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TICKET SCALPING: AN ECONOMIC ANALYSIS AND PROPOSED SOLUTION

John D. Tishler*

"[H]onest-to God, everyday consumers are getting ripped off by leeches and parasites whose only skill in life is to hire the homeless or college students and send them to stand in line, scrounge the tickets, jump the price and resell them."1

“Our business is the free enterprise system at work.”2

INTRODUCTION

Ticket scalping seems inseparable from the live entertainment industry upon which it depends. Scalpers manage to acquire and resell tickets to an extraordinary array of events at substantial profits. Besides the obvious examples of sporting events and rock concerts, scalpers have sold tickets to events ranging from the Academy Awards Presentation3 to the Mike Tyson rape trial.4

Despite the long history of attempts to control ticket scalping, there is no consensus among states that ticket scalping is a problem worthy of legislative concern. The statutes that do exist vary considerably in focus and comprehensiveness.5 The lack of consensus is well illustrated by the legislative responses of four states in the past four years. When the Tennessee Legislature revised the state’s entire criminal code in 1989,6 it quietly decided to repeal the previous pro-
hibition against ticket scalping. Pennsylvania, on the other hand, increased the penalties for violation of its comprehensive ticket scalping law in 1990. Illinois also increased the penalties for violation of its anti-scalping law in 1990, but after a few mostly unsuccessful prosecutions against established brokers and street hawkers, the Illinois legislature emasculated the law by exempting ticket brokers from its scope. Meanwhile, the late rock music promoter, Bill Graham, and a consortium of other promoters successfully lobbied for the introduction of a bill to prohibit all forms of ticket scalping in California. The bill led to some flamboyant debate illustrated by the quotes which begin this article, but, ultimately died in committee.

This is not the first scholarly article to consider the public policy issues raised by ticket scalping. Nor is it the first to rely primarily on economic analysis. Like the others, this article will review the economics of ticket scalping. But more importantly, it will go beyond economic analysis to consider various normative responses to the scalping phenomenon. While other articles recognize that the

9. ILL. ANN. STAT. ch. 121 1/2, para. 157.33 (Smith-Hurd Supp. 1992). This revision classifies a violation as a Class A misdemeanor and authorizes a fine of $5,000 for each offense. Id.
15. Both Jonathan Martel and the team of Stephen Happel and Marianne Jennings use the tools of economic analysis to understand the market for tickets and the role scalpers play in that market. See Happel & Jennings, supra note 14, at 2; Martel, supra note 14, at 4-6.
scalping debate concerns powerful interests beyond those of ticket consumers, this article will expand that analysis. I will conclude that scalping is best conceptualized as a harm to promoters rather than to consumers and that policies which facilitate the protection of promoter interests will lead to an efficient market for live entertainment as well as the appropriate amount of consumer protection. This article will also discuss the implications of a recent Seventh Circuit opinion which discussed the promoter's role in the market for tickets.

I. THE STATE OF THE LAW

Currently, thirteen states prohibit the resale of tickets to all entertainment events for more than the original box office price, generally including service charges of the primary contractor, plus some restricted premium. Another six states prohibit resale of tickets for profit only to certain events such as college athletic events or boxing matches. Two states prohibit scalping only at the situs of the event.

16. Several authors have considered and analyzed the role that performers, athletic teams, stadium and theater owners, and promoters play in the debate. See Diamond, supra note 14, at 73; Bershad & Ensor, supra note 14, at 100-01, 111 & n.141; Happel & Jennings, supra note 14, at 7-9, 12-14; Martel, supra note 14, at 26-27. Throughout this paper, the term "promoter" will be used to include performers, athletic teams, and theater and stadium owners except where context indicates otherwise.


18. A primary contractor is an agency, such as Ticketmaster, which contracts with the promoter to offer tickets for first sale at remote locations. This article will use the term "box office price" to mean the price the promoter charges for the ticket plus any service charges of the primary contractor plus any local taxes.


event. In some states where scalping is not controlled by state law, municipalities are authorized to pass laws restricting ticket scalping.22

Six states currently require licensing of persons and brokers engaged in the resale of tickets.23 These states impose a variety of license fees and regulations on resellers, including price restrictions24 and bonding requirements.25

Illinois and New York provide civil remedies against scalpers.26 Illinois allows consumers who pay more than the box office price to sue the seller for $100.27 This law is practically useless, however, since it exempts ticket brokers.28 New York provides a cause of action for "any person who has been injured by reason of a violation" of its scalping law.29

Numerous plaintiffs have challenged the constitutionality of anti-scalping legislation which limits the price a seller may realize on resale.30 Today, courts routinely uphold such restrictions against
both federal and state constitutional challenges. There is virtually no chance that any court today would strike down any anti-scalping statute on constitutional grounds.

II. ECONOMICS OF TICKET SCALPING

A. The Opportunity for Scalping

The scalper's profit opportunity derives from a box office ticket price set below the market clearing price. The lower box office price creates a situation where people are willing to buy more tickets than there are tickets available.

Consider a market in which resale of tickets is impossible or impracticable. A box office price set below the market clearing price in such a market creates a situation in which some consumers willing to pay the box office price are unable to obtain a ticket. A non-price distribution scheme determines which consumers receive tickets. Those who do obtain tickets receive consumer surplus in

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see People v. Newman, 180 N.Y.S. 892 (App. Div. 1919). Statutes which regulate ticket resale at the situs of the event are upheld as within the scope of the state's police power to regulate commercial activity and protect the public against fraud and harassment. See, e.g., Loska v. Superior Court, 233 Cal. Rptr. 213, 219 (Ct. App. 1986).

31. For a more thorough discussion of the judicial response to anti-scalping legislation, see Diamond, supra note 14, at 74-77; Bershad & Ensor, supra note 14, at 85-90; Happel & Jennings, supra note 14, at 3-6.

32. But see Loska v. Superior Court, 233 Cal. Rptr. 213 (Ct. App. 1986). The Loska court read the Los Angeles ordinance to prohibit a bona fide patron from reselling an extra ticket at face value or below and held that such a prohibition was unconstitutional. Id. at 221-22. The court cured the defect by judicial construction. Id. See infra note 33 for the definition of bona fide patrons.

33. For purposes of this analysis, a scalper is a person or entity which purchases tickets with the intent of selling such tickets at a price above the price paid for them. This definition also includes someone whose original ticket purchase was motivated by a desire to attend the event, but who later decides to sell the tickets at a price premium because the utility of the profit received is greater than the utility of attending the event. However, the definition excludes someone who purchases tickets with the intention of attending the event, but who ultimately sells those tickets because she is unable to attend. Martel calls this last type of consumer a "bona fide" consumer, Martel, supra note 14, at 15 & n.53, and I adopt that description herein. These definitions are designed for analytical purposes only and do not necessarily correspond to any legal definitions of these terms.

34. The market clearing price for \( n \) identical tickets is the reservation price of the \( n \)th highest bidder in a hypothetical auction for those tickets.


36. Such a situation could arise either from a perfectly-enforced law prohibiting resale or from extremely high transaction costs which engulf any potential profit from resale.

37. See discussion infra part II.D.

38. Consumer surplus is the difference between a buyer's reservation price (the highest price that buyer would pay for the good) and the price that the buyer actually pays for the
excess of that which they would have received if ticket prices could float freely.99

Now assume an initial distribution of tickets identical to the one described above but in a market in which resale at any price is possible.40 Here, higher valuing consumers shut out by the non-price distribution scheme will offer to pay ticket holders a price above the box office price.41 Ticket holders who value the ticket at a lower price will agree to sell to the higher valuing user. In the absence of transaction costs, these mutually beneficial transactions will occur until the highest valuing users possess all the tickets.

The transaction costs for the individual transfers discussed above would in fact be extremely high. Many mutually beneficial exchanges would fail to occur if each willing buyer had to find a willing seller. Such market imperfection creates a profitable role for one who can unite a willing buyer and a willing seller. This is the ticket scalper, a person who facilitates the transfer of tickets from the low-valuing consumer to the high-valuing consumer and takes as payment a portion of the surplus created.43

B. Uniqueness of the Ticket Market

Two interesting features of the ticket market illuminate the analysis of ticket scalping. First, the cost of producing a live event once it is planned depends very little on how many tickets are sold. It costs the promoter virtually nothing to fill an otherwise empty seat.44 However, the number of seats in most venues is fixed, so once they are all sold, the cost of adding one more patron is astronomical,

good.

39. This is true only if the extra surplus is not absorbed in the acquisition scheme. See generally Yoram Barzel, A Theory of Rationing by Waiting, 17 J.L. & Econ. 73 (1974) and infra note 91.

40. This assumption is unrealistic. The availability of resale creates incentives for persons who do not value the underlying performance to purchase tickets in anticipation of a profitable resale. Hence, the initial distribution of tickets, regardless of the distribution scheme, will be different in a market with resale than in a market without resale.


42. In the real world, the "low-valuing consumer" is likely to be the box office itself. Ticket scalpers often obtain their tickets from "diggers," persons hired by scalpers to stand in line at the box office and purchase as many tickets as they can for the scalper to later resell. Bershad and Ensor, supra note 14, at 82 & n.7.

43. See Martel, supra note 14.

44. Additional patrons increase only security and clean-up costs, and the increase in these costs attributable to any one additional patron is negligible.
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if not infinite. In economic terms, once an event is planned, the marginal cost for each seat is virtually zero until all seats are sold; however, once capacity is achieved the marginal cost of additional seats is nearly infinite. \(^4\) Output of tickets is therefore fixed at the house capacity, \(^5\) and the market clearing price will depend only on the demand for the tickets. \(^6\) Since consumers tend to judge the fairness of a price upon the seller's out-of-pocket cost and resent pricing based on the demand for the product, \(^7\) consumers will often consider the market price of a ticket, which depends so heavily on demand, unfair.

Second, ticket sales are often a secondary component of the overall profit picture of the underlying event. \(^8\) Revenues from ancillary sources, such as the licensing of merchandise, are highly dependent upon the maintenance of goodwill among both those who purchase tickets and those who do not. \(^9\) Fans who perceive that they could never see their favorite team or rock band live might lose interest in the sport or band. When live performances are primarily staged for the purpose of generating publicity for a related product, one would expect pricing of those shows to reflect marketing decisions related to sales of the related product rather than sales for the live event. \(^10\)

45. In order to add one more patron, the promoter would have to move the event to a larger venue or add extra performances. Happel & Jennings, supra note 14, at 6 n.37. Such steps are generally impossible for sporting events and often impracticable for other performances.

46. Marginal cost is the cost to the seller of producing one more unit of output than it is currently producing.

47. See Martel, supra note 14, at 15 n.55.


49. Since supply is fixed, the market clearing price for the tickets will be the intersection of the vertical supply curve with the demand curve. See Lloyd G. Reynolds, Economics: A General Introduction 418-20 (5th ed. 1988).


51. Thaler, supra note 50, at 209-11.

52. See id.; see also Happel & Jennings, supra note 14, at 9; Martel, supra note 14, at 26-27. For example, professional sports teams receive substantial revenues from television coverage, licensing of merchandise, and concessions sales at the event. But see Joseph Tybor, Future Sports: The Average Fan Faces a Shutout, Chi. Trib., Jan. 18, 1992, § C, at 1 (stating that television revenues for professional sports show signs of declining and predicting that ticket prices will increase to pay the inflated salaries of athletes). Similarly, rock musicians often tour to support new albums and also earn money from sales of concessions and merchandise such as T-shirts and posters. Happel & Jennings, supra note 14, at 9; Martel, supra note 14, at 26-27.

