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ASSESSING THE ECONOMIC RATIONALE AND LEGAL REMEDIES FOR TICKET SCALPING

Stephen K. Happel*
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INTRODUCTION

Hal (not his real name) is black, nondescript and [thirty-one years of age]. When I met him outside Yankee Stadium, he wore a torn Steelers T-shirt and jeans. Hal is the quintessential exponent of free-market economics. Or, as the legal system would have it, black-market economics. Throughout our conversation he was on the lookout for police—uniformed and un-uniformed and undercover. Hal enjoys his trade. He should: It's a sweet gig. I gave Hal \$20. My seat was excellent: behind third base, eight rows back. Indeed, I wouldn't have come uptown at all had I not known that some scalper or other would serve me well. I have a crazy schedule. I can't buy in advance. The man sitting beside me had sold my ticket to Hal for \$7.50 (a corporate box he couldn't use). He was happy. I was happy. Hal, with a \$12.50 profit, was happiest. This transaction, which pleased everyone, had been illegal, of course. The law is an idiot. Again.¹

You can find ticket scalpers like Hal at sporting events from Wimbledon² to the Super Bowl.³ You can find them at rock concerts⁴ and you can even find them at Broadway plays in Moscow or at the Bolshoi Ballet.⁵

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1. Mano, *Scalping*, NAT'L REV., Aug. 28, 1987, at 37.

2. At the 1988 Wimbledon championships, a pair of tickets to the men's finals brought \$2000. *Wimbledon Umpires Double-Fault*, NEWSWEEK, June 27, 1988, at 37. At the same time, many "touts" (as scalpers are known in England) were handed a setback as traders were fined, jailed, and had their tickets held until the championships were over. *Wimbledon Perestroika*, 307 ECONOMIST 61 (June 1988).

The interesting aspect about ticket allocation at Wimbledon is that tickets are initially allocated for nominal sums to members of closed "privilegents." Those with little interest in tennis are the ones who offer their tickets to the touts who then get them to the public. In addition, the umpires at Wimbledon were discovered to be scalping their free one-half dozen pairs of centre court tickets. The touts cried foul when the umpires demanded 800 quid a pair for the tickets. NEWSWEEK, *supra*, at 37.

3. Super Bowl tickets have undergone markups ranging from 200% to 900%. *Super Bowl XV: Football's Little Bighorn?*, SPORTS ILLUSTRATED, Jan. 26, 1981, at 31.

4. For example, during rock singer Prince's 1985 "Purple Rain" tour, tickets originally sold for between \$15.50 and \$17.50 each, but fans paid scalpers as much as \$5000 for two front row seats. Nager, *America's Biggest Ticket Scalper*, ROLLING STONE, May 9, 1985, at 9. More recently, Houston's Ticketron service was deluged with calls from irate parents whose children were paying \$75 a piece for U-2 concert tickets with a face value of \$17.50. Pankay, *Scalpers Skim the Boxoffice Cream*, VARIETY, February 4, 1987, at 161.

One scalper commented:

On a rock concert you make more money than anything else. Those kids, their parents give them \$200 and tell them to get out of here. 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." They say that.

Mano, *supra* note 1, at 37.

5. The highest priced theater tickets originally sold in Moscow for \$18, but the scalpers' price was \$40. *Moscow Digs "Cats;" Scalpers Get Busy*, VARIETY, May 25, 1988, at 1.

The omnipresence of ticket scalping indicates that, from an economic perspective, scalpers create various benefits. Yet, there are ongoing legal attempts to restrict or even prohibit scalping activities, ostensibly to increase overall welfare. In order to determine if restrictions or outright prohibition are appropriate, a series of questions must be addressed. Why does scalping arise in the first place and, in particular, what role do those promoting the events play in generating scalping activities? Who benefits and who loses from scalping in an unregulated environment? What about nuisance effects, illegal activities, and the use of "diggers," individuals who simply stand in line to purchase large blocks of tickets for resale by scalpers? What market-oriented approaches may be used by promoters or team owners to deal with problems raised by scalping activities?

This article addresses these questions by drawing upon neoclassical microeconomic market theory as it relates to the current regulatory framework. Section I begins by outlining statutory regulation at the state level in the United States, after which judicial interpretation is reviewed. Section II examines the economic motivation behind scalping and discusses the role of promoters in generating the phenomenon. Section III, drawing upon the economic analysis, summarizes the key problems surrounding existing regulation. Section IV then presents situations under which scalping can be defended on efficiency grounds and considers how long-run profit maximizers may go about trying to eliminate scalping if profits are being reduced. The article concludes with some views about the future direction of ticket scalping regulation in the United States.

