated football matches in England and Wales by means of a national membership scheme."	extsuperscript{21} The national membership scheme licensed spectators, creating a database that allowed the police to regulate attendance at sporting events.\textsuperscript{22} Full implementation of the membership scheme stalled as a result of the staggering expense

\begin{flushright}
13. Id.
15. Id.
20. Id.
21. Id.
\end{flushright}
required to maintain the extensive network.\textsuperscript{23}

The notion of a national membership scheme survived, in part, through the discretionary power of the courts to photograph the recipients of exclusion orders.\textsuperscript{24} However, the reactive nature of the membership scheme proved futile in combating the increasingly violent activity of football supporters both inside and outside stadiums.\textsuperscript{25} Subsequently, two amendments, the Football (Offences and Disorder) Act 1999 and the Football (Disorder) Act 2000, revised and reinforced the Football Act.\textsuperscript{26}

1. Football (Offences and Disorder) Act 1999

The Football (Offences and Disorder) Act 1999 established “banning orders” for domestic and international matches.\textsuperscript{27} A banning order is a court-ordered mandate which “prohibits the person who is subject to the order from entering any premise for the purpose of attending such matches.”\textsuperscript{28} In order to prohibit attendance at football matches occurring outside England or Wales, that person must report to a local police station during the relevant “control period.”\textsuperscript{29} The control period commences five days before the beginning of the match, and ends when the match is finished or cancelled.\textsuperscript{30} During the control period, the suspect must surrender his passport, neutralizing his ability to travel to the foreign site of the English football match.\textsuperscript{31} Depending on the manner in which banning orders are imposed, the court’s restrictive mandate lasts no more than ten years, and no fewer than two.\textsuperscript{32} Subsequent legislation provided teeth to this already prohibitive initiative.

\textsuperscript{23} Id.


\textsuperscript{25} \textit{Sporting Violence}, 139 NEW L.J. 1621, 1621 (1989).

\textsuperscript{26} Author’s note to clear up any confusion: the new legislation passed in 1999 and 2000 can be referenced as, for instance, the Football (Disorder) Act 2000, or as the “amended” Football Spectators Act 1989 (effective August 28, 2000). Although textual references in this Note may be made to the subsequent amendments, whenever possible, citations will be directly to the Football Spectators Act 1989.

\textsuperscript{27} Football (Offences and Disorder) Act 1999, c. 21, §§ 1, 6 (Eng.).

\textsuperscript{28} Football Act, \textit{supra} note 17, § 14.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id. § 14F.
2. Football (Disorder) Act 2000

In anticipation of Euro 2000, Home Secretary Jack Straw rushed the Football (Disorder) Act 2000 (2000 Act) through Parliament. The 2000 Act implemented a number of significant changes to the existing legislation. Ultimately the amendment established a more proactive scheme for combating hooliganism. Bryan Drew, Head of Strategic and Specialist Intelligence at the National Criminal Intelligence Service, praised the 2000 Act as legislation that “has real teeth and, rigorously applied, will go a long way to further squeeze the criminal element out of support for our national game.”

Prior to August 28, 2000, the Football Act empowered authorities to impose domestic or international banning orders only upon individuals who had been convicted of football-related offences. Crimes involving international fixtures resulted in a ban from games abroad, while domestic altercations only affected attendance at matches in England and Wales. Following the enactment of the 2000 Act, however, each exclusion order now results in a domestic and international ban. Consequently, even if the conduct occurred during a domestic match, the statute mandates the surrender of an individual’s passport during all control periods.

The recent amendment also greatly expands the use of banning orders. Under the Football Act, a banning order was employed following conviction for a “relative” offence if it would “help to prevent violence or disorder at or in connection with any regulated football matches.” The current effect of a banning order remains the same: to prohibit attendance at domestic or international football matches. However, the 2000 Act greatly increases the array of
"relevant offences" for which exclusion applies, including conduct not immediately connected to football, such as transit to and from the game.  

The original Football Act focused on punishing those who contributed directly to football-related offences. The significant expansion of the Football Act’s scope through the 2000 Act was criticized as being unnecessarily broad. However, as long as the banning order is in response to the conviction of a crime of violence or disorder, such an augmentation of banning orders apparently remains consistent with the stated principles of public policy. Hooliganism is a national epidemic, and contribution to the violence may come from unexpected culprits. However, the 2000 Act may have taken the general distaste for football-related violence too far.