C. The Underpricing of Tickets

The imbalance of supply and demand for certain tickets is caused by the pricing policies adopted by the promoters of events for which tickets are scalped. Happel and Jennings identified a number of reasons why promoters often price their tickets below the ultimate market clearing price, including poor market analysis, post-sale shortages, promoter-insider trading, price setting for the long run, and pricing for "the blue-collar fan." I revisit these reasons for promoter underpricing in order to supplement and clarify ambiguities, and to lead the discussion towards this article's normative proposals. The reader should be mindful that the lines dividing these explanations are often blurry, and promoters may underprice for more than one reason.

1. Poor Market Analysis and Post-Sale Shortages

A promoter must set the price for tickets before the event actually occurs. The promoter may misconstrue demand and unintentionally set the price for tickets below the market clearing price. Furthermore, the span of time between ticket marketing and the underlying event creates an opportunity for changed demand conditions in the interim. Such errors are nearly certain to result in a resale market. This is so for three reasons. First, the promoter is ordinarily unable to increase output to match the unanticipated demand. Second, tickets cannot be consumed until the date of the underlying event. The full initial release is therefore available for resale until the event occurs. Third, unconsumed tickets are extremely easy to

54. Id. at 7-9. Promoters may underprice tickets in two related but distinct ways: First, by pricing tickets in such a way that the total number people willing to pay the price (or prices if the tickets are scaled) printed on the tickets exceeds the number of tickets available; second, where seats are reserved, by failing to price the more preferred seats at a level that matches the demand for these seats. One or both underpricing forms may occur for any given event.

55. Id.

56. Happel and Jennings' first two reasons for promoter underpricing, poor market analysis and post-sale shortages, both refer to the same basic phenomenon, and I therefore consider them together. Their "blue-collar fan" category really includes two distinct motivating factors, altruism and audience demographic preferences, and I consider each separately. Additionally, I supplement Happel and Jennings' list with one additional reason for promoter underpricing, the inability to perfectly price differentiate.

57. See Happel & Jennings, supra note 14, at 7-8.

58. Id.

59. Happel & Jennings, supra note 14, at 8. Strong demand may arise for tickets after the initial sale, such as when an athletic team improves its record over the course of a season or when a performer has an unexpected surge in popularity before the show date. Id.

60. See discussion supra part II.B.
market, being small in size and representing a right of admission to a generally known event.

2. Inability to Perfectly Price Differentiate

It is important here to distinguish price differentiation from price discrimination. Price discrimination refers to a pricing scheme whereby sellers charge different prices for identical products based upon the reservation price of the buyer. While promoters frequently make use of price discrimination, sellers of tickets face the same difficulties with price discrimination as sellers of other goods. Failure to price discriminate does not create a viable market for scalpers; everyone who values the ticket at its market price is able to obtain one. Instead, failure to price discriminate merely allows purchasers to retain the entire consumer surplus of the transaction.

Price differentiation, on the other hand, is charging a different price for different seats in the venue depending on the desirability of the seat. Since each seat in a reserved seating event is a unique good, each seat has its own demand characteristics. It would be impossible to properly estimate the market clearing price for each individual ticket to a reserved seat show. If promoters do decide to price differentiate, they are likely to err on the side of pricing better seats too low because errors on the high side will cause those seats to go unsold.

Even if promoters had available the information necessary to perfectly price differentiate, they would not likely do so because of the high costs of distributing and marketing tickets which each bear a different price. Therefore, even promoters inclined to price differ-

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61. See supra note 38 for the definition of reservation price.
63. A very common example is a reduced price for students at events on university campuses.
64. Two problems face a seller who wishes to perfectly price discriminate: Potential for resale and imperfect information. See Martel, supra note 14, at 16-17 (citing Daniel Kahneman et al., Fairness as a Constraint on Profit Seeking: Entitlements in the Market, 76 Am. Econ. Rev. 728, 735 (1986)). Price discrimination requires monopoly power, but monopoly power as it is usually understood is not sufficient for prevention of resale. Imperfect information refers to the seller's inability to correctly determine each buyer's reservation price. See id.
65. Sellers price discriminate to capture some of the consumer surplus for themselves. Hirshleifer, supra note 62, at 353.
66. Since the marginal cost for each seat once an event is planned is virtually zero, see discussion supra part II.B., promoters have an incentive to price that seat, as well as every other seat, at a price low enough to sell with certainty.
entiate are likely to charge only a few distinct prices based upon the average demand for a ticket in large, delineated setting areas. Scalping opportunities will arise from the difference in quality within these delineated regions.

3. Promoter Insider-Trading

This possible motive is the most insidious. Promoters may deliberately hold back the choicest tickets from initial sale to the public so that they can sell those tickets to scalpers and earn the accompanying profits. Although promoters often deny it, accusations of this sort of activity still surface.

Insider scalping serves two purposes. First, it allows the promoter to hedge his initial pricing analysis. If demand for the initially released non-choice seats is moderate or low, the promoter may release the choice seats at box office prices; if demand is high, the promoter can arrange for sale by scalpers. Second, it allows the promoter to conceal his true pricing policy from the public.

4. Altruistic Price Setting

Economists are consummate skeptics, and they often try to peer below seemingly altruistic behavior in order to unearth the self-serving motive. It is clear, however, that some performers and promoters make strong and consistent claims that they wish to charge reasonable ticket prices solely out of a desire to be fair to their fans.

67. An example would be price differentiation between the main floor and the balcony.
68. Happel & Jennings, supra note 14, at 8.
69. For example, according to an inside source, promoters of the Rolling Stone's 1989 Steel Wheels tour withheld a total of 150,000 tickets from normal sale. Michael Goldberg, Ticket Rip-Off, ROLLING STONE, Nov. 1, 1990, at 21. The tour promoter denied any dealings with scalpers, but many of these tickets clearly ended up in the hands of scalpers. Id. at 40. Insiders to the tour alleged that the "holds" were excessively large and that in some cases tickets were used instead of cash to pay employees. Id. at 22.
70. See Happel & Jennings, supra note 14, at 8.
71. See discussion infra part IV.A.
72. ROBERT H. FRANK, PASSIONS WITHIN REASON 21 (1988). "The flint-eyed researcher fears no greater humiliation than to have called some action altruistic, only to have a more sophisticated colleague later demonstrate that it was self-serving." Id.
73. Jerry Pompili of Bill Graham Presents and head of Californians Against Ticket Scalping said that scalping restrictions wouldn't affect promoters' profits, but "this is our living. You have a responsibility to your fans—to your customers. We don't just want their money. We want them to come back...to have a good time...to think once in a while they can get a good seat—not just the guys who drive Ferraris." Goodman, supra note 12, at 16. Happel and Jennings use Bruce Springsteen, a performer known for his association with the working class, as an example of a performer who makes numerous efforts to keep ticket prices low for his concerts. Happel & Jennings, supra note 14.
Economic theory normally assumes that firms are profit maximizers because this assumption accurately predicts business behavior and avoids unnecessary analytical complication. Profit maximization is merely an assumption, however, and individual actors may have other motives in carrying out their business. Very wealthy performers might well derive more satisfaction from providing entertainment to fans at reasonable prices than from profit maximization.

5. Demographic Preferences

Another aspect of pricing for low-income patrons is marketing strategy. Promoters might underprice tickets because they prefer lower-income patrons to higher-income patrons. This preference will occur where the live event serves to create interest in related products which are disproportionately consumed by lower-income persons. A promoter who underprices for this reason is likely to choose a distribution mechanism which favors lower-income persons over higher-income persons.

6. Price Setting for the Long Run

Happel and Jennings discuss two related topics under this category, maintenance of goodwill and marketing strategy to maximize complementary revenues. Underpricing might be profit maximizing in the long run to a promoter who relies upon goodwill to generate repeat business. Studies suggest that consumers perceive price increases as unfair when those increases are the result of increased demand with no corresponding increase in the seller's costs. Of course, such statements and actions are also consistent with long-run profit maximization. Whether one believes that Springsteen or the people at Bill Graham Presents are truly altruistic, rather than simply ingenious long-run profit maximizers, comes down to a question of faith.

Assuming altruism exists, a performer or promoter may employ two different types of altruism. One is to wish for every consumer to pay a "fair" price and receive consumer surplus. The other is to specifically intend to benefit lower-income people by allowing them to attend an event they would not be able to attend if a market clearing price were charged.

75. See infra notes 51-53 and accompanying text.
76. This is likely to be the queue since it is assumed that lower-income persons have a lower opportunity cost of time. See infra note 97. But see infra text accompanying notes 98-101.
78. Id.; see also Thaler, supra note 50, at 210-11; Martel, supra note 14, at 26-27.
79. Kahneman et al., supra note 50, at 734-38. For example, 82% of subjects answered that it was unfair for a hardware store which has been selling snow shovels for $15 to raise the
consumers are no different—they perceive very high ticket prices as unfair despite their willingness to pay them. Studies further show that people will refuse to transact with those who "take advantage" of consumers by charging an "unfair price."

Promoters, performers, and venue owners are often repeat players in their respective markets. Concert promoters who promote many events each year might not charge the market clearing price for any one event for fear that their less popular events might suffer. Similarly, because sports team owners and leagues play many games, raising the price for more popular games might hinder sales to the less popular games. Contrast professional boxing events, which are infrequent and do not rely on team loyalty. Fight promoters may charge $600 or more for a ringside seat.

Perhaps a stronger occasion for maintenance of goodwill at the expense of short-run profit maximization is the second aspect of Happel & Jennings' long-run analysis—marketing ancillary goods and services. Where a major purpose of the live event is to generate publicity for a related good or service, one would expect to see promoters taking extraordinary steps to create and maintain the goodwill necessary for effective marketing of these related products. Because of the consumer psychology discussed above, market clearing price to $20 on the morning after a large snowstorm. Id. For further discussion on this issue, see infra part III.A.2.

80. See Bershad & Ensor, supra note 14, at 100 (quoting complaints from consumers who purchased tickets from scalpers, e.g., "[t]he system allows a scalper to get as much as he wants for a concert and that's not fair to the fan" (quoting Ticket Scalping Opponents Hope to Put Ceiling on Outrageous Resale Prices, Newark Star-Ledger (N.J.), Aug. 3, 1985, at 1)).

81. Thaler, supra note 50, at 205-07. Thaler postulates two kinds of utility: acquisitional utility and transactional utility. Acquisitional utility is traditional consumer surplus, the difference between what the item is worth to the consumer and what the consumer actually pays. Transactional utility is a function of the difference between the price paid and some reference price. Id. at 205. The reference price is essentially a "fair" price, and Thaler's studies indicate that a strong component in evaluating fairness is the seller's cost. Id. at 205-06.

Ticket purchasers have little idea of the promoter's cost. It is therefore likely that ticket consumers view the box office price as the reference price for their transaction utility function. State laws implicitly sanction the use of box office price as reference price by requiring the price to be printed on the ticket itself. E.g., 4 Pa. Cons. Stat. Ann. § 211 (1963 & Supp. 1992).