I. CURRENT REGULATORY FORMATS FOR THE CONTROL OF SCALPING

A. Statutory Regulation

Currently, twenty-one states have some form of scalping regulation.⁶ Some of these states regulate only at particular types of public institutions.⁷ Other states restrict scalping only in certain events.⁸ Some limit the location of the

6. See ALA. CODE § 40-12-167 (1987); ARIZ. REV. STAT. ANN. § 5-204 (1974); ARK. STAT. ANN. § 5-63-201 (1987); CAL. PENAL CODE § 346 (West Supp. 1982); CONN. GEN. STAT. § 53-289 (1981); FLA. STAT. § 817.36 (1981); GA. CODE ANN. § 10-1-310 (1981); ILL. ANN. STAT. ch. 121, para. 157.32 (Smith-Hurd Supp. 1988); GEN. LAWS OF KEN. ANN., KEN. PENAL CODE § 518.070 (1982); LA. REV. STAT. ANN. § 4:1 (West 1973); MD. ANN. CODE art. 56, § 119 (1987); MASS. GEN. LAWS ANN. ch. 140, § 185D (West Supp. 1982); MICH. COMP. LAWS ANN. § 750.465 (West 1968); MINN. STAT. ANN. § 669.805 (West Supp. 1982); N.C. GEN. STAT. § 14-344 (1981); N.J. STAT. ANN. §§ 56:8-1 to 56:8-35 (West 1983); N.Y. GEN. BUS. LAW § 169-C (McKinney Supp. 1981); 4 PA. CONS. STAT. 211 (1981); S.C. CODE ANN. § 16-720 (Law. Co-op. 1976); TENN. CODE ANN. § 39-4041 (1975); and WIS. STAT. ANN. § 36.50 (West 1966).

This list does not include the numerous county and city ordinances that also regulate scalping. For example, South Dakota and Virginia have enabling provisions that permit local governments to regulate scalping. See VA. CODE ANN. § 15.1-29.3 (1981) and S.D. CODIFIED LAWS ANN. § 9-34.8 (1981).

7. In Connecticut, scalping is prohibited only for events sponsored by educational institutions. See CONN. GEN. STAT. § 53-289 (1981). In Wisconsin, scalping is prohibited only for events of the University of Wisconsin. See WIS. STAT. ANN. § 36.50 (West 1966).

8. Georgia and South Carolina provide the most generic approach, regulating scalping at all "athletic events." See GA. CODE ANN. § 10-1-310 (1981) and S.C. CODE ANN. § 16-17-720 (Law. Co-op. 1976). The Arizona and California statutes apply only to wrestling and boxing events. See ARIZ. REV. STAT. ANN. § 5-204 (1974) and CAL. BUS. & PROF. CODE § 18,710 (West 1964). However, Arizona has passed legislation proposed which would prohibit scalping on state property. ARIZ. REV. STAT. ANN. § 13-3718 (1989).

scalping,⁹ while others restrict or define the maximum resale profit.¹⁰ Some state regulations are designed to prohibit scalping only if the issuer wishes to do so.¹¹ Other regulations attempt to control scalpers by requiring a license.¹² All of the states with antiscalping regulation impose some form of criminal sanctions through convictions or fines,¹³ with the majority of states holding violations to be misdemeanors.¹⁴

B. Judicial Review: Constitutional Validity of Scalping Regulations

Early judicial response to antiscalping provisions was negative, there being some reluctance to enforce state laws prohibiting scalping on the grounds that such activity was largely private and hence could not be justified as a legitimate exercise of the public police powers.¹⁵ The basic reasoning of the courts was that amusement and entertainment did not affect public interest in the sense that justified other forms of regulation, such as that of specific commercial transactions.¹⁶ Further, the early courts noted that resale of tickets for profit was not different than resale of other merchandise¹⁷ and that the "hazards of street vending" argument could not be justified when other ambulatory vendors—such

9. California does not prohibit scalping for athletic and entertainment events except at the site of the event. See CAL. PENAL CODE § 346 (West Supp. 1982).

10. Illinois, Louisiana, Maryland, Michigan, Minnesota and Tennessee prohibit profits altogether. See ILL. ANN. STAT. ch. 121, para. 157.32 (Smith-Hurd Supp. 1988); LA. REV. STAT. ANN. § 4:1 (West 1973); MD. ANN. CODE art. 56 § 119 (1987); MICH. COMP. LAWS ANN. § 750.456 (West 1968); MINN. STAT. ANN. § 609.805 (West Supp. 1982); and TENN. CODE ANN. § 39-4101 (1974).

Florida limits profits to one dollar per ticket. See FLA. STAT. § 817.36 (1981) and North Carolina limits them to three dollars per ticket. See N.C. GEN. STAT. § 14-344 (1981). New York and Pennsylvania permit a profit of two dollars per ticket. See N.Y. GEN. BUS. LAW § 169-C (McKinney Supp. 1981) and 4 PA. CONS. STAT. 211 (1981).

Massachusetts sets a generic limit of two dollars in excess of ticket face value unless the reseller can establish additional service charges are warranted. See MASS. GEN. LAWS ANN. ch. 140, § 185D (West Supp. 1982). North Carolina allows a "reasonable service fee." N.C. GEN. STAT. § 14-344 (1987).

11. For example, Kentucky's statute provides: "(1) A person is guilty of ticket scalping when he intentionally sells or offers to sell a ticket to an event at a price greater than that charged at the place of admission or printed on the ticket, unless authorized by the issuer or by law." GEN. LAWS OF KEN. ANN., KEN. PENAL CODE § 518.070 (1982).

12. Alabama's regulation provides: "Any person offering for sale or selling tickets at a price greater than the original price and who is commonly known as a ticket scalper shall pay a license tax of \$100.00." ALA. CODE § 40-12-167.

13. Alabama's regulation carries no criminal penalty for violation which may be explained by the fact that Alabama's judiciary has recognized scalping as a protected activity. See *Estell v. City of Birmingham*, 286 So. 2d 872 (Ala. 1973); see notes 25-26 *infra*.