C. Banning Orders Made on a Complaint

The Football Act aggrandized police enforcement power, allowing the issuance of a notice to appear before a magistrate for a banning order absent an accompanying conviction on a football-related offence. This procedure, termed “banning orders made on a complaint,” violates reasonable expectations of civil liberty. The Football Act, as revised by the Football (Offences and Disorder) Act 1999 and the 2000 Act, enables courts to impose banning orders against individuals who have never been convicted of a football-related offence. Local authorities can apply for a banning order based on a complaint against a suspect if it appears to the officer that the respondent has "at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere." Furthermore, the Act permits police to detain that person for up to four hours (extendable up to six hours with the authorization of an Inspector) while making the requisite inquiries. The magistrate may not take into account any of the suspect’s conduct occurring more than ten

42. Id. § 14.
44. Football Legislation Receives Royal Assent, supra note 40; see also Jenny Mackenzie, Mike Backs Law to Tackle the Football Hooligans, COVENTRY EVENING TELEGRAPH (LONDON), Aug. 30, 2000, at 7.
45. Graham, supra note 18, at 3.
46. Rees, supra note 43.
47. Football Act, supra note 17, § 14B(1), (2).
years before the application for the banning order.49

Herein lies a distinction integral to the legitimacy of the 2000 Act. While exclusion orders derived from conviction of a football-related offence are substantiated by the accompanying criminal act, banishment based solely on a complaint infringes upon certain fundamental human rights and freedoms as established by the European Union, and go far beyond what is necessary to prevent disorder.50

III. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) sets forth a number of fundamental rights and freedoms, enforced by the European Court of Human Rights (ECHR).51 The majority of alleged violations are heard before the court sitting in chamber of seven judges.52 The ECHR decides on the admissibility and merit of applications and, if necessary, undertakes an investigation of potentially legitimate allegations.53 More serious accusations may be referred directly to the Grand Chamber, which is the highest authority of the ECHR.54 Whether the ECHR is sitting in original jurisdiction or as an appellate body, judgments arising therefrom are final.55 The Football Act arguably is in violation of Article 7 of the Convention.

A. Article 7 of the Convention

The United Kingdom ratified the Convention on August 3, 1951.56 Two years later, the requisite number of European nations

49. Football Act, supra note 17, § 14C.
50. Graham, supra note 18, at 3.
53. Id.
54. Id.
55. Id.
ratified the Convention, granting it the force of law. Article 7.1 of the Convention states that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Fundamental rights are not protected without restraint. An infringement upon certain fundamental rights and freedoms is justified so long as it remains consistent with the European Union's structure and objectives. The constraint of a fundamental right must always be considered with regard to "the social function of the protected activity." The scope of Article 7's protection is limited only by the court's interpretation of certain essential terms. Protection is triggered if the petitioner of right incurred a substantive increase in punishment levied upon a prior criminal offence.

B. The Act and Standards of Article 7

1. Hooliganism Is Criminal Conduct

Article 7.1 of the Convention prohibits the imposition of a greater punishment for a previously committed criminal offence. Retrospective prohibitions linked to criminal offences receive heightened scrutiny because criminal penalties threaten an individual's freedom with impending imprisonment. Therefore, it is necessary to determine whether acts associated with hooliganism constitute criminal conduct. In Engel v. Netherlands, the ECHR identified three criteria relevant to the classification of conduct as a "criminal offence."

It must first be ascertained whether "the provision(s) defining the offence charged belong . . . to criminal law, disciplinary law or

57. Id.
58. Convention, supra note 51, art. 7.1 (emphasis added).
60. Id.
61. Convention, supra note 51, art. 7.1.
62. Id.
both concurrently.\textsuperscript{65} For the purpose of Article 7 of the Convention, arrest alone is not sufficient to characterize conduct as criminal in nature.\textsuperscript{66} For instance, "[s]imple vagrancy is not an ‘offence’ under Belgian law" because, although indigent defendants had been arrested, "the magistrate did not find the applicants ‘guilty’ nor impose a ‘penalty’ on them."\textsuperscript{67} Despite the court’s conservative definition of a criminal offence, hooliganism is distinguishable from the passive disturbance associated with vagrancy and begging. Hooliganism is a blanket term which encompasses many acts of violence and public disorder, including, but not limited to, possession of alcohol, weapons, or the use of threats or violence towards another person or property at a football match.\textsuperscript{68}