82. Happel & Jennings, supra note 14, at 8.

83. Id.

84. Martel, supra note 14, at 27 (citing Richard Thaler, Mental Accounting and Consumer Choice, 4 Marketing Sci. 199, 210 (1985)).

85. See supra part II.B.

86. See, e.g., supra text accompanying note 53.
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ticket prices are antithetical to this goal.

D. Alternative Distribution Schemes and the Function of the Scalper

When a promoter charges less than the market clearing price for tickets, demand for those tickets will exceed their supply, and some mechanism other than price must determine which consumers get to purchase the tickets. Three common mechanisms are discussed below.87

1. Queue88

Queuing is the usual distribution mechanism for rock concerts and is also common in single game (as opposed to season ticket) purchases for sporting events. Queuing has a number of features. First, it is virtually costless89 for the promoter; all the costs are shifted to consumers in the form of loss of time, boredom, and physical discomfort.90 Indeed, the costs of the waiting time will absorb all the consumer surplus if all consumers value the good equally.91 These costs are deadweight losses—no one captures the consumers' losses.92 Second, ticket consumers view queuing as the fairest method of ticket distribution, compared with lotteries and auctions.93 Consumers probably prefer queues because of a sense of democratic equality created by the queue. A queue is a great equalizer—position in the queue appears independent of social or economic status.94 Third, queuing substantially transforms the cost of a ticket. The true cost becomes the money price plus the time price of waiting in line.95

As to the third feature, time price is variable among individu-

87. This discussion is similar, but not identical, to the analysis of Martel, supra note 14, at 33-40. Martel originally collected the scholarly sources cited herein.
88. Queue is the British word for a waiting line.
89. Queuing is costless in the sense of out-of-pocket costs. Opportunity costs from non-price rationing still exist. See infra text accompanying notes 40-41 for a discussion of the profit opportunities which the original ticket distributor foregoes by failing to price ration.
91. Barzel, supra note 39, at 83. Variations in valuation allow some surplus to be captured by intramarginal consumers. Id.
92. Martel, supra note 14, at 37.
94. See Reisman, supra note 90, at 432.
95. See Happel & Jennings, supra note 14, at 6.
Economists point out that the cost of time varies directly with wage rate. This analysis is flawed in the case of queuing for a ticket. Work hours tend to be fixed long in advance of knowledge of an event for which people queue, and most workers cannot freely trade “time on the clock” for time to stand in line. Time to wait in a queue is probably sliced from leisure time rather than work time. Thus, the value of leisure time is probably a greater determinant of the cost of waiting in line than wage rate. Factors such as personal, family, and social obligations and length of work week strongly influence the value of leisure time. Additionally, individual tolerance for boredom and crowds affects the cost of waiting in line.

While it seems true that given a choice, the poor will choose goods with a higher time price and the rich will prefer a higher money price, this more likely reflects the diminishing marginal utility of money than it reflects time price varying with wage rate. Hence, the argument that queues ration tickets in a manner that varies inversely with wage rates is only a half truth. People with less wealth will in general prefer a rationing system by queue rather than by price because the money saved is of more value to them than the money saved by wealthier persons. But that is not to say that queues ration tickets to the less wealthy. Queues merely benefit the less wealthy who value money more than time while harming the more wealthy who would pay to avoid standing in line.

Furthermore, any empirical perception that poorer persons tend to wait in ticket lines more often than richer persons is surely affected by the existence of scalpers even where scalping is illegal. Wealthy persons who know they can obtain tickets from scalpers are

96. Martel, supra note 14, at 38.
98. By leisure time, I mean only time for which a person is not earning a wage. This time may be used for any number of activities, many of which we would not commonly think of as leisure.
99. Reisman, supra note 90, at 431.
100. See Martel, supra note 14, at 38.
101. But see Barzel, supra note 39, at 73, which argues that for some goods the rich rather than the poor will stand in line to obtain them. According to Barzel, the rich will queue more for goods which are characterized by high income elasticity and low price elasticity and the poor will queue more for goods with low income elasticity and high price elasticity. Id. Tickets which are targeted to middle and lower-income persons are likely to have low income elasticity (income level has low impact on taste for the performance) and low price elasticity (demand is affected relatively little by price increases). See, e.g., Keith D. Mano, Scalping, NAT’L REV., Aug. 28, 1987 (“Kids’ll pay anything for a rock-concert ticket. Kid’ll say, “Let me go in the concert. When I come out you can kill me.””). Barzel’s analysis is therefore indeterminate as to whether the rich or the poor will line up more for tickets.
far less likely to stand in line. If scalping could be completely stopped, wealthy persons might very well wait in the same lines for tickets as do poorer people.

When tickets are allocated by queue, scalpers hire people to stand in line and purchase tickets which are turned over to and resold by the scalper. Essentially, the scalper serves as a middleman in a transaction where one party pays another to stand in line. Thus, scalping partially restores price allocation to a non-price distribution system.

Promoters sometimes inject lottery features into the queue. For example, tickets to a recent benefit concert featuring Bruce Springsteen and others were sold by queue, but place in the queue was determined by a lottery conducted one hour before ticket sales began. Promoters probably take such measures not because they favor random distribution over time distribution, but rather as a means of preventing the public safety problems that occur when people line up too far in advance.

2. Lottery

Another common method for allocation of underpriced tickets is the lottery. Often times, only persons who first meet some merit criterion are allowed to enter the lottery. Sometimes, a lottery is used instead of a queue when very high demand makes regulating the queue too costly. Lotteries have a number of features which make them desirable to a promoter wishing to maintain goodwill. First, lotteries have an \textit{ex ante} equality attached to them. Second, lotter-

102. It is widely alleged that scalpers do more than simply hire "diggers" to stand in line when tickets are distributed by queue. See discussion \textit{supra} part II.C.3; see also Chuck Philips, \textit{Ticketmaster Has 'Had It' with Brokers; Lawsuit: Ticket Agency Asks $1 Million in Damages Against an Encino Broker for Allegedly Thwarting the Legal Distribution System}, L.A. \textit{TIMES}, Apr. 11, 1991, at F1 (describing Ticketmaster's allegation that a broker bribed employees of a Ticketmaster outlet to reserve blocks of seats before they went on sale).

103. Martel, \textit{supra} note 14, at 40.


105. \textit{See} Elster, \textit{supra} note 93, at 8. For example, each team competing in the Super Bowl receives an allotment of 17.5\% of the total number of tickets. Alison Muscatine, \textit{Super Bowl Tickets Not For Everyone; Agencies Buy Them, Hike Up the Price}, WASH. \textit{POST}, Jan. 14, 1992, at A1. The competing teams conduct a lottery amongst their season ticket holders with special rules to determine who may buy the Super Bowl tickets. \textit{Id}.

106. \textit{E.g.}, tickets for the Jackson's 1984 "Victory Tour" were distributed by a mail order lottery system "[i]n an effort to discourage counterfeiting and scalping and to insure a fair distribution of tickets." Leslie Bennetts, \textit{Jackson's Countdown Begins}, N.Y. \textit{TIMES}, July 5, 1984, at C11.

ies are relatively cheap to administer. Third, lotteries can achieve a broad base distribution, generally reflecting the pool of entrants. Finally, lotteries create a smaller dead-weight loss of consumer surplus than queues. Lotteries will therefore allow winning entrants to retain most of the consumer surplus.

When lotteries are used to allocate underpriced tickets, the scalper who manages to obtain and resell tickets again serves the role of restoring price allocation amongst consumers. The presence of scalpers may also distort the initial allocation if eligible persons enter the lottery solely to resell any tickets received to scalpers. Such entrants serve as paid proxies for higher valuing users. Where scalping exists and transaction costs of entering the lottery and reselling any tickets received are zero, all eligible persons should enter a lottery for underpriced goods.

Scalpers obtaining tickets distributed by lottery face costs different from where tickets are distributed by queue. Rather than paying diggers to stand in line, scalpers need to find eligible entrants willing to resell. The "endowment effect," whereby a person's reservation price for sale of a good is higher than the same person's reservation price for purchase of the good, is likely to severely restrict the flow of tickets to higher-valuing consumers. Thus, in order to obtain a good supply of tickets, scalpers will most likely have to provide incentives for persons who have no interest in the event—"lottery diggers"—to enter the lottery. These costs may be higher or lower than the costs of obtaining tickets distributed by queue. Scalpers might also engage in commercial bribery and promoter insider scalping to circumvent the lottery.

3. Merit

Promoters occasionally allocate scarce tickets by merit to reward certain individuals with the privilege of purchasing a ticket. Such an allocation serves two important ends for the promoter. First,

C.L. L. Rev. 113, 120-23 (1977); Elster, supra note 93, at 37, 63-73.
108. Greely, supra note 107, at 117.
110. The cost of entering a lottery is generally quite small in comparison to the cost of waiting in line.
111. See Martel, supra note 14, at 36.
113. See supra notes 69 and 102.
114. See Martel, supra note 14, at 33-35.
merit criteria are often designed to reinforce goodwill for the organization.\textsuperscript{116} For example, football teams offer prior season ticket holders the option to renew their tickets every year.\textsuperscript{116} New applicants for season tickets must place their names at the bottom of a long waiting list, and tickets become available only when a previous holder fails to renew.\textsuperscript{117} This design rewards continued loyalty and more importantly assures a continuous revenue stream through good and bad years.\textsuperscript{118}

Second, merit criteria can serve to conceal auction-based pricing when an overt auction would impair goodwill.\textsuperscript{119} College sports teams sometimes allocate tickets only to "valued alumni," that is, those who have contributed vast sums of money to the school.\textsuperscript{120} Non-profit organizations, sometimes exempted from scalping laws,\textsuperscript{121} often sell tickets in an auction fashion to those who give the highest donations.\textsuperscript{122}

Scalpers may play little role in a merit-based distribution scheme if the tickets are ultimately distributed by an overt or covert auction or if the recipients are bona-fide consumers subject to the endowment effect.\textsuperscript{123} Scalpers do play a role, however, when endowed consumers must purchase more tickets than they can use, either to a single event or to a series of events. Consumers will often sell such excess tickets to brokers who will market them to other consumers.\textsuperscript{124}

III. Scalping as Harm

With an understanding of why promoters chose to underprice tickets and the role scalpers play in the resulting distribution...
schemes, we can now shift our focus to a normative perspective of whether scalping is a problem and, if so, what responses, legal or otherwise, are warranted. Other authors have considered this question and have come to a variety of conclusions. Thomas Diamond concluded that scalping is harmful to consumers with no corresponding benefit to anyone other than scalpers.\textsuperscript{125} Jonathan Martel concluded that consumers have no vested right to consumer surplus, and, except where public funds or facilities are involved, scalping should be permitted as an attractive form of wealth distribution.\textsuperscript{126} Happel & Jennings point out that various constituencies, including promoters, performers, initial ticket holders, potential ticket holders, those who cannot afford tickets from scalpers, and finally, scalpers themselves, have differing interests with regard to scalping, and that the act of reselling for a profit must be distinguished from its nuisance effects.\textsuperscript{127} They conclude that existing scalping laws which entirely prohibit scalping are too broad, and that laws should be tailored to the needs of each constituency.\textsuperscript{128}

My normative analysis is similar to that of Happel & Jennings; however, I believe that only two constituencies truly matter to a legislator grappling with a proposed ban on scalping: Ticket consumers as a whole, in whose name scalping laws are written, and promoters, performers, and teams as a whole, those who lobby most vigorously for antiscalping laws. The harms to consumers and the harms to promoters are intimately linked, but separation for analytical purposes is crucial to an understanding of the appropriate manner to frame responses to ticket scalping.