14. Several states carry much harsher penalties. For example, Rhode Island carries a \$1,000 fine for each offense. R.I. GEN. LAWS § 5-22-26 (1987). Connecticut labels a party's third offense a felony. CONN. GEN. STAT. ANN. § 53-289 (West 1985).

15. See *Tysoni Brothers v. Banton*, 273 U.S. 418 (1927).

16. The two-prong constitutional test for a regulation to survive the public welfare test required establishing that:

(1) the activity regulated is a threat to the general safety, morality or welfare of society; and

(2) the statute, ordinance or regulation serves to reduce that threat

Kirtley v. State, 84 N.E. 2d 712 (Ind. 1949).

17. See *Ex Parte Quarg*, 84 P. 766 (Cal. 1906).

as peanut vendors—were not also regulated.¹⁸ Other courts found that scalping statutes simply regulated without advancing the public good.¹⁹

During the development era of the first half of this century, courts generally rejected the notion of scalping regulation, but at the same time appeared able to make distinctions between and among the various types of cases and statutes or ordinances brought before them. For example, even the earliest cases recognized the constitutionality of licensing requirements²⁰ and that trend of permitting licensing seemed to hold up as the cases and regulation continued.²¹ Overall, however, the initial judicial decisions regarding scalping were unfavorable, particularly with those statutes prohibiting scalping altogether or those imposing what appeared to be arbitrary regulation.²²

It has been primarily during the second half of the century that the courts have staged considerable debates regarding the validity of antiscalping regulation; for the most part, these regulations and ordinances have been upheld as a legitimate exercise of the police power.²³ While some courts still reject scalping convictions by narrowly applying the statutory language,²⁴ they seem to generally support all forms of regulation.

More recent challenges to antiscalping regulations are generally based on, (1) undue interference with a private property right,²⁵ (2) the deprivation of due

18. The case involved a Los Angeles city ordinance which the city defended on the grounds of hazards created, but the public safety argument was lost when the hazards of other vendors were pointed out. *People v. Van Wong*, 332 P.2d 872 (Cal. 1958).

19. *See, e.g.*, *Kirtley v. State*, 84 N.E.2d 712 (Ind. 1949); *Heller v. Cleveland*, 25 Ohio Op. 106, 37 Ohio L. Abs. 545 (C.P. Cuyahoga County 1942); *People v. Steele*, 83 N.C. 236 (N.C. 1907).

20. *See, e.g.*, *People v. Weller*, 143 N.E. 205 (N.Y. 1924); *In re Opinion of Justices*, 143 N.E. 208 (Mass. 1924); *People v. Newman* 180 N.Y.S. 892 (N.Y. 1919).

21. *See, e.g.*, *Brody v. Marshall*, 72 Pa. D. & C. 197 (C.P. Phila. County 1950) and *Kelley-Sullivan, Inc. v. Moss*, 22 N.Y.S.2d 491, 110 Misc. 362 (N.Y. Sup. Ct. Spec. Term 1940).

22. *See, e.g.*, *In re Gilchrist*, 181 N.Y.S. 245 (N.Y. 1920).

23. The shift in judicial attitudes is perhaps attributable to the U.S. Supreme Court's shift on expansion of governmental authority to regulate, which required that the economic regulation be "rational." *See generally* *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). With this shift from the two-part test, *supra* note 16, regulation simply had to be designed to remedy a legitimate government concern.

For example, in *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981), the Tennessee Supreme Court, upheld a scalping statute in a case in which N.C.A.A. (National Collegiate Athletic Association) basketball tournament tickets with a face value of \$16 for a regional game and \$30 for the finals were sold by defendant Spann at prices of \$75 for the regional tickets and \$250 for the finals. Spann was charged with a violation of the Tennessee code, § 31-4101, which provides:

Scalping admissions tickets—Penalty. It is unlawful for any person to scalp an admission ticket, pass or admission card to any theater, auditorium, stadium, dance hall, rink, athletic field or any other place to which tickets, passes or admission cards are required as a condition upon admittance thereto; or to offer or to attempt to scalp any such admission ticket, pass or admission card.

TENN. CODE ANN. § 31-4101 (1984).

The Tennessee Supreme Court upheld Spann's conviction on the grounds that "a prohibition on resale of tickets for a premium is a regulation which is entirely reasonable and within the police power of General Assembly." 623 S.W.2d at 273.

24. For example, in *People v. Johnson*, 278 N.Y.S.2d 80, 52 Misc.2d 1087 (N.Y. Crim Ct. 1967), a visiting foreigner sold her two \$20 Metropolitan Opera tickets to an undercover officer for \$40 apiece when her estranged husband refused to attend the event with her. The court refused to allow the conviction to stand on the grounds that, in the language of the statute, the woman was not "in the business of reselling tickets."