The second factor, perhaps of greater importance, is the very nature of the offence.\textsuperscript{69} The criminal nature of hooliganism is evident when one considers an account of one hooligan, Terry Mann, who is a super-fan of the English football club Newcastle United. Mann spent thousands of dollars painting the United crest on his garage door, and installed a stained-glass window with the emblem upon his front door.\textsuperscript{70} Authorities connected Mann to several vicious altercations that occurred both while he was attending matches and viewing games at the pub.\textsuperscript{71} After receiving a complaint for returning to his seat late after the beginning of the second half of a game, Mann punched a man in the face, breaking his nose.\textsuperscript{72} Following the brawl, Mann appeared before Newcastle magistrates, charged with assault. Under the 2000 Act,\textsuperscript{73} the disorderly conduct resulted in revocation of season tickets he had held for over twenty-seven years, and a three-year banning order.\textsuperscript{74} As Mann’s behavior demonstrates, hooliganism embodies the very nature of criminal conduct.

A third factor utilized to classify a “criminal offence” within the Convention is the severity of the potential penalty.\textsuperscript{75} In Demicoli v.  

\textsuperscript{67} Id.
\textsuperscript{68} Football Act, supra note 17, sched. 1.
\textsuperscript{70} Brenda Hickman & Owen McAteer, Superfan is Kicked Out of Town, EVENING CHRON. (Newcastle), Jan. 17, 2001, at 1.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} 2000 Act, supra note 33.
\textsuperscript{74} Hickman & McAteer, supra note 70, at 1.
Malta, the court held that a maximum punishment of sixty days in jail, and an additional fine for defamatory libel, reached a degree of punishment sufficient to classify an offence as “criminal.” As noted above, there are a variety of acts of public disorder associated with hooliganism. Many of these acts of misconduct are punishable by imprisonment. Furthermore, a person guilty of violating an imposed banning order is subject to a term of imprisonment not to exceed six months. While this potential sentence is not severe, it exceeds a minimum standard of severity as established by Demicoli.

General consideration of Engel’s three-prong analysis indicates that the hooligan activity prohibited by the Football Act is criminal in nature, and therefore, within the protection of Article 7.

2. The Football Act Increases the Punishment for Prior Criminal Conduct

European case law does not clearly delineate the magnitude of “an increase in punishment” that is required to trigger the protection of Article 7. Increased jail time would most certainly constitute an increase in punishment; but the revocation of a person’s passport, thereby restricting his travel during the control period, may not.

In Tre Traktörer AB v. Sweden, the court concluded that the revocation of a liquor license was a severe measure, but did not reach the level of a penal sanction. Intuitively, revocation of national citizenship papers is more severe than the revocation of an establishment’s liquor license, as the former defines one’s identity and controls that person’s fundamental freedom to travel.

However, such a distinction is not necessarily dispositive. The analysis does not necessarily culminate with the finding that an increased punishment has been levied. Even penal measures may have retrospective effect where “the purpose to be achieved so demands, and where the legitimate expectations of those concerned are duly respected.” Thus, a further balancing analysis is required.

76. Id.
77. See, e.g., Criminal Justice Act 1967, § 91(1) (Eng.) (persons found drunk in public places).
78. Football Act, supra note 17, § 14J.
79. See Demicoli, 210 Eur. Ct. H.R. at 17, ¶ 34.
a. Purpose of Statute

The Football Act is, above all else, public safety legislation. The primary purpose of the Football Act is to prevent violence and disorder at or in designated football matches.\(^{82}\)

In addition to ensuring public order, however, the Football Act was passed to safeguard England's economic well-being. English football club involvement in foreign competitions often means increased revenues and lucrative sponsorship deals, an integral part of the English economy.\(^{83}\) Banishment of English clubs from international tournaments deprives the nation of substantial, expected revenue.\(^{84}\) Additionally, the resurgence of hooligan violence undermined England's bid to host the World Cup in 2006.\(^{85}\) FIFA President Sepp Blatter insisted that FIFA would not "look as if it is rewarding England after what the thugs have done."\(^{86}\)

Thus, legitimate and compelling interests played a part in Parliament's decision to enact the Football Act and its subsequent amendments. However, the proffered governmental interests must be weighed against infringements upon the human rights of English citizens.

b. Expectations of English Citizens

A primary policy concern in the application of criminal law is that the general population be able to reasonably predict the ramifications of their conduct.\(^{87}\) Retrospective application of law violates this principle of reasonable expectation of criminal punishments. Banning orders made on a complaint supplement the criminal penalty for prior acts, often after the suspect completed his sentence of imprisonment or paid his fine. Consider the enforcement of the Football Act against English citizens in the following cases. Each account depicts a particular infringement upon the suspect's civil liberties.