A. Harms to Consumers

1. Previous Theories and Criticism

Two views, illustrated by the quotes which begin this article, dominate public discussions on the impact to consumers of ticket}

\textsuperscript{125} Diamond, supra note 14, at 77-81. Diamond admits, however, that “[f]or those to whom cost is not a relevant factor, the scalper’s manipulation of price may provide a welcomed source of tickets.” Id. at 73. As will be demonstrated, Diamond fails to recognize that scalpers might be the only source of tickets, not just for the wealthy, but for anyone unable to exploit the non-price distribution mechanism. See infra part III.A.

\textsuperscript{126} Martel, supra note 14, at 18, 25, 40-41 (In Martel’s view, scalping creates wider wealth distribution because a scalper spreads the consumer surplus to himself and his employees while, in the absence of scalpers, one consumer retains the surplus for each ticket.).

\textsuperscript{127} Happel & Jennings, supra note 14, at 10-11, 14.

\textsuperscript{128} Id. at 14.
scalping. The first is that scalpers are pure parasites on the ticket market. They unfairly remove tickets from the legitimate distribution sites and raise prices to whatever the market will bear. In economic terms, scalpers merely extract consumer surplus without performing any service which would merit the profit. Thomas Diamond made this argument, and it is always the argument that state legislators hear when they consider bills to restrict ticket scalping. The second view is that scalping is merely "the purest form of free enterprise," a legitimate operation where scalpers perform a service and charge as much as they can for it. Neither view accurately describes the scalper's role in the ticket marketplace. I shall consider the first view below and the second in part B of this section.

Proponents of the view that scalpers "rip off" consumers by cornering existing supplies and raising the price make several fundamental errors. Most of those errors are illustrated in the following excerpt from Diamond's argument that scalpers are different from ordinary retail merchants:

In ordinary commercial transactions, the merchant is an essential component of the marketing process; he provides the consumer with the conveniences of accessibility and centrality. The merchant possesses an unquestioned right to make a profit for the vital services he performs. There is generally no need to regulate his prices even though they may be excessive; if consumers adjudge his prices to be unreasonable, they have the freedom to purchase the desired goods or services from less expensive merchants.

The scalper's activities stand in stark contrast to those of the merchant. Instead of providing a recognized and essential service in the marketing process, the scalper deprives consumers of a valuable, previously existing service—the availability of tickets through the box office. As the scalper depletes the box office supply of tickets, he lessens the consumer's opportunity to purchase at the lowest price. The scalper eliminates the lower-priced competition, thus creating his own market. No alternative source exists at the original price. Although people who want to obtain tickets can choose among scalpers (provided there is more than one), they cannot avoid the exorbitant prices. The scalper obtains the higher price as a result of his intrusion into the market.

129. See supra text accompanying notes 1 and 2.
130. See supra text accompanying note 1.
131. See supra text accompanying note 2; Goodman, supra note 12.
132. Diamond, supra note 14, at 77-78.
The first error in Diamond's argument is its implicit assumption in referring to "the consumer" that all consumers would have access to tickets at the box office price in the absence of scalpers. Where this is so, the box office price is at least as high as the market clearing price, and scalpers could not earn a profit. Wherever scalpers can earn "exorbitant prices," there would be in the absence of a resale market a substantial number of consumers who could not obtain a ticket at the box office, or any other, price. The second flaw in Diamond's argument is that it tends to forget that in the absence of scalpers, promoters have full monopoly control over the price of tickets. While it is true that the promoter faces different constraints on his monopoly power than does a scalper, scalpers do not inject monopoly power into an otherwise competitive arena. If anything, scalpers diffuse the monopoly power of promoters and their primary contractors. Diamond's third error, which is related to the first, is that he fails to consider that, like the retailer who "possesses an unquestioned right to make a profit," scalpers provide "the conveniences of accessibility and centrality." They allow a ticket consumer to bypass the non-price distribution mechanisms and obtain a ticket which she otherwise might not have been able to obtain in exchange for a cash premium which she willingly pays.

Another consumer-based argument, not put forth by Diamond, is that scalpers deprive "real fans" of the ability to obtain tickets, or at the very least obtain tickets at a "fair" price. Underlying this argument are several assumptions of dubious validity. The first is that the status of "real fan" creates an entitlement to a ticket or to a below-market price. Most promoters do not use merit-based criteria to distribute tickets, so the "real fan" faces the same obstacles as more casual patrons. Second, it forgets that when there are more "real fans" than seats in the venue, many "real fans" are shut out no matter what distribution mechanism is employed. Finally, it assumes

133. See supra part II.A.
134. See Martel, supra note 14, at 19. Like any monopolist, the promoter price is limited by demand, which is affected by the availability of imperfect substitutes.
135. See, e.g., State v. Leary, 587 A.2d 85, 89 (Conn. 1991) ("The legislature could reasonably have relied on market forces that affect owners of entertainment facilities differently from fly-by-night ticket scalpers in deciding to regulate only the markup charged by the latter.").
137. Diamond, supra note 14, at 78; see also supra text accompanying note 132.
138. Id.
139. See, e.g., Goodman, supra note 12, at 16 (quoting Bill Graham, "Real fans—the average fan—doesn't have a fair shot.").
that "real fans" are better able to exploit non-price distribution mechanisms. This is not necessarily the case. But, even where it is, why should the spirit of consumer protection favor a limited class of consumers over the entire pool of consumers?

None of the above discussion is meant to say that consumers are not offended by scalpers and the high prices they sometimes charge. Clearly many, if not most, consumers are offended. The real harm, though, seems to be due to the inherently limited nature of live entertainment. Laws which prohibit scalping might benefit consumers in the sense that the consumer surplus is preserved for the consumers, but they restrict availability of tickets to those who can exploit the non-price distribution mechanisms and thereby harm a significant number of consumers. Laws against resale also force consumers to bear the costs of non-price distribution mechanisms such as waiting in line and working (or paying) to include oneself in the merit-based distribution group.

2. Irrational Preferences

The offense to consumers derives in part from mental standards of fairness. Consumers have strong standards of community fairness which are violated when one party gains by imposing costs upon another. Standards of fairness require a reseller to price goods in a cost-plus manner, thus indicating that a fair division of consumer surplus is a "fair" profit to the seller with the rest belonging to the consumer. Consumers apparently perceive unfavorable shifts in the distribution of consumer surplus as comparable to a theft of a previous entitlement.

Some goods, such as financial instruments and works of art, can be price rationed without violating standards of fairness. Kahneman, et al. claim that price rationing is considered fair when an active resale market exists and the good can be seen as a store of

140. See supra notes 79-80 and accompanying text.
141. Martel, supra note 14, at 20. But see supra note 39 and accompanying text.
143. Martel, supra note 14, at 22-24 also discusses these issues.
144. Kahneman et al., supra note 50, at 734-38.
145. Id. at 731.
146. Id. at 734.
147. Price rationing is the allocation of scarce goods based upon the consumer's willingness to pay.
148. Kahneman et al., supra note 50, at 736.
value. 149 Where a resale market exists, explain the authors, "the potential resale price reflects the higher value of the asset and the purchaser is therefore not perceived as sustaining a loss." 150 If the authors are correct in their intuition, the reason consumers perceive price rationing of tickets as unfair, even though a resale market exists, is that the ticket is wholly consumed on the date of the performance. The ticket is like a hot potato—someone eventually sustains the "loss" of the inflated price.

This discussion raises the fascinating and troubling issue of whether the police power of the state should protect irrational consumer preferences. Ticket scalping is not fraud since the terms of the transaction do not deceive the consumer in any way. 151 At worst, scalping violates a consumer's perceived entitlement to consumer surplus. It is interesting to note that while scalping is illegal in a substantial minority of states, other practices judged unfair by respondents to Kahneman, et al.'s surveys are perfectly legal. 152 The literature on irrational consumer preferences has to date been positive rather than normative—it describes behavior without placing value judgments upon such behavior. That is, the literature does not specify normative criteria to judge whether these preferences should be protected, sanctioned, nurtured, or discouraged. I consider the issue in the following section.

3. Appropriateness of Legal Protection for Consumers

The law has protected consumers against perceived harms from scalping in two different ways. It has criminalized resale at a profit in some jurisdictions, and it has provided a private cause of action in two jurisdictions. 153 I will now consider whether these protections are appropriate.

The market for entertainment tickets is not a monopoly. 154 It is

149. Id.
150. Id.
151. Fraud is "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." BLACK'S LAW DICTIONARY 660 (6th ed. 1990).
152. Kahneman et al., supra note 50, at 733-38 (survey questions 8 and 14, involve raising a tenant's rent, which may be illegal in a local community with rent control laws).
153. The private cause of action is advocated by Diamond, supra note 14, at 81-92 (recommending extension of unfair trade practice law to ticket scalping); see also supra note 26 and accompanying text (state statutory sources for consumer remedies).
154. Monopoly "is a market situation in which there is a single seller of a particular product for which there are no good substitutes." CURTIS, supra note 35, at 59.
better described as monopolistically competitive.155 While each promoter has monopoly power over the event in question, relatively close substitutes exist, including other concerts or sporting events, television or radio broadcasts of the event, recordings, and other types of entertainment. Thus, the standard justifications for regulation of monopoly should not apply to the ticket market.156

Regulation of markets for essential goods might be justified where the need for goods at a below-market price outweighs the distorting effects on markets and the cost of public subsidies. Tickets, however, are not essential—they virtually define the notion of a luxury good.

The law need not use economic rationality as its benchmark for good legislation. However, the push to make market forces conform to non-economic notions of fairness invariably leads the market to react somewhere else. For this reason, a growing body of scholars are questioning the effectiveness of limitations on the freedom of contract for achieving egalitarian ends.157 Consumers have no entitlement to consumer surplus. They often receive it as a result of market forces, but every consumer must sometimes forego consumer surplus where the economic cost of the item approaches the consumer’s reservation price. Tickets in high demand are economically costly items. Where promoters choose not to reap the available profits, their practice should not create an entitlement to receive the ticket at the below market price. More importantly, their practices cannot bestow such an entitlement on all consumers because some consumers will necessarily be unable to obtain tickets at that price. The law should leave the protection of irrational consumer preferences to market partici-

155. Monopolistic competition is characterized by a large number of independent sellers of the product type and unrestricted entry into the industry, but some degree of product differentiation allowing each firm a small degree of monopoly power. Monopolistically competitive industries behave very similarly to competitive industries, and due to unrestricted entrance, economic profits, while possible in the short-run, disappear in the long-run. EDGAR K. BROWNING & JACQUELINE M. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 362-73 (1983).


157. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 122-27 (2nd ed. 1989); see also Richard Craswell, Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 STANFORD L. REV. 361, 376, 386-87, 395-98 (1991) (stating mandatory warranties likely to harm some consumers while helping others, but describing peculiar conditions where mandatory warranty would benefit all consumers while harming sellers); Harold Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. LEGAL STUDIES 223, 225-27 (1972). Cf., Anthony T. Kronman, Contract Law and Distributive Justice, 89 YALE L. J. 472, 508-11 (1980) (arguing that while regulation of contracts is sometimes ineffective in achieving its ends, it may be a more effective means of redistributing wealth than taxation).
pants who have a built-in incentive to maintain goodwill. Where these market participants cannot protect consumers against perceived harms, laws should not try to do so. Such laws will necessarily be unjust to some consumers, and they are likely to be ineffective in achieving their goals.158

4. Regulation of the Ticket Resale Market

Other aspects of the ticket scalping problem might be justifiably viewed as consumer offenses. The harassment, physical dangers, possibilities for counterfeiting, and traffic problems attendant with scalpers who hawk tickets in public, particularly at the site of the event, are legitimate concerns of the state.159 A plausible argument can be made that these problems are not serious enough to merit regulation, but if viewed as serious, control of on-site sales is a legitimate exercise of the state’s police power.

Another potential problem occurs when an event is canceled. Normally, when an event is canceled, consumers can return their tickets to the box office for a refund of the event price.160 Where patrons purchase tickets from a scalper, it is unclear how they can obtain a refund if the event is canceled.161 Presumably, the scalper’s customer can return the ticket to the box office for a refund of the printed price, but this is likely to be of little comfort when the price he actually paid was a substantial multiple of the printed price.

158. See supra note 157 and accompanying text.

159. See, e.g., Loska v. Superior Court, 233 Cal. Rptr. 213 (Ct. App. 1986). The court upheld Los Angeles Municipal Code §42.03(a) prohibiting the sale or offer to sell tickets in a public place as a valid exercise of the police power. Id. at 219. The preamble of that statute states:

WHEREAS, the practice of selling and attempting to sell tickets [in public places] . . . continues to result in the sale of counterfeit tickets[,] . . . assault upon and injury to members of the public[,] . . . purse snatching and other assorted robberies, . . . interference with the normal and lawful flow of vehicular and pedestrian traffic[,] . . . and . . . harassment and annoyance of the public

Id. at 215; see also Happel & Jennings, supra note 14, at 11-12.

160. Ticketmaster, a national primary contractor, refunds the printed price but not the service charge for canceled events. Telephone interview with Janet Masurka, employee of Ticketmaster (Feb. 27, 1992). Ticketmaster service charges depend on the price of the ticket and currently range from $2.50 to $7.00 per ticket. When an event is canceled, ticket purchasers return their tickets to the point of purchase for a refund. If tickets are charged by phone, refund is by mail. Id. Ticketmaster acquired Ticketron, the originator of the remote computer box office service, in 1991, becoming the largest provider of such services in the country. Ticketmaster to Buy ‘Significant Assets’ Of Main Competitor, WALL ST. J., Feb. 26, 1991, § C, at 11.

161. See Bershad & Ensor, supra note 14, at 97.
States might decide that the risk of cancellation should be placed on the ticket seller, and that the scalper must refund the full price paid by the final consumer in the event of cancellation. Such a statute would work best under a comprehensive licensing regime.

One final concern is the alleged connection between scalpers and crime, particularly drug dealing. This is not a consumer concern, but it is certainly a legitimate concern of the state. This problem is better handled by licensing of ticket brokers than outright prohibition of scalping since prohibition invites a black market, and persons who deal in black markets are much more likely to be involved in other illegal activities.

B. Harm to Promoters

1. Empirical Argument

In the last section I argued that the law should not regard resale of tickets for more than the box office price as a harm to consumers. Those who argue, however, that scalping is merely a free-market exercise and should be legal because scalping does not harm consumers as a class have ignored the vital supply side element of the ticket market: The promoter and the entities it represents. As the earlier analysis of promoter underpricing indicates, promoters underprice for a variety of reasons. Where they underprice because of poor market analysis or an inability to price differentiate, they may not be concerned about scalping. Where, however, they underprice because of altruism, maintenance of goodwill, or demographic concerns, scalping directly undermines the business goals of the promoter.

Promoters are virtually always the interest group which lobbies most strongly for laws prohibiting scalping. California provides an excellent case study of the politics of ticket scalping. State senator Bill Lockyer (D-Hayward) introduced a bill in April 1991 to

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162. Only California explicitly provides for this remedy as of this writing. CAL. BUS. & PROF. CODE § 22507 (West 1987).
163. See supra note 23 for a list of statutes with licensing arrangements.
164. See Bershad & Ensor, supra note 14, at 97-98.
165. Id. at 97 (quoting John Carbone, Executive Assistant, New Jersey Attorney General).
167. See supra part II.C.
169. See id.
toughen California's existing ticket scalping law, which applied only to on-site scalping.\textsuperscript{171} Lockyer argued his bill as a consumer protection measure,\textsuperscript{172} but all indications are that consumers played little or no role in the ensuing debate. The bill's chief proponent was the group Californians Against Ticket Scalping, a lobbying group created by Bill Graham Presents, one of the state's most powerful concert promoters.\textsuperscript{173} Graham's group was supported by "the San Francisco 49ers, the Giants, Oakland As, Golden State Warriors, Sacramento Kings, San Diego Padres and numerous promoters and stadium operators."\textsuperscript{174} The California Association of Ticket Agents opposed the measure.\textsuperscript{175} At the hearing in front of the Senate Judiciary Committee, Graham and Bob Weir, guitarist and vocalist of the rock group The Grateful Dead, testified in favor of the bill.\textsuperscript{176} Notably, no article describing the debates in the Senate makes any mention of any consumer group or even any individual consumer supporting or testifying in favor of the bill. The California battle was clearly one between promoters and ticket brokers.\textsuperscript{177}

The spirited support that promoters lend to anti-scalping legislation and the apparent indifference of consumer organizations seems to indicate that the most clearly identifiable harm done by ticket resale of tickets for more than the box office price. Violators would have been guilty of a misdemeanor punishable by up to a $1000 fine and six months in jail. Violators caught selling more than 20 tickets could have been sentenced to $5000 and one year in jail. A second offense would have constituted a felony. See Jesse Hamlin, \textit{Something Else: Ticket Scalpers Under Attack}, \textit{San Francisco Chron.}, Mar. 19, 1991, at E2.

172. \textit{See supra} text accompanying note 1.
173. \textit{See supra} note 1; Hamlin, \textit{supra} note 170.
176. \textit{Id.} Weir testified, "I don't practice my art, my music, to give these parasites something to do to make my tickets more expensive for my fans." \textit{Id.} Weir also "compared ticket brokers to mosquitoes which . . . have no place in the food chain." \textit{Id.} In response to Weir's testimony, a Los Angeles ticket broker bellowed to Weir, "You stick to singing. You're not a bad singer." \textit{Id.}
scalpers is done to promoters. Frustration of distribution schemes targeted to particular demographic segments is a direct harm to promoters. Other harms are more indirect. Low ticket prices please consumers\textsuperscript{178} and increase the goodwill of the promoters and the products tied to the underlying events.\textsuperscript{179} Scalpers interfere with this process, although they do not completely undermine it, since consumers are likely to blame the scalpers rather than the promoters for price premiums.\textsuperscript{180}

2. Normative Analysis of Promoter Protection

If we view ticket scalping as a harm to promoters rather than as a harm to consumers, the analysis rises above the confines of the typical debate on the subject. The question changes from whether scalpers are legitimate free-market entrepreneurs or leaches on the public to whether promoters have a right to control the distribution of tickets to their events, and, if so, how to effect a sufficient degree of control. I consider the first prong of this question below and the second prong in part IV.

As discussed earlier in part II.B., promoters and performers often stage an event for purposes beyond profit maximization from the event itself.\textsuperscript{181} Where this is their purpose, society benefits from facilitating their efforts.\textsuperscript{182} Put another way, charging below-market ticket prices must create more profit in the long-run than single-event profit maximization; otherwise, we would not see below-market ticket prices as a stable phenomenon. In economic terms these additional profits increase the allocative efficiency of resources in the entertainment industry\textsuperscript{183} but decrease the allocative efficiency of ticket distribution (the highest valuing consumers do not necessarily get to attend the event).\textsuperscript{184} Economics provide no way to balance

178. Low ticket prices certainly please those who are able to obtain tickets. An exception might be those who expend their entire consumer surplus waiting in a queue. See supra note 39 and accompanying text. Low ticket prices might indirectly provide goodwill even for those unable to obtain tickets. Consumers shut out of a queue or lottery process might perceive that they had a chance to obtain tickets, a perception that those who are bid out of an auction do not share.

179. See supra part II.B.

180. Thaler, supra note 50, at 211; see also Happel & Jennings, supra note 14, at 13.

181. See supra Part II.B.


183. This is another way of saying that the same amount of labor and capital for a live event will produce more wealth if tickets are underpriced than if tickets are sold at market price.

184. See Martel, supra note 14, at 3.
these conflicting inefficiencies. We must look to other normative criteria to judge whether the law should facilitate ticket underpricing.

A foundation of our society is the freedom to conduct both personal and business affairs in the manner which one chooses.\textsuperscript{185} Promoters and the artists and athletic organizations whom they represent are in every sense the owners of the events they bring about. Combined, they provide the talent and the capital for the event, and they bear the risk of success or failure. An essential attribute of ownership is control. Those who own the event should have control at least to the extent that it does not interfere with the vested rights of others. The underpricing promoter might interfere with the interests of consumers who place a high monetary value on the ticket, but high valuing consumers have no vested right to the goods they desire. I therefore argue that promoters, artists, teams, and venue owners have a moral right to control distribution of tickets to their events.

Whether or not one agrees with this argument, putting control of ticket distribution in the hands of promoters will further serve the irrational consumer preferences described above since promoters usually have a strong interest in maintaining their goodwill with consumers.\textsuperscript{186} The only interests which will not be served by the policies which this article advocates are those of the ticket brokers and those of the high valuing consumers who prefer price over non-price allocation.

3. \textit{United States v. Mount}

Judge Easterbrook seized the issue of ticket scalping in this recent opinion.\textsuperscript{187} While this case was based upon criminal theft rather than any anti-scalping statute or civil cause of action against a scalper,\textsuperscript{188} the holding and dicta support the views advocated by this article.

The facts of the \textit{Mount} case are as follows. John Mount was a ticket broker who agreed to purchase from Steven Gray 30 strips of Minnesota Twins playoff and World Series tickets with a face value of $400 each (total price $12,000). Mount agreed to pay Gray $1000 for each strip (total price $30,000). Mount was aware that Gray intended to obtain the tickets by fraud, but took efforts to ensure that

\textsuperscript{185} Like all such broadly stated propositions, this one has its limits. \textit{E.g.}, The Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988) (prohibiting discrimination and segregation in places of public accommodation).

\textsuperscript{186} \textit{See supra} part III.A.2.

\textsuperscript{187} \textit{United States v. Mount}, 966 F.2d 262 (7th Cir. 1992).