25. In *State v. Major*, 253 S.E.2d 724 (Ga. 1979), the lower court declared illegal the Georgia

process when regulation is so overbroad as to prohibit resale²⁶ or (3) violation of the equal protection clause in cases where scalping prohibitions only apply to certain facilities.²⁷ The most recent case to strike down a scalping ordinance was *Estell v. Birmingham*,²⁸ in which the Alabama Supreme Court struck down an ordinance that prohibited scalping of tickets to the annual University of Alabama-Auburn College football game on the basis that the ordinance was frivolous and not based on a legitimate public interest.²⁹ Nonetheless, the case remains an isolated one and distinguishable since the focus of the statute was upon the event rather than on the generic public policy concerns regarding scalping.³⁰ With the exception of one case,³¹ all of the judicial reviews of scalping regulations have been the result of criminal convictions appealed by convicted scalpers.

At present, scalping prohibition and regulation are considered valid exercises of police power on the bases that they ensure fair or full public access to events, as well as prevent the nuisance of scalpers and possible concomitant harassment.

ticket scalping statute (GA. CODE ANN. § 96-602 (1985)), which provides as follows:

It shall be unlawful for any person to sell, or offer for sale, any ticket of admission or other evidence of the right of entry to any football game, basketball game, baseball game, soccer game, hockey game, or golf tournament for a price in excess of the price printed on the ticket: Provided, however, that a service charge, not to exceed \$1, may be charged when tickets or other evidences of the right of entry are sold by an authorized ticket agent through places of established businesses licensed to do business by the municipality of county, where applicable, in which such places of business are located.

GA. CODE ANN. § 96-602 (1985).

The trial court called the law "contrary to the due process clause of the Georgia Constitution because it unduly interfered with the private property right of disposing of one's property at a non-exorbitant, non-fraudulent, non-extortionate price set by him." 253 S.E.2d at 724.

26. In most regulations, resale is not totally prohibited but resale for a premium is prohibited and hence the courts have reasoned that there is no deprivation of property and therefore no violation of the due process clause. See *Spann*, *supra* note 23.

An additional observation of the courts is that these statutes serve to place "all sports fans on an equal footing in the race to the ticket window." *State v. Major*, 253 S.E.2d at 733.

27. For example, the Portland, Oregon, code provides as follows:

Tickets to all events at municipally owned facilities shall have printed thereon the retail price thereof. It shall be unlawful for any person to sell or offer for sale any such ticket at a price greater than the retail price printed thereon, exclusive of fees or service charges for sale of tickets not exceeding fifty cents per ticket at regular ticket outlets.

PORTLAND, OR., CITY CODE, § 14.36.070 (1988).

State v. Yonker, 585 P.2d 43 (Or. 1978), *Yonker*, convicted of scalping Portland Trailblazer basketball tickets, contended that the statute violated the equal protection clause because the prohibition on scalping applied only to municipally-owned facilities and not privately-owned facilities. The court dismissed the argument on the grounds that there was a rational basis for the distinction in treatment because Portland taxpayers had paid for construction and supported operation of the facilities and the purpose of the ordinance was to ensure that tickets were freely available to those taxpayers.

28. 286 So.2d 872 (Ala. 1973).

29. The court noted:

We have carefully considered the opinion... and are in agreement with the result that the activity engaged in by the defendant, *Estell*, in reselling football tickets at a greater price than that advertised by the proprietor or manager of the football game was not so affected with a public interest as to be the subject of a price fixing regulation under the police power of the City of Birmingham.

286 So.2d at 873.

30. There are some states with no judicial review as yet of their antiscalping ordinances, but *Estell* is the last reported opinion in which an ordinance was declared unconstitutional.

31. In *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *Gold*, a ticket broker, brought a class action seeking to enjoin the New York Attorney General from enforcing a New York statute which prohibited a resale profit in excess of \$1.50 per ticket.

In addition, the deprivation and use of scalping funds may be a concern, considering the magnitude of revenues.³² Regulation of scalping may be generated by legitimate public welfare concerns,³³ but it is unclear whether current statutes adequately address those public concerns or whether such regulation represents a rational approach given the economic motivation and constraints at issue.³⁴

II. AN ECONOMIC ANALYSIS OF TICKET SCALPING: THE MOTIVATIONS FOR SCALPERS AND PROMOTERS

A. Unique Aspects of Demand Related to Limited Seating

From a market perspective, ticket scalping is a consumer service. Demand and supply forces interact and influence producers and consumers through the price mechanism.

Here it is important to recognize that the price mechanism for concerts or sporting events carries a further price component in addition to actual ticket price. Relying upon microeconomic terminology, the relevant idea here is "full price," where the full price of any commodity consists of its market-goods component plus its time component.³⁵ This means that the price of a ticket to a sporting event, rock concert or other such live experience is the actual dollar amount paid for the ticket plus the opportunity cost of the time spent in acquiring the ticket.³⁶

The critical question then becomes: Just why does the market-goods component of the price to selected events become so strongly affected by ticket scalping? The answer must begin with supply. Sporting events and rock concerts take place

32. Though the small-time scalper seems to be the focus of most regulations, the scalping business has been a breeding ground for major scams and securities fraud. For example, Walter Payton was among 140 investors swindled out of a total of \$3.2 million in a scalper's scheme that involved borrowing money from investors to buy tickets and then paying them back with a 10-20% profit in two months or less. The scalper involved operated this particular scheme in Chicago, as well as another in Los Angeles. *Bears Star Payton Burned*, *JET*, May 14, 1984, at 50.