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82. Football Act, supra note 17.
84. Id.
85. Id.
86. Id.
i. Profiling

The first football hooligan to be banned from domestic and international football matches under the new “get tough” legislation of the 2000 Act was a twenty-one year-old warehouse worker from Swindon.88 In 1996, Chris Sawford was convicted of threatening behavior.89 A year later, Sawford was arrested after a group of English supporters became rowdy in a Belgian bar during a friendly match against France.90 Sawford spent the night in a Belgian jail cell, but was released the next day without arrest.91

Last summer, police in Brussels deported Sawford as he attempted to board a plane for Euro 2000, and he appeared before an English magistrate three days later.92 Based in part on Sawford’s prior altercations, the magistrate imposed a four-year banning order under the Football Act.93 Because local police arbitrarily determined that Sawford fit the hooligan profile, the court essentially imposed an additional penalty upon his prior conduct despite the fact that he had avoided criminal prosecution for nearly three years.

ii. Insufficient Statutory Clarity

A statute that does not clearly describe the prohibited conduct fails to afford the requisite degree of foreseeability.94 David Savage, a married thirty-two year old from Sheffield, was arrested for running on the field after a goal by his team, Sheffield Wednesday.95 Savage had moved from his seat when he noticed space nearer to the field; he was involuntarily pushed on to the field after the goal, but then stayed there to celebrate.96 Savage did not know this was a criminal offence; in fact, as one observer noted, “[h]e’s been a Sheffield Wednesday fan for thirty years and attends most matches sitting in the family enclosure.”97 The 2000 Act was passed between the time of this

89. See John Coles, Footy Yob is Banned from All Matches, SUN (London), Aug. 31, 2000.
91. Id.
92. Young, supra note 88, at 12.
93. Coles, supra note 89.
96. Id.
97. Id.
offence and Savage’s court hearing. Consequently, the amended Football Act enabled the Court to issue a three-year banning order, in addition to the statutory fine prescribed for such conduct.

It is not entirely clear that Savage’s innocuous behavior falls within the ambit of hooliganism, or that the infraction of running on the pitch deserves banishment from domestic and international football matches. Such uncertainty suggests that the Football Act may not be stated precisely enough to permit a desirable degree of predictability. In Erdogdu v. Turkey, the ECHR held that “crimes of propaganda” were not precise enough to enable citizens to distinguish between permissible and prohibited behavior. The Football Act implicates all crimes of “violence” or “disorder,” language that is unnecessarily broad when retrospectively applied to impose substantial punishment.

iii. Altered Legal Consequences

Amarjit Samra insists he is a “scapegoat” for the trouble England supporters cause throughout the international football community. Samra received a banning order from every football game in the country for three years. The banning order made on a complaint originated from an incident three years ago, in which Samra pleaded guilty to being drunk while trying to enter a football ground. Samra claimed he absolutely was not a hooligan, but only pleaded guilty because it would have been too difficult to travel back and forth for court proceedings. Having never been involved in any acts of violence, Samra believed the magistrates were determined to make an example out of him the minute he entered the courtroom wearing an English national team jersey.

Whereas Samra intended to plead guilty to public drunkenness

98. Id.
99. Id.
101. Id. ¶¶ 57, 59.
102. Graham, supra note 18, at 3.
104. Id.
105. Id.
106. Id.
out of convenience and to facilitate closure to the court proceedings, the decision ultimately led to the issuance of a banning order by complaint. Had the 2000 Act existed at the time of Samra's initial arrest, it is likely that it would have impacted his decision-making. This retrospective application of the Football Act eliminated any semblance of reasonable expectation of consequences.