\textsuperscript{188} \textit{Id.} at 264.
the Twins were to be paid the $12,000 face value of the tickets.\textsuperscript{189} As it turned out, Gray was cooperating with federal agents, and Mount was arrested before the transaction was consummated.\textsuperscript{190}

The question on appeal was whether the trial judge had correctly applied the federal sentencing guidelines to the offense. The judge added points to the formula provided under the guidelines "after concluding that the offense involved a 'loss' of more than $10,000 but less than $20,000."\textsuperscript{191} Mount challenged these additional points on the grounds that since he intended the team to receive the face value for the tickets, the team’s "loss" as defined under the guidelines was zero.\textsuperscript{192} The court concluded that under the facts viewed in a light most favorable to the defendant, the "loss" to the Twins was at least $18,000, the market value of the tickets ($30,000) minus the money to be paid ($12,000).\textsuperscript{193}

Judge Easterbrook recognized that "[p]romoters of sporting events routinely oppose scalping and seek legislation against the practice, suggesting not only that they are willing to set prices below the level fans will pay but also that they want the monetary cost borne by the fan in the seat to fall below the market-clearing level."\textsuperscript{194} He explained the court’s holding as follows:

A vendor may choose its customers, and the fraud in a case such as this deprives the seller of that choice—a valuable commodity indeed when the seller knows that it is offering a bargain . . . .

. . . . The Minnesota Twins are not discounting tickets out of filial devotion, for . . . the club does not derive utility from making its customers better off as such. Nonetheless the team has business reasons to set low prices and derives value (out of which Gray and Mount defrauded it) by being able to make these gifts . . . . No matter why the Twins set the prices as they did, the difference between face and market price was an element of value to the Twins. Mount’s fraud, if successful, would have deprived the team of that value . . . .\textsuperscript{195}

\textsuperscript{189.} Id.
\textsuperscript{190.} Id.
\textsuperscript{191.} Id.
\textsuperscript{192.} Id. at 265-66.
\textsuperscript{193.} Id. at 266. Judge Ripple concurred in the judgment, but stated he would have valued the "loss" at $12,000. "This is a common-sense approach that avoids making the term of a criminal sentence turn on conjecture." Id. at 267 (Ripple, J., concurring).
\textsuperscript{194.} Id. at 263.
\textsuperscript{195.} Id. at 266-67.
Judge Easterbrook analogized Mount's theft to a theft of "10,000 caps the team plans to give away at the next game."\textsuperscript{196} Easterbrook commented that by Mount's logic, the value of this hypothetical theft is zero since the Twins were not planning on charging for the caps.\textsuperscript{197}

Judge Easterbrook's analysis implies that promoters have a property interest in the difference between the box office price and the market price. If theft of tickets is to be valued at the market price, it is a small step to say that a scalper who collects a price premium that the promoter did not want charged "steals" the promoter's property. The scalper has "stolen" the gift the promoters intended to give to the fan who ultimately attends the event. While this "theft" should not be actionable under the criminal law for reasons stated below, the "theft" falls nicely into a theory of private law injunction and recovery.

IV. PROTECTING THE INTERESTS OF PROMOTERS

A. Criminal Law

Existing criminal law regimes provide the promoter with protection from scalping by subjecting anyone who sells a ticket for above the box office price or a prescribed premium to criminal penalties.\textsuperscript{198} Promoters have fought numerous legislative battles to have such statutes enacted.\textsuperscript{199} Promoters clearly believe that criminal prohibition, although ostensibly a consumer protection measure, provides excellent protection of promoter interests. While criminal statutes certainly provide some protection, they have several weaknesses which make them undesirable tools for promoter protection.

In the absence of fraud or theft businesses do not generally rely on the criminal law to protect their interests.\textsuperscript{200} Where the injury is only to goodwill, the remedy is always civil rather than criminal.\textsuperscript{201}

\textsuperscript{196} Id. at 266.
\textsuperscript{197} Id.
\textsuperscript{198} See supra note 19 and accompanying text.
\textsuperscript{199} See supra notes 170-177 and accompanying text.
\textsuperscript{200} See Bershad & Ensor, supra note 14, at 117 (quoting a New Jersey judge, "[T]he anti-scalping amendment . . . is the only section of the state's Consumer Fraud Act with criminal sanctions.").
Second, laws against scalping are difficult to enforce and often not enforced at all.\textsuperscript{202} Because scalping is a consensual transaction between buyer and seller, no victim reports the crime. Police forces, especially in urban areas where scalping is most prevalent, have more important tasks than enforcing laws against scalping. Third, in states where scalping is illegal, out of state brokers advertise in local papers and sell tickets by phone order.\textsuperscript{203} Finally, anti-scalping statutes are often avoided by bundling a ticket along with another service such as a bus ride to the show or hotel accommodations.\textsuperscript{204}

From a consumer standpoint, criminal anti-scalping statutes have another weakness. They unwittingly set the scene for promoter

\textsuperscript{202} See supra note 10.

\textsuperscript{203} Jim Parsons, Baseball Capitalists Are Bullish on Twins, MINNEAPOLIS STAR TRIB., Oct. 5, 1991, at 1B (describing Arizona broker selling tickets to Minnesota Twins games for $300 each); see also Chuck Phillips, Why Does a $30 Ticket Become a $600 Ticket?; The Answer Has Set Off—Once Again—A Drive to Set Limits on the Prices That Ticket Brokers Can Charge in California, L.A. TIMES, May 27, 1990 (citing statement of Richard M. Kessell, executive director of the New York State Consumer Protection Board, that the New York law has been largely ineffective due to out of state brokers). New York amended its law in 1991, adding the proviso,

The legislature further finds that many ticket resellers advertise and sell tickets to New York state residents from locations outside the state. It is the legislature's intent that governmental bodies charged with enforcement of this article have the authority to regulate the activities of out-of-state resellers within this state to the full extent of the state's powers under the federal and state constitutions and that this article be construed in light of this purpose.

N.Y. ARTS & CULT. AFF. LAW § 25.01 (McKinney 1984 & Supp. 1993). It is unclear whether New York authorities will attempt to prosecute out-of-state sellers and questionable whether such a prosecution would be constitutional.

Some states, for example Massachusetts and New Jersey, explicitly limit the reach of their statutes to in-state events. MASS. GEN. LAWS ANN. ch. 140 § 185A (West 1991); N.J. STAT. ANN. § 56:8-26 (West 1989). Massachusetts brokers advertise in Connecticut newspapers for tickets to events in Connecticut, where scalping is also prohibited, CONN. GEN. STAT. § 53-289 (West 1991). E.g., NEW HAVEN ADVOC., Feb. 27-Mar. 4, 1992, at 29 (advertisement by Ticketworld, a Massachusetts company); see also Bershad & Ensor, supra note 14, at 120-22.

\textsuperscript{204} Season ticket holders for the San Francisco 49ers had to commit "to a package of air fare, ground transportation, hotel accommodations for four days along with various theme park and party extras" at a cost of $1600-$2200 per ticket to enter their team's lottery for Super Bowl XXVI Tickets. "Reason given—this will eliminate ticket scalping. C'mon guys, who's scalping whom?" LETTERS TO THE GREEN, SAN FRANCISCO CHRON., Dec. 29, 1990, at D5; see also All-Star Tickets Skyrocket from $75 to $1000, USA TODAY, Feb. 6, 1992, at 6C (description by Mark Barnett, Florida Assistant State Attorney General, of loophole allowing brokers to charge premium prices by offering travel or hotel packages).

Thaler notes that this practice eases the transaction disutility felt by consumers. Thaler, supra note 50, at 211 (noting that, "[b]ecause of the shape of the value function in the domain of losses, a given price movement seems smaller the larger is the quantity with which it is being integrated."); see also Bershad & Ensor, supra note 14, at 122.
insider-trading. Because scalping statutes are seldom enforced and easily evaded, scalpers still demand tickets for events in states where the practice is illegal. Promoters can easily participate in the scalping business with little chance of exposing themselves to criminal liability. Promoters may do this in a variety of ways. One possibility is to sell blocks of tickets to scalpers at face value with a tacit understanding that the promoter will receive a kickback from later resale. Another is to provide tickets to out-of-state brokers who can legally resell the tickets at a premium. Finally, some state statutes prohibit resale at a premium only when done without the permission of the promoter. Where the promoter participates, the scalper has implicit if not explicit permission.

The ideal regime for promoters is one in which they can reap the profits from market clearing ticket prices without suffering the corresponding goodwill loss. Where scalping is illegal and promoters secretly participate, promoters enjoy the best of both worlds. Criminal laws might thus create the unintended result of perpetuating a fraud on ticket consumers.

B. Self-Help

Happel & Jennings advocate self-help for protection of promoter interests. Promoters can employ a number of non-legal measures to control scalping of their tickets. The most commonly employed technique is limiting the number of tickets each person may purchase. This technique is likely to be ineffective. Where distribution is by queue, scalpers simply hire a large number of diggers to stand in line and have each purchase the maximum number of tickets. Ticket limits might be more successful in lottery distribu-

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205. Promoter insider-trading is discussed supra part II.C.3.
207. See Thaler, supra note 50, at 211 (“the transaction disutility generated by a high black market price is not attributed to the original seller”).
208. Promoters still suffer some loss of goodwill due to the higher price the consumer ultimately pays. See supra notes 77-86 and accompanying text for a discussion of promoter goodwill.
209. Happel & Jennings, supra note 14, at 14. These authors do not, however, discuss what self-help measures are available or whether any of them can be effective.
210. Promoters often institute line control measures to enforce ticket limits. Such measures help to preserve the peace, but they do nothing to prevent diggers from obtaining large quantities of tickets. Philips, supra note 104, at F10.
but scalpers can circumvent such limits by hiring large numbers of people to enter the lottery. Another self-help method is to announce the date of ticket sales very close to the actual performance date. This practice no doubt makes the scalper’s job more difficult, but it probably does little to prevent ticket scalping unless sales are announced within days or hours of the show date. To stop scalping at the site of the event, promoters can release additional tickets for sale through the box office on the day of the event, thus undercutting the profits of street hawkers. This practice will be effective only to the extent that consumers do not anticipate it. If consumers anticipate that tickets will be sold and the quantity of tickets demanded at the box office price is higher than the number to be sold, more unticketed patrons will show up at the event than tickets available through the box office and scalpers will have a market. These additional patrons might cause significant congestion and crowd control problems.

Phil Collins used more extreme measures to control scalping for a concert he gave in a 2200 seat auditorium in San Diego. Tickets to the show went on sale only 24 hours before the concert. Seats were assigned randomly and limited to one per person. Rather than give out the ticket, the box office required the customer to show identification and sign a form in exchange for a receipt. At the concert, patrons had to bring back their receipts and show identification to pick up their tickets. According to a number of industry experts, this type of scheme is only practical when a very popular act plays a very small venue.

Professional sports teams have the option of revoking season tickets resold at a premium. Many season tickets are owned out-

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211. Where demand is extremely high, distribution by telephone order approximates a lottery. The priority of distribution will be determined by the telephone system and the order in which the primary contractor answers the calls.

212. See At Last, U2 Concert Tickets Go on Sale this Afternoon, Hartford Courant (Conn.), Feb. 21, 1992, at C2 (promoters announced ticket sales less than three weeks before the date of the show in effort to curtail scalping).