Another example is Bill Meisler, known as the most blatant, if not the largest-volume, scalper in the U.S., because of his advertisement in *Billboard* magazine which read: "MICHAEL JACKSON, BRUCE SPRINGSTEEN, PRINCE: Thanks for all you've done for me, from America's Number 1 Ticket Broker, Bill Meisler, Corporation." Meisler was investigated by the Ohio Department of Securities for his sale of notes to investors at prices between \$500 and \$20,000 with repayment at double the face value in eight weeks (the notes were used to finance his ticket purchases to provide for his scalping base). See Nager, *supra* note 4, at 9.

33. Meisler has faced suits totaling \$40 million, filed by investors who were not repaid in what amounted to a Ponzi scheme based on ticket sales at double to ten times original prices. However, repayment could not be made if the concert flow did not continue and the Prince concert, *supra*, left Meisler with 2,000 unused tickets. Nager, *supra* note 4, at 9.

34. Indeed, given the Meisler experience, it might be more productive for states to limit the sources of scalpers' funds—*i.e.*, by prohibiting loans, investment sales and so forth—rather than resort to securities fraud statutes for prosecution.

35. For example, the purchase and installation of an auto part may cost a car owner \$20 in cash, but the full price of the repair may be, say, \$80, when the time component consisting of the labor of installation is recognized. The same is true of the price of food purchased at the grocery store and then prepared by the purchaser versus the cost of catered food. For a complete discussion of time component costs, see Becker, *A Theory of the Allocation of Time*, *Econ. J.*, Sept. 1965, at 1.

36. For example, in the passage opening this article, it was worth \$12.50 (or maybe more) to the Yankee fan with the crazy schedule not to have to wait in line or buy a ticket in advance.

at facilities with a given capacity constraint at the time of the event.³⁷ Only so many people can fit into a given facility, and within any facility certain locations are preferable to others. This space limitation presents the possibility for large economic rents—that is, profits—for scalpers.

But whether the rents actually arise depends ultimately upon demand. For scalpers to be successful, the event either must be a sell-out or intense demand must exist for particular seats.³⁸ This strong demand is the result of potential ticket buyers' desire to be "part of the crowd." There is a singularity to being at an event live. It is a "here and now" phenomenon in which the excitement and chemistry among those attending can create intensely pleasurable memories that last for considerable periods of time. This means that individuals are willing to incur the full price of attending such events even when they are being broadcast "free" on television or are available later on videotape.³⁹

B. Reasons Underlying Scalping: The Surprising Creators of the Scalping Market

The motivation behind scalping and the reason that ticket scalpers are able to make significant monetary gains for certain events lies in the pricing approach adopted by most event promoters. Typically, the market-goods prices of tickets are determined well in advance of a scheduled event⁴⁰ and the tickets have the preset prices printed upon them.⁴¹ Then tickets are sold by the owners or promoters through designated outlets several weeks or months prior to the event. When these prices are set too low relative to what the market will bear, ticket scalpers will enter the market to make monetary gains. Five possible explanations arise as to why initial market-goods prices may be "too low" relative to consumer demand up to or at the time of an event:

1. Poor Market Analysis

Because of the "here and now" nature of live events, there is considerable uncertainty beforehand regarding demand. One explanation for less-than-market-clearing prices is that price setters fail to undertake detailed market analysis. Rather, prices are set by rule-of-thumb, *e.g.*, charging what other promoters are charging for similar events.

37. Naturally, supply can be increased over time either by building additional facilities, expanding existing facilities or by holding more than one show in a given facility. The focus of this article is on events that cannot be reproduced easily, if at all, and that are held in facilities with given capacity constraints.

38. One scalper has noted: "It's like investin' [sic] in the stock market. All depends on how good the game gonna be. Also the weather plays a big part. I eat tickets at least two times a week." Mano, *supra* note 1, at 37.

39. One executive of Ticketmaster, a distributing agency, noted, "You really don't understand this business until you've stood in line for a heavy metal [rock] concert with kids with thumbtacks in their foreheads." *Id.*

40. Often, rock concert organizers will seek bids from major potential promoters, who must in turn have some idea of market demand before submitting their bids. Similarly, team owners set ticket prices for the season in advance.

41. Some statutes specifically require that tickets to events have the prices printed on their face. *See, e.g.*, ILL. ANN. STAT. ch. 121-1/2, para. 157.32 (Smith-Hurd Supp. 1988); LA. REV. STAT. ANN. § 4:1 (West 1973); MINN. STAT. ANN. § 609.805 (West 1987) and N.J. STAT. ANN. §§ 56:8-27 to 56:8-35 (West Supp. 1987).

While this may be true at times, it is difficult to believe that team owners or event promoters consistently underestimate demand and fail to recognize that they can capture large economic rents under certain conditions. Markets provide information that promoters, as well as potential ticket scalpers, observe. It would seem that experienced promoters are unlikely to make consistent, profit-reducing mistakes.

2. *Post-Sale Shortages*

A second explanation is that, while the initial price may have been determined through detailed market analysis and was market-clearing at the time the tickets first went on sale, the real shortage arose after the tickets were sold.

For example, a team may start a winning streak or a performer may receive a special award or a large amount of publicity that intensifies demand as the event approaches.⁴² Profit-maximizing owners or promoters would like to capture the resulting economic rents, but with a policy of set ticket prices and advance sales, they can only do so if they have remaining tickets and decide themselves to scalp these tickets.