IV. Could the Act Exist in the United States?

Both European and American jurisprudence share the principle of law prohibiting ex post facto laws. Although the U.S. Constitution and its interpretations are not binding on the ECHR, decisions handed down by the U.S. Supreme Court offer a thorough analysis and interpretation of retrospective application of criminal laws. Furthermore, as several other European countries have instituted their version of the Football Act, it is not outside the realm of possibilities that similar legislation could arise in the United States. It is therefore relevant to consider the constitutionality of banning orders issued by complaint.

A. Ex Post Facto Prohibition in the United States

The U.S. Constitution requires that "[n]o State shall... pass any... ex post facto law." The constitutional protection is such that Congress may not enact "any statute which punishes as a crime an act previously committed." Essentially, the purpose of the ex post facto prohibition is to "assure that legislative Acts give fair warning of their effect... and [to] restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." In the late eighteenth century, the Supreme Court held that ex post facto constitutional protection applied only to penal statutes that disadvantage the offender subjected to them. In attempting to refine the definition of "punitive" legislation, the Supreme Court formulated a list of persuasive, though not comprehensive, factors: (1) whether the sanction involves restraint; (2) whether the punishment is excessive; (3) whether it has historically been viewed as a punishment;

108. Compare U.S. Const. art. I, § 10, cl. 1, with Convention, supra note 51, art. 7.1.
(4) whether there is a finding of scienter; or (5) whether the traditional purpose of the statute coincided with traditional aims of punishment—retribution and deterrence. Still, many courts viewed the Kennedy factors as helpful, but not dispositive. Unfortunately, analysis was somewhat clouded by the Supreme Court's failure to issue a "definitive answer" to the question of the meaning of "punishment," or to articulate a "formula" for identifying constitutionally prohibited legislation.

The Court later clarified that the focus of the ex post facto inquiry is not whether the defendant was "disadvantaged" by the legislative change, but whether the change "alter[s] the definition of an offence or increas[es] a punishment." According to Collins v. Youngblood, only legislation that: (1) makes an act criminal which was innocent when performed, (2) imposes an additional punishment on a previously convicted person, or (3) impacts the legal defenses available to a defendant at the time the act was committed, violates the ex post facto clause of the Constitution.

B. The "Intents-Effects" Analysis

Collins ignored the list of potential factors identified in Kennedy v. Mendoza-Martinez without overruling the decision, leaving courts with multiple, although not entirely inconsistent, tests for defining punitive legislation. Justice Stevens' concurrence in Collins stated that an ex post facto application of law is one that substantially deprives the defendant of his right to a fair trial and protections from excessive punishment. Subsequent analysis focused first on the purpose or intent of the statute, and then on the effect of the legislation upon the defendant, to determine if the statute was punitive.

This "intent-effects" test became the definitive test of whether legislation was punitive when it was reaffirmed by the Supreme Court in United States v. Ursery. Although the Court did not explicitly cite the Kennedy factors in its opinion, the ultimate test consolidated

117. Id. at 52.
118. Id.
119. Id. at 52.
many of the factors into the “effects” prong of the analysis.\textsuperscript{121}

Application of the intent-effects test to the Football Act shows the football Act is an unconstitutional ex post facto law because it is retrospective and imposes an additional punishment on a convicted person for a previous act.\textsuperscript{122}

\textbf{1. Intent of the Act}

In deciding whether a statute is penal, the Supreme Court begins its analysis by examining the purpose of the statute.\textsuperscript{123} The categorization of a particular provision as civil or criminal “is first of all a question of statutory construction.”\textsuperscript{124} On its face, the Football Act is a public safety law. Indeed, advocates of the Football Act would argue that the sole intent of the legislature was to ensure public safety, not to punish hooligans. That argument, however, can be rebutted by examining the Football Act more closely. Banning orders are triggered by criminal activity and protracted imprisonment is levied for violation of its decree.\textsuperscript{125} Thus, the Football Act’s penal purpose is evident.

Further, the Supreme Court held that the intent of the legislature will be ignored if “the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention.”\textsuperscript{126} Thus, the effects of the statute must be examined as well as the intent.