214. Id.

215. E.g., Sam Smith, League Vetoes a ‘Symbolic’ Uniform Switch, Chi. Trib., Dec. 21, 1990, at C7 (describing Chicago Bulls threat to revoke season tickets of those caught selling tickets for above face value). At least one court has held that teams may refuse renewal of season tickets for those caught scalping. See Ray Gibson, Ruling Lets Cubs Cut Broker Off, Chi. Trib., Mar. 16, 1991, at C5 (describing holding of Cook County judge that the Chicago Cubs may refuse renewal of season tickets to a broker).
right by ticket brokers, others are owned by bona-fide fans who sell the tickets they cannot use to a broker. A vigorously pursued non-renewal policy should be extremely effective at curtailing scalping to sporting events.

Finally, promoters might adopt an attitude of "if you can't beat 'em, join 'em." The practice of house scaling, or charging market prices for the best seats at a venue, might be gaining momentum with some rock artists and some sports teams have already introduced scaled pricing for seats to popular events. Some feel that since consumers in some markets must pay significant premiums to scalpers for the best seats, consumers will actually prefer the artist receive the price premium rather than a scalper. The scaling alternative, however, has only limited appeal, especially for those artists who wish to maintain a goodwill base among middle and lower-income consumers.

C. Civil Lawsuits

The most effective way for promoters to enforce low ticket prices would be a civil cause of action against anyone who resells a ticket at higher than some agreed upon price. To date, no state explicitly provides such a cause of action, and my research has revealed no case where a promoter attempted such a cause of action.

Nonetheless, a properly designed civil cause of action has many advantages over criminal prohibition. First, the enforcement costs are placed on the promoter rather than on the public police department and criminal court system. Since promoters wish to restrict the liberty of contract to further their business purposes, it is appropriate that they bear the costs of doing so. Second, a civil cause of action for damages can disgorge the scalper of his ill-gotten profits while compensating the promoter for the loss of goodwill the scalper caused. Third, conditions for resale would be set by the promoter rather than by an inflexible statute. Since prohibiting resale at a profit

216. See, e.g., Gibson, supra note 177.
217. See, e.g., Parsons, supra note 203, at 1B.
219. For example, the Los Angeles Lakers charge up to $350 for "celebrity courtside seats." Lakers Are Hottest of The Hot; Popular NBA is a Big Ticket Item, WASH. POST (Capital), Nov. 4, 1989, at D6.
221. See supra notes 77-86 and accompanying text.
reduces the value of the ticket to at least some consumers, promoters will not always choose to restrict resale for fear that such a restriction might hurt sales.

Fourth, by contracting with certain resellers, promoters can participate in the profits from scalping if they so desire. Such arrangements allow scalpers to serve as partial underwriters for an entertainment event by agreeing to purchase a certain number of tickets at face value and bear the risk that demand will be lower than expected. In return for that risk, scalpers are allowed to earn a profit on the tickets that they resell. Fifth, a promoter can use the publicity from a lawsuit against scalpers to bolster goodwill. The promoter will appear to be serving the interests of consumers, an appearance that can be made even more convincing by donating any awards to charity. Finally, the availability of a civil cause of action will tend to lay bare promoter insider-trading. Where scalping occurs and promoters do not sue, consumers will infer that the promoter is either indifferent to their interests or actively involved in the enterprise.

Perhaps the only weakness of a civil action as opposed to criminal prohibition is that the costs of monitoring scalping activity and the costs of filing suit will prevent promoters from suing all but the most visible ticket brokers. Some scalping will always occur that promoters either cannot detect or is too low-scale to make a lawsuit worthwhile. This problem is far less serious than it might appear at first glance, particularly when one considers that the current crop of criminal laws is usually ineffective against both brokers and incidental sales. In order to protect their goodwill, promoters need only deter the activities of the large, established brokers. The vast majority of scalped tickets are sold by brokers who advertise publicly and rely on corporate purchases for their business base. These brokers do most of the harm to promoters’ goodwill. They obtain vast numbers of tickets, often the best seats, thus restricting the number and

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222. See supra part II.C.3. and text accompanying notes 207-08.

223. For instance, the Chicago Tribune analyzed forty-one cases in which street scalpers were arrested. Only two defendants were eventually found guilty. Twenty-six of the cases were dismissed, and in the other thirteen, the defendants failed to appear and either lost their bonds or had default judgments entered against them. Ray Gibson & Mark Caro, For Scalpers, the Hit-and-Run Is on with Every Pitch, CHI. TRIB., July 21, 1992, §1, at 1; see also Gibson, supra note 10, at 1.

224. See Parsons, supra note 203 (describing Arizona ticket broker who advertises in Minneapolis and comments, “We've got a lot of good corporate clients there. Corporations are our best customers. They frequently want blocks of tickets to entertain their clients and they want them on short notice.”)
quality of seats available at the box office price. More importantly, they let the public know through their advertisements that they have the best seats for sale, making a mockery of promoter attempts to set "fair" prices for tickets. The occasional sale by a street hawker affects the supply of tickets very little and does virtually no public harm to the image of the promoter. To the extent that street scalping is a problem, it can be effectively controlled with on-site prohibitions enforced by the criminal law.

A cause of action against scalpers has four important prerequisites. First, ticket resellers must be subject to state or local license, bond, and accounting requirements. These are essential to the availability of a defendant, information for discovery, and possibility for collection. Many states already provide sufficiently comprehensive licensing schemes. Secondly, restrictions on resale must be part of the contract between purchaser and promoter. The simplest way to incorporate a restriction is to print it on the ticket itself and state that such restriction is binding against any holder of the ticket. Additional forms of notice might also be employed. Third, courts must be willing to enforce these clauses not only against the original parties to the transaction, but also against all subsequent holders of the ticket. Finally, either the substantive law or the restriction itself must provide a remedy sufficient to deter scalpers and make suing worthwhile for the promoter. The remedy can be an injunction against current and future sales of tickets at a premium or damages.

Below are some potential sources of law for a promoter cause of action. The descriptions below set out ideas in relation to each potential source, but are quite incomplete statements of the law in each field. Anyone contemplating an actual cause of action against a scalper is well advised to thoroughly research the law of each field in the particular jurisdiction.

1. By Statute

New York is the only state which currently has an anti-scalping statute worded broadly enough to explicitly create a cause of action.
TICKET SCALPING

for promoters. The New York statute provides a cause of action for "any person who has been injured by reason of a violation" of the ticket scalping law. The aggrieved party may sue for an injunction or damages in the amount of "actual damages or fifty dollars, whichever is greater," or both.

The statute as currently worded is of some value to promoters in that it provides for an injunction against continued scalping. The remedy of injunction is not terribly useful for single events since much of the damage is already done by the time a promoter discovers the activities of a scalper. Even a preliminary injunction would leave a window sufficient for scalpers to earn significant profits. However, if a court is willing to enjoin a scalper from reselling at a premium for all future events of the promoter, artist, or team, or at the particular venue, then the statute would become a powerful weapon against scalpers.

The damages provision is, however, wholly inadequate. It will be very difficult to prove actual damages for loss of goodwill, and a recovery of $50 is an insufficient incentive for a promoter or performer to sue and an even more ineffective deterrent to a broker.

A better statute would either provide for enforcement of liquidated damages clauses written directly on the ticket or allow far greater statutory damages. Any contractual or statutory damage provision should at least equal to the total dollar amount of premiums charged for all tickets the scalper sold to the event in question.


231. Id. § 25.33.

232. The entire text of § 25.33 is:

Notwithstanding any right of action granted to any governmental body pursuant to this chapter, any person who has been injured by reason of a violation of this article [regulating ticket resale] may bring an action in his or her own name to enjoin such unlawful act, an action to recover his or her actual damages or fifty dollars, whichever is greater, or both such actions. The court may award reasonable attorney's fees to a prevailing plaintiff.

233. Id.

234. The promoter must obviously first discover the actions of a scalper before he can file for a preliminary injunction.

235. This difficulty in proving actual damages is illustrated by the passage of § 43(a) Lanham Act, 15 U.S.C. § 1125 (1988). This section created a federal cause of action for anyone damaged by the false product descriptions made by a competitor about either the competitor's or the plaintiff's product. Actual damages need not be proven for a § 43(a) action. Section 43(a) was intended to supplement the common law action for trade disparagement which was ineffectual because it required a showing of actual damages as a prerequisite for obtaining an injunction. Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 188-92 (2nd Cir. 1980).
Double or triple that amount would provide an even greater incentive to sue but would probably require a statutory basis.  

2. Unfair Competition

Unfair competition law varies widely between states. Many states have statutes which define or supplement the common law, and these statutes also vary widely. Some of these statutes are arguably broad enough to encompass the activity of ticket scalpers, although they remain untested in this regard.

The common law is not settled on what types of offenses constitute unfair competition. Unfair competition law most commonly applies in actions for passing off goods as those of another. Most jurisdictions extend unfair competition law beyond passing off into other forms of deception, as well as into areas such as dilution and misappropriation.

The potential (or lack thereof) for a cause of action against scalpers based upon unfair competition is best illustrated by the "Miss Clairol" cases. These cases all involved Clairol's bifurcated marketing scheme for "Miss Clairol" hair-care products whereby Clairol sold the products to beauty salon jobbers for approximately one-half the price charged to wholesale distributors for retail outlets. The products were identical, but packaged differently—the bottles were individually boxed for the retail trade and sold in six-
packs to the professional trade. The professional six-pack bore the legend, "For Professional Use Only." In addition, the retail packages included a sheet of instructions with warnings about possible dangers and suggestions of how to avoid them. This form of price discrimination created obvious incentives for resale, and defendants in all these cases were obtaining the professional six-packs and reselling the individual bottles to the general public. Some of the defendants attached home-made instruction sheets to each bottle, but these left out the warnings provided in Clairol's instruction sheet.\textsuperscript{422}

These activities differ from those of the ticket scalper. The Clairol resellers arguably deceived consumers as to the source of the product, while scalpers perform no such deception. Also, ticket scalpers sell their product for more, rather than less, than the price dictated by the supplier. Nonetheless, the points of law discussed in these cases are generally germane to the activities of scalpers.