3. *Promoter-Insider Trading*

A third possibility is that the owners or promoters are indeed involved in ticket scalping. For instance, they may offer nonchoice seats at "typical" prices, holding choice seats back to see if an extremely strong demand for the event develops as nonchoice tickets are sold first. If demand is strong, then the choice tickets are scalped at market-clearing prices. The owners or promoters in this case can be short-profit maximizers who have decided that detailed market analysis prior to sales is costly or inappropriate. Of course, they may set initial prices too low and forego some profits. Also, they run the risk of bad publicity if they are caught scalping.

4. *Price Setting for the Long Run*

A fourth explanation for less-than-market-clearing initial prices is that the price setter is a long-run profit maximizer who is worried about "spoiling the market." As indicated in the previous paragraph, scalping by owners or promoters is often frowned upon by potential consumers, even if scalping is legal. This might create adverse effects for promoters or team owners in the long run.

Thus, a highly visible rock concert promoter who has many events each year in the same arena may not charge market-clearing prices for certain artists because his less popular concerts would suffer due to the bad publicity associated with perceived "ticket gouging."⁴³ Similarly, major sport associations like the National

42. For example, Prince's Academy Award nomination for his acting in the film *Purple Rain* intensified the demand for tickets to his concert performances. Mano, *supra* note 1, at 37. Of course, in some cases the converse might also hold true: interest in a concert may dwindle as the time between initial sales and the actual event passes. In such a situation, scalpers must unload their tickets quickly after initial sales. *Id.*

43. See, e.g., Bershad & Ensor, *Ticket Scalping Legislation—A New Jersey Case Study*, 9 SETON HALL LEG. J. 81, at 99-101 (1985), for a review of attendees' complaints.

Basketball Association (N.B.A.)⁴⁴ or Major League Baseball specify limits⁴⁵ on the prices that home teams can charge for the N.B.A. finals or the World Series so that the proper image of the league can be maintained—and so that future sales are not hurt.

In such situations, ticket scalpers allow promoters or team owners to shift the blame away from themselves as market-goods prices for certain events skyrocket.irate consumers cannot complain to management as readily.⁴⁶

Long-run profit maximizing promoters and owners may also charge lower than the market-clearing price for tickets if complementary revenues from the event are sizable. For example, rock concerts generate compact disc, tape and record sales for performing artists after an event, as well as concession sales during the event. Major league sports teams generate substantial concession sales as well, and they also receive television revenues. This means that the live gate becomes a secondary source of revenue, and seemingly “too low” market-goods ticket prices become more prevalent.

5. *The “Blue-Collar Fan”*

Finally, less-than-market-clearing prices may be charged by owners or promoters because they want to be “fair” to their customers, the fans. At times, this may be tied to long-run profit maximization. While in the name of fairness baseball teams fail to raise single game ticket prices as certain games take on special importance during the season, they may also be considering the market value of goodwill and complementary revenues. At other times, however, profits may become secondary to fairness, as in the case of singer Bruce Springsteen, who apparently wants his “true” fans to be able to attend his concerts; his great success and wealth seem to have given him the ability to trade profits for other objectives.⁴⁷ Of course, not many event promoters can afford to do this.

C. The Effects of “Too Low” Prices on Ticket Scalpers

Whichever of the five previous explanations for “too low” market-goods ticket prices to major events pertains, the result will be lengthy queues. Ticket scalpers, taking advantage of demand, will attempt to purchase tickets at or near the set market-goods price. They may employ diggers to stand in line to purchase large blocks of tickets, and they may create nuisance effects.⁴⁸ If diggers do not

44. N.B.A. team owners have found other ways to control scalping. For example, during the 1987 N.B.A. playoffs, the Dallas Mavericks’ owners refused to sell tickets to street people who they identified as diggers, *Beaumont (Tex.) Enterprise*, April 22, 1987, at 1A, col. 1.

45. The league’s price limits may serve to intensify demand particularly because of the non-repeat nature of the events and the limited capacity.

46. When management sells blocks of tickets in advance to selected brokers, as many major league teams do, uncertainty is shifted along with the blame for scalping. The brokers respond to immediate market conditions and make profits or suffer losses accordingly.

47. Springsteen’s concert promoters have actively sought antiscalping enforcement to ensure that fans can afford tickets. *Lawmen Mobilize to Stop Springsteen Scalpers*, Newark (N.J.) *Star-Ledger*, Aug. 3, 1985 at 1, col 1, and 9.

48. Nuisance effects include: harassing people in ticket lines (as diggers sometimes do in order to either reach the head of the line or drive people out of the line, so that the digger can make repeated purchases of tickets and thereby overcome limits on the number of tickets that one buyer can take at one time), bothering people as they enter the event (either trying to get them to buy or sell tickets), and counterfeiting of tickets.

lengthen lines, causing “artificial” increases in demand,⁴⁹ and if nuisance effects and other public costs such as scams and securities fraud remain minimal, then *laissez-faire* economists defend scalpers as simply vendors who reduce the full price of tickets for certain buyers, notably those busy individuals with high opportunity costs of time. Standing in line is expensive for such individuals, so they are willing to pay substantially more than the initial market-goods price for selected events or seats. Economic rents in this case arise with the reallocation of resources, but this is justifiable from a *laissez-faire* perspective since market resources should be directed toward their highest return.