\textbf{2. Effect of the Act}

In order to violate the Constitution’s prohibitions on retrospective legislation, the Football Act must increase punishment for a previously committed act.\textsuperscript{127} Thus, it is important to determine whether the effect upon the detained hooligans is both retrospective and punitive in nature. A law operates retrospectively when it changes the legal consequences of acts completed before its effective date.\textsuperscript{128} Banning orders premised on a complaint implicitly violate this principle of law by effectively levying additional punishment for prior

\begin{itemize}
\item \textsuperscript{121} Id. at 290.
\item \textsuperscript{122} See, e.g., McDonald v. Massachusetts, 180 U.S. 311, 312 (1901).
\item \textsuperscript{123} Trop v. Dulles, 356 U.S. 86, 96 (1958).
\item \textsuperscript{125} Football Act, supra note 17, § 14J.
\item \textsuperscript{126} United States v. L.O. Ward, 448 U.S. 242, 249 (1980).
\item \textsuperscript{127} Cf. Convention, supra note 51, art. 7.1.
\item \textsuperscript{128} Weaver v. Graham, 450 U.S. 24, 29 (1981).
\end{itemize}
In order to gauge whether the hypothetical existence of the Football Act as American law increases the punishment for a prior act, it may be helpful to consider analogous legislation.

C. Constitutionally Retrospective Legislation

The Sexually Violent Predators Act (SVPA) allows the state to impose an involuntary civil commitment after completion of a criminal sentence upon a convicted felon with a history of perpetrating violent sexual offences. The California Supreme Court concluded the statute did not conflict with constitutional ex post facto provisions when applied to a defendant whose most recent offence occurred before enactment of the SVPA. Although the court relied on the legislative record in preserving the state's interest over the individual's freedom, this result appears to be a clear example of a retrospective increase in the time served for a violation that occurred prior to enactment of the SVPA.

Consider also statutes that provide for increased punishment for convicted felons found in possession of firearms. Although possession of a firearm is a constitutionally protected right, valid legislation restricts this privilege in the case of convicted felons. The court stated that felony possession statutes do not prescribe additional punishment in violation of the ex post facto clause. A statute is not retrospective "merely because it draws upon facts antecedent to its enactment." Instead, the court emphasized that the governmental interest in protecting past and potential victims of violent crime validates this particular restriction of personal freedom.

D. The Football Act and the Constitution

The aforementioned decisions of U.S. courts allowed retrospective legislation despite the apparent ex post facto implications. The distinction likely arises because of the importance of criminal justice policies targeting violent sexual predators or felons in possession of a firearm. It could be argued that the governmental interest in restricting the right of "hooligans" to travel does not reach

129. Football Act, supra note 17, § 14C.
131. Id. at 611.
133. Id.
134. Id.
a similar intensity. Victims of hooligan violence and their families probably would disagree strenuously. There are, however, other distinctions as well.

The SVPA evidenced a decidedly proactive approach towards violent sexual predators. Commentators have noted that the same proactive approach characterizes the 2000 Act revisions of the Football Act. However, the legislation lengthening the civil commitment of sexual offenders was a product of their statistically recidivist behavior. California Governor Pete Wilson proclaimed that sex offenders have a 90% recidivism rate. Such recidivism rates are not paralleled among offenders who committed criminal offences typical of “hooliganism.” This statistical disparity in rates of recidivism justifies allowance of retrospective increase in punishment as to sexual offenders but not for other types of offenders.

Additionally, felon firearm possession statutes are distinguishable from banning orders made on a complaint. Courts do not classify felony possession statutes as retrospective application of law. The crime for which the defendant is being punished is not the earlier felony conviction, but “the new and separate crime of which the prior felony conviction is only a constituent element.” In fact, this analysis closely parallels the rationale for upholding banning orders made upon a conviction while at the same time invalidating those imposed on a complaint. Although all exclusion orders punish the violent tendencies of hooligans, banishment following a conviction does not draw entirely upon the status of being a hooligan, but rather aggregates the punishment for the concurrent conviction. For that reason, banning orders made on a conviction are analogous to felon firearm statutes and do not involve the retrospective application of law. Alternatively, banishment arising solely on the basis of a complaint is based entirely upon the status of being a hooligan and thus cannot be similarly justified by analogy to felony

137. Id.
138. NATIONAL CRIMINAL JUSTICE COMMISSION, THE REAL WAR ON CRIME 74-75 (Steven Donziger ed., 1996). “A Justice Department study found that only 17.9% of state inmates are violent recidivist - that is, they are incarcerated for a violent offence and had committed a prior violent offence.” Id.
139. Venegas, 89 Cal. Rptr. at 108-09.
140. Football Act, supra note 17, § 14A.
E. Is Hooliganism a 20th Century Social Disease?