Each jurisdiction approached the Clairol problem differently. The New York court granted an injunction against the defendant based upon New York's unfair competition statute.\textsuperscript{423} The court justified its decision partly on the tendency of the defendant's action to damage Clairol's goodwill by obstructing Clairol's marketing scheme.\textsuperscript{424} The Pennsylvania court, although lacking an unfair competition statute, also granted an injunction against the defendant.\textsuperscript{425} The court based its holding on its interpretation of the common law of unfair competition and upon the doctrine of equitable servitude.\textsuperscript{426} The court indicated that unfair competition was not limited to actions for "passing off," but encompassed any "action reasonably likely to deceive and confuse the public."\textsuperscript{427} The Sixth Circuit, reviewing Michigan law under diversity jurisdiction, analyzed the

\begin{quote}
\textsuperscript{\textit{242}} E.g., Clairol, Inc. v. Cody's Cosmetics, 231 N.E.2d at 915.
\textsuperscript{\textit{243}} Clairol, Inc. v. Peekskill Thrifty Drug Corp., 141 U.S.P.Q. (BNA), at 153 (citing N.Y. GEN. BUS. LAW § 368-d (McKinney 1984)).
\textsuperscript{\textit{244}} Id.
\textsuperscript{\textit{245}} Id. The court held:
Defendant's display to the public of uncartoned bottles of "Miss Clairol", with or without sheets of paper attached thereto, is likely to injure the goodwill and business reputation which plaintiff has created through the expenditure of substantial sums of money, effort and ingenuity, and to degrade the plaintiff and its products . . . in the eyes of the consuming public, and to obstruct the sale of "Miss Clairol" to such public all in violation of [N.Y. GEN. BUS. LAW § 368-d] and of general principles of unfair competition.
\textsuperscript{\textit{Id.}}
\textsuperscript{\textit{246}} See infra part IV.C.4 for a discussion on equitable servitudes.
\textsuperscript{\textit{247}} Clairol, Inc. v. Sarann Co., 146 U.S.P.Q. (BNA) at 731. The court held that defendant's repackaging, with or without instruction, was likely to deceive since consumers would assume that Clairol had authorized the sale in such packaging. \textit{Id.} at 731-32.
\end{quote}
common law in much the same way as the Pennsylvania court and came to roughly the same conclusion.\textsuperscript{248}

The Massachusetts and New Jersey courts rejected Clairol's argument and enjoined only those sales which did not include a copy of Clairol's instructions. The Massachusetts court concluded that Massachusetts's unfair competition law required likelihood of confusion of a product, trade name, or activity of another with the product, trade name, or activity of the plaintiff.\textsuperscript{249} The court further remarked: "Clairol, it seems to us, largely seeks to protect what has been an effective marketing and advertising device."\textsuperscript{250} The New Jersey court concluded that its unfair competition statute\textsuperscript{251} was inapplicable since Clairol had failed to show by a preponderance of the evidence that defendant's activities depreciated the value of Clairol's products in the public mind.\textsuperscript{252} The court then engaged in a somewhat confusing analysis of the common law of unfair competition\textsuperscript{253} finally concluding that defendant's action was subject to injunction unless it packaged the identical product with identical instructions.\textsuperscript{254}

The threads of an unfair competition action against ticket scalpers are woven into the language and rationale for some of these decisions. The language and reasoning of others would preclude such an action. In those jurisdictions which follow the reasoning of the New York, Pennsylvania, or Sixth Circuit courts, promoters might be permitted to maintain an unfair competition suit against a ticket scalper.

3. \textit{Common Law Action for Breach of Licensing Agreement}

Legally, a ticket to an entertainment event is a license.\textsuperscript{255} A license is freely assignable so long as assignability is intended in its creation,\textsuperscript{256} and parties may impose any qualification upon the as-

\begin{itemize}
\item \textsuperscript{248} Clairol, Inc. v. Boston Discount Ctr. of Berkley, Inc., 608 F.2d at 1118-21 & n.9.
\item \textsuperscript{249} Clairol, Inc. v. Cody's Cosmetics, Inc., 231 N.E.2d at 916.
\item \textsuperscript{250} \textit{Id}. at 917. This court also rejected \textit{sub silentio} the equitable servitude argument. \textit{Id}. at 917 & n.9.
\item \textsuperscript{251} N.J. REV. STAT. § 56:4-1 (West 1989).
\item \textsuperscript{252} Clairol, Inc. v. Cody's Cosmetics Plus, 325 A.2d at 508.
\item \textsuperscript{253} \textit{Id}. at 510 (the court stated, "[d]eception of the consumer alone constitutes a sufficient basis for relief. Whenever goodwill is being or has been damaged without any justification, and in the absence of an equal or superior right, the owner thereof is entitled to relief."). The discussion leaves unresolved the question whether damage of goodwill without deception is actionable.
\item \textsuperscript{254} \textit{Id}.
\item \textsuperscript{255} 86 C.J.S. Theaters \& Shows § 35 (1954); \textit{see also}, \textit{e.g.}, Marrone v. Washington Jockey Club, 227 U.S. 633, 636-37 (1913); State v. Waisvisz, 582 N.E.2d 1383, 1386 (Ill. App. Ct. 1991).
\item \textsuperscript{256} \textit{Restatement of Property} § 517 (1954).
\end{itemize}
A host of authority has held that a promoter may refuse admission to a place of amusement on grounds of improper ticket transfer so long as the restriction on transfer is printed on the ticket. Specifically, the proprietor of a place of amusement may "refuse admission to those who pay more than the price printed upon the ticket or who purchase them from a ticket broker or speculator." Unfortunately, it appears that refusal of admission is currently the only remedy available to promoters under the law of licenses. Since the public generally views persons who buy tickets from scalpers as victims, denying admission to a scalper's customer would impair rather than bolster goodwill. Furthermore, ticket-takers generally have no way of knowing whether a patron has purchased a ticket from the primary contractor or a scalper.

4. *Equitable Servitudes*

The promoter grants a license to attend an event as part of a contract between itself and the initial purchaser. That contract can certainly condition acceptance of the ticket upon agreement not to resell at a premium and provide for enforcement of the condition through damages. The major problem in the ticket scalping context is that the person who resells the ticket for a premium is often not the original purchaser and therefore not a party to the initial contract. Promoters need a way to enforce a liquidated damages clause against any holder of the license. While a willful court might be willing to extend the remedy available for wrongful alienation of a ticket from mere denial of admission to injunction or damages against the seller, such an action currently lies in the interstice between the law of licenses and the law of contracts.

The servitude might be the bridge which can link these bodies of law together. A servitude is "a device creating an interest that runs with possession or ownership of an estate in land." Servitudes which directly concern the dominant tenement in land have long been recognized and enforced at equity. Surprisingly, there is a paucity of authority on whether servitudes are enforceable on types

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257. Restatement of Property § 518 cmt. b (1944).
260. Restatement (Third) of Property (Servitudes) at xxi (Tentative Draft No. 1, 1989).
of property other than land. Professor Zachariah Chafee reviewed
the subject of equitable servitudes on personal property in 1928 and
found that courts were reluctant to enforce equitable servitudes on
personal property.262 He nonetheless considered them appropriate
where they are not opposed to public policy.263

Only a handful of cases have considered the question of servi-
tudes restricting the alienability of personal property. Very few of
these in the modern era have enforced an equitable servitude on
chattels. Clairol, Inc. v. Sarann Co., Inc.264 was a case involving
Clairol’s bifurcated marketing scheme described above in part
IV.C.2. The court held that the legend “For Professional Use Only”
placed an equitable servitude on the product which prevented the
defendant, a retail outlet, from reselling it to consumers.265 The deci-
sion has not, however, been followed by other jurisdictions consider-
ing the issue.266 The only other case in the modern era to find an
equitable servitude on a chattel is Nadell & Co. v. Grasso,267 which
held that a producer has a sufficient proprietary interest in his chat-
tels to sustain an equitable servitude.268

An argument can be made that resale restrictions placed on a
ticket are more properly enforced as servitudes than restrictions on
personal property. Because a ticket is a license, the promoter as li-
censor may restrict alienability in any way it chooses.269 Restrictions
on the alienability of chattels, on the other hand, are disfavored and
may be illegal under antitrust laws.270 Even so, it is uncertain

262. Zechariah Chafee, Jr., Equitable Servitudes on Chattels, 41 HARV. L. REV. 945,
955 (1928).
263. Id. at 1007. Chafee, however, questioned whether the benefit derived from a law of
equitable servitudes on chattels would justify “the immense judicial labor required for a satis-
factory development of the operation and limits of the proposed device.” Id. at 1013.
1965).
265. Id. at 734.
were as follows: Plaintiff purchased from a railroad company some damaged jars of fruit salad
bearing the Kraft name on the lids. The railroad company provided as a condition of sale that
plaintiff would not permit the jars to enter retail outlets under the Kraft name. Plaintiff sold
the jars to one Vizcarra under an agreement that Vizcarra would market the fruit salad to
retailers in containers bearing his name. Thereafter, a former employee of the plaintiff who
was aware of the restriction on the goods bought part of the shipment from Vizcarra and sold
a portion of the goods in the Kraft containers to a retailer. This action was to enjoin the
former employee from reselling containers bearing the Kraft name to retailers. Id. at 507-08.
268. Id. at 512.
269. RESTATEMENT OF PROPERTY § 518 cmt. b (1944).
270. See generally Clairol, Inc. v. Boston Discount Ctr. of Berkley, Inc., 608 F.2d 1114,
whether an equitable servitude can be placed upon a license under current law.

5. **Right of Publicity**

The right of publicity is the common law right to be free from having one's name, likeness, or identifying characteristics expropriated for the commercial purposes of another without consent.²⁷¹ Many states have codified the right to publicity,²⁷² but the remedies provided in these statutes are not always exclusive of common law remedies.²⁷³ Claims under the doctrine of right of publicity normally arise when one party uses the name or identifying characteristic of a well-known person to sell its own product without that person's permission.²⁷⁴ The Supreme Court has explained that “[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will.”²⁷⁵

The rationale by which scalping could violate the right to publicity is that ticket brokers expropriate the names of performers and sports team in their advertisements and on the ticket itself without permission in order to sell their product.²⁷⁶ This application certainly stretches the right of publicity doctrine to its very limits, but it does fall within the rationale for the right of publicity doctrine as articulated by the Supreme Court.²⁷⁷ The success of a cause of action based upon this idea would depend heavily on the substantive law of the particular jurisdiction. Some states specifically exclude resale of the works of performers from the scope of their right of publicity statutes,²⁷⁸ but a few states do have statutes broad enough to encom-

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²⁷² See infra notes 278-79.


²⁷⁴ E.g., Carson, 698 F.2d at 831.

²⁷⁵ Zacchini, 433 U.S. at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966)).

²⁷⁶ This idea was suggested by Jeff Berke.

²⁷⁷ See Zacchini, 433 U.S. at 576.

²⁷⁸ E.g., FLA. STAT. ANN. § 540.08 (West 1988); MASS. GEN. LAWS ANN. ch. 214,
pass a cause against scalpers. The action might also be possible in those states with a common law right to publicity.

A cause of action based on the right of publicity is a long shot, but a court inclined to punish scalpers might be willing to find it. It certainly could be included as an alternative theory in any lawsuit not specifically derived from an anti-scalping statute.

V. CONCLUSION

Ticket scalpers provide a valuable economic function. They provide easy access to tickets and they promote the allocative efficiency of the distribution of tickets by ensuring that tickets are sold to the highest valuing consumer. Nonetheless, their activities are loathed by many consumers who consider their actions unfair and their prices exorbitant. Teams, artists, promoters, and venue owners are all long-run profit maximizers who are cognizant of their role in the community and sensitive to the concerns of their customers. Many of them use live entertainment as a means of bolstering revenues from other areas of their operations. These actors often deliberately underprice tickets to their events and design distribution schemes to make sure that the people who ultimately attend the event have paid a “fair” price for their tickets. Scalpers undermine these efforts.

State legislatures have failed to create an effective solution to the problems posed by scalpers. This article proposes a better solution, a private cause of action for promoters against scalpers. This solution is consistent with economic principles and fair to all market participants. Under a private law regime, a state requires ticket brokers to be licensed and bonded and may choose to prohibit them from selling tickets at the site of the event. These requirements protect consumers from fraud and harassment. The state then creates a private cause of action in the name of the promoter, artist, athletic organization, or venue owner against anyone who sells a ticket in violation of the conditions printed on the ticket. Under this regime, both consumers and promoters will receive the maximal amount of protection the law can effectively provide from trade practices which offend consumers and damage the goodwill of those who work hard to provide live entertainment.

\[\text{§ 3A (West 1989).}\]