III. KEY PROBLEMS SURROUNDING REGULATION

Based on these economic arguments, it becomes easier to distinguish among various statutes in order to determine the flaws and possible detrimental effects of scalping regulation. The following discussion summarizes the key regulatory problems arising in today’s environment.

A. Difficulties of Enforcement

Scalping abounds in spite of significant numbers and types of regulation. Although appellate opinions do give some indication of enforcement efforts, that effort is necessarily limited because of costs, the difficulty inherent in “catching” a transaction and the lack of uniformity in state laws and local ordinances. For example, in a densely populated multistate area such as greater New York, there will be residents of various states who wish to attend a given event in New York City. Neighboring New Jersey prohibits scalping⁵⁰ but New York permits it⁵¹ with the result that scalpers simply cross the state line to avoid any problems with violations. Some proposals—generally designed to alleviate the police manpower problem—have been made to encourage private enforcement to allow purchasers to get their tickets and then sue the scalper for the price difference and some penalty.⁵²

B. Differences in Constituency Interests

In the entire ticket sale-scalping scenario, there are a number of different constituencies involved in the sale of tickets to high-demand, limited-seating events. First, there are the promoters, who may or may not be in accord with the performers in terms of ticket-pricing objectives. Next, there are the initial ticket holders who originally plan to attend the event. Then there are potential ticket holders, those who want to attend the live event but want a convenient, non-time-consuming way to purchase tickets. In addition, there are those who could not get tickets initially and are precluded from the event because of the

49. Whether diggers lengthen lines and cause artificial increases in demand is open to debate. If diggers merely take the place of people who would have stood in line if diggers were not allowed, then lines are not lengthened. On the other hand, diggers may increase demand, at least momentarily, if they try to buy tickets in addition to those who do not substitute diggers’ time for their own in line.

50. N.J. STAT. ANN. §§ 58:8-27 and 58:8-33 (West Supp. 1987).

51. N.Y. ARTS & CULT. AFF. LAW §§ 25.03 and 25.05 (McKinney 1984).

52. See ILL. ANN. STAT. ch. 121-1/2, para. 157.34 (Smith-Hurd Supp. 1987) (allowing suit to recover the extra ticket cost, plus \$100).

higher prices resulting from scalping.⁵³ Finally, there are the scalpers who may or may not be associated with the promoter and who may or may not have planned to attend the event originally. All of these parties have different interests, constraints, motivations and expectations.

C. Ticket Scalping As a Service

Ticket scalping causes a redistribution of tickets, typically toward those individuals with a high opportunity cost of time.⁵⁴ For those who do not want to spend time waiting in line, scalping provides a service. Scalpers serve as middlemen for those whose time is worth the ticket price differential created by the post-initial sales by scalpers. As implied in the introduction to this article, such a service makes many individuals happy. However, given human nature in rent-seeking activities, nuisance effects and other public costs seem inevitable.

D. Arbitrariness of Present Regulation

Some statutes try to prevent scalping by drawing a distinction between those who purchase tickets in order to attend the event and those who purchase strictly for resale.⁵⁵ Some statutes focus on the prohibition of the resale of tickets above their initial market-goods price, or with only a small predetermined markup.⁵⁶ Some statutes prevent scalping where public facilities are involved, but permit scalping where private facilities are used.⁵⁷ Some statutes restrict scalping to certain athletic events.⁵⁸ This arbitrariness across state statutes raises questions of equality before the law and illustrates the critical role of value judgments in particular parts of the country in assessing motivations and behavior. Furthermore, differentiation in laws in metropolitan areas drawing event participants from more than one state renders strong regulation ineffective, since scalpers will simply conduct their business in states where such activity is unregulated or the regulation is less stringent.⁵⁹

E. Significance of the Public Policy Issues

It is impossible to provide an adequate discussion of the flaws in current regulation without considering the significant public policy issues surrounding it. For example, some prohibitions may exist, as in Dallas, to prevent exploitation of the homeless as diggers.⁶⁰ In other cases, the scalping industry has used drug

53. Promoters and others involved in event sponsorship often set event prices to reach the largest number of a certain age or group. It may simply be a matter of pricing to establish goodwill. Pyne, *Talking Scalps, '80s Style*, Phoenix (Ariz.) Gazette, Aug. 23, 1986, at 4, col. 1.

54. In some cases, the demand is so high, it is simply impossible for the potential ticket holders to acquire the tickets. For example, in Bayreuth, Bavaria, there is an opera house that Richard Wagner built. Tourists wait in line at the box office for hours hoping to intercept a ticket that is returned. Scalping is illegal. To obtain tickets for the next summer's performances, applications must be made by November 15. Applications pour in from 73 countries. Generally, after applying three years in a row, one is permitted to purchase two tickets. Kelley, *The Suche Line*, NAT'L REV., Feb. 24, 1984, at 60-61.

55. See *supra* notes 6-11, and accompanying text.

56. *Id.*

57. *Id.*

58. *Id.*

59. See *supra* notes 50-51.

60. See Pankay, *supra* note 4 (noting how often and how many homeless persons are employed to stand in line for tickets to major events).

dependency as a means of attracting and maintaining an on-call staff of diggers.⁶¹

There are also nuisance effects. Diggers may try to force their way to the front of the line if the number of tickets per purchase is limited. Scalpers at the site of the event may harass those going in. Unregulated scalping may encourage ticket fraud, and the ability to resell tickets readily can lead to counterfeiting.