Edward Grayson published an article entitled *Sentencing Soccer Hooligans* shortly after Parliament passed the original Football Act in 1989. Grayson insisted that the only cure to football-related violence was a more stringent enforcement of the exclusion orders. According to Grayson, the enforcement should be similar to a mandatory revocation of a driver’s license for the infraction of driving under the influence of alcohol: commit an act of violence at a match and receive a banning order, in all instances. That analogy might be acceptable. More importantly, the article evidenced the magnitude of the social disturbance caused by football-related violence in the mind of the commentator. After all, the legality of the Football Act ultimately depends on the balance between the government’s interest in preserving public safety and countervailing civil rights of the individual.

The comparison between hooliganism and drunken driving also makes clear the conclusion that even the greatest threats to public safety do not warrant limitless, retroactive application of punishment. Grayson concludes his article by stating, “If there is any objection in principle or practice to extending the draconian drink-driving [sic] prohibition [to hooliganism] it will be of value and interest to know why.” In response, one wonders how Grayson would comment on the inverse question posed to him with respect to the invention of banishment orders made solely on a complaint.

Grayson correctly states that the conviction of drunk drivers frequently occurs because of “familiarity with and recognition of the offender by local police.” Local enforcement, such as random drunk driving checkpoints, is an integral tool of law enforcement in promoting public safety on the highways. Initially, this appears to

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142. Id.
143. Id.
144. Id.
145. Id.
146. Mich. Dept. of State Police v. Stitz, 496 U.S. 444, 455 (1990) (holding that “the balance of the State’s interest in preventing drunken driving . . . and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program”) (emphasis added).
support the Act's empowerment of local authorities to detain known hooligans before they travel to football matches. The rationale is clear: the sooner authorities can identify potential culprits, the better chance of averting harm. However, drivers are only punished if they fail sobriety tests administered by police.

Alternatively, banning orders issued upon a complaint take this rationale beyond constitutional constraints. An exclusion order suspect need not be drunk at the time, nor committing any other act of football-related violence. He may be merely preparing to board a plane or a train to travel to a football match. And the authorities are permitted to evaluate his past conduct in order to predict the likelihood that he may contribute to violence or disorder in connection with the match. Under the Football Act, authorities can detain the suspect, and impose future detention, despite his lawful behavior. One would have difficulty arguing that it is constitutional to arrest a sober driver because his past behavior provides grounds to believe detainment would help to prevent injury at some indefinite point in his travels in the future.

V. Conclusion

If a suspect faces greater detriment under a banning order than he was exposed to under the law at the time he committed the crime for which he was convicted, he has received increased punishment. Fundamental freedoms and human rights carry great weight in society, so competing governmental interests must be extremely strong in order to infringe upon these rights. Public safety is important, but that interest is sufficiently advanced by limiting enforcement of the Football Act to banning orders resulting from convictions. After all, those exclusion orders more accurately target the actual perpetrators of violence. Anyone who witnesses the catastrophes of football-related violence can comprehend the legitimate and compelling interests of the government. Now, weigh those interests against the numerous examples of the illegitimate application of banning orders made on complaint, discussed above.

Banishment upon a complaint resembles adverse treatment on the basis of status rather than conduct. Courts must remain cautious in permitting retrospective punishment, as they have been with legislation that restrains the freedom of sexually violent predators

147. Football Act, supra note 17, § 14A.
and restricts the constitutional rights of felons. Important factors to consider in targeting a dangerous class might be the frequency and magnitude of the threat posed to society. Hooligans have not yet reached this infamous pedestal. They are a diverse population, not easily targeted with invidious legislation as formulated by the 2000 Act amendment to the Football Act.

Therefore, it may be true to say that the government's interest in prohibiting the travel of some hooligans is greater than its interest in prohibiting the travel of others. Ultimately, banning orders made on a complaint are undermined by this amorphous definition of a "hooligan." The vague language of the Football Act perpetuates its arbitrary and unconstitutional application. The multitude of criminal acts that subject a person to banishment under the Football Act vary tremendously in terms of degree of depravity. The indefinite application of retrospective punishment weakens the government's compelling interest and, outweighed by the need to protect the civil rights of England's football hooligans, violates Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ex post facto clause of the U.S. Constitution.

149. Football Act, supra note 17, sched. 1.
150. See Koster, supra note 95, at 2.