Finally, it is naive not to consider the tremendous revenues involved in the activity.⁶² This has led to fraud in the past;⁶³ furthermore, there may be serious repercussions from such heavy flows of cash through informal economic organizations.⁶⁴

IV. THE EFFICIENCY OF SCALPING AND ALTERNATIVES FOR PROFITMAKERS

Most regulation of scalping takes an overly broad approach to activities which, from a microeconomic viewpoint, may result in an inefficient market. Existing statutes fail to recognize or distinguish between scalping as a nuisance or as a potentially illicit business activity—and scalping as a middleman function that provides valuable services for a time-constrained group of potential ticket holders wishing to attend a live event.

From a neoclassical microeconomic, or free-market, perspective, there are clearly times where ticket scalping should be condoned rather than condemned, as long as nuisance effects or illegal activities are not present. One obvious situation is when the price setter has underestimated demand because of a lack of detailed market analysis. Here, ticket scalping ensures that those most willing to pay in fact attend the event.

Scalping may also be condoned when intense demand develops after initial sales. Once again, scalping means that those most willing to pay the full price are the ones to attend the event. Furthermore, since voluntary exchange benefits both parties, those individuals who had every intention of attending, but then sold their tickets because of attractive new offers, must be better off as well.

The situation in which promoters hold back choice seats to see if extremely strong demand arises as the event approaches resembles that of manufacturers who decide to hold some goods in inventory rather than selling all output at one time. While society may frown upon promoter—"insider"—trading as mischievous or unethical, from an efficiency standpoint scalping directs scarce resources toward those consumers most willing to pay, while allowing the promoter to capture economic rents instead of scalpers.

61. Statutory vulnerability in this area results, particularly when so many high school and college students are employed as diggers. For example, Meisler acquired 12,800 tickets to a 1984 Prince concert, despite an eight-ticket per person limit, by hiring 1,600 high school and college students to stand in line for him. Nager, *supra* note 4, at 9.

62. Meisler grossed \$660,540 on the 1984 Prince Cincinnati Concert and had expenses of \$298,000. After repaying investors double their original investment, he had \$120,000 of personal profit. *Id.* at 10.

63. See *supra* notes 32-33.

64. Bill Meisler's downfall came when he bounced a \$7.3 million payback check to investors. During an interview he acknowledged he knew the check would bounce and offered the following explanation: "It just got too big too fast. We were taking in \$500,000 a week." Meisler said his staff consisted of co-workers from his former busboy job and that they committed bookkeeping errors like paying off notes two and three times and paying them off early. Nager, *supra* note 4 at 11.

Situations in which a promoter or team owner seeks to maximize long-run profits, or wants to be "fair" to fans, must be interpreted more carefully in terms of the overall desirability of scalping.⁶⁵

Long-run profit maximizers may tolerate scalping when they are not averse to ticket redistribution in response to changing market conditions and they do not want to incur the costs of changing their initial price strategy. This allows them to avoid the blame for higher prices, and they are content as long as complementary revenues are maintained or increased. Tickets are again directed toward those most willing to pay, thus promoting efficiency.

However, if expected revenues are not maintained or increased as scalping takes place, long-run profit maximizers will want ticket scalpers driven from the market. For example, having to pay extremely high ticket prices may discourage those attending an event from concession purchases and other complementary spending. This loss of expected revenues may cause fewer events to be produced as time passes. The argument can be made that society suffers as a result.

There exist various means by which long-run profit maximizers might try to eliminate scalping. Certainly, they may try to go through political channels, lobbying for regulation, restriction, enforcement and so forth, but this imposes nuisance costs on numerous individuals⁶⁶ as scalping rents are redirected. Alternatively, long-run profit maximizers may try to find market-oriented strategies to deal with scalping, such as "Dutch auctions,"⁶⁷ more closely controlled ticket distribution,⁶⁸ changes in capacity⁶⁹ or higher economic rents through surcharges.⁷⁰

Neoclassical economists, seeing the efficiency of market-price allocations, much prefer market-oriented strategies to political rent-seeking as long as there are not

65. See *supra* note 46.

66. For instance, Hal and the Yankee fan described in the opening passage.

67. One alternative to eliminate scalping for a major event in a fixed-capacity arena facing extremely high demand (e.g., the World Series or Super Bowl) would be to start with what is perceived as the highest possible market-goods ticket price the market will bear and sell tickets at the distribution points for a short period (several days). Assuming some seats are still available, the price is lowered somewhat and tickets are again sold at the distribution points for a short period. This Dutch-like auction would continue until all seats were sold. Scalping could, however, still arise in such a situation if demand somehow surged after the tickets were sold. Thus, promoters adopting this approach should decide to sell tickets only shortly before the event in question.

68. One ticket distribution method that guarantees no scalping is to have event participants immediately enter the event after purchasing their tickets at the ticket window. Of course, this means individuals wanting to attend an event are not guaranteed tickets unless the promoter charges prices sufficiently high to eliminate lengthy queues.

A second method to minimize scalping would be to have individuals, as they buy tickets in advance, show some form of valid identification—preferably a photograph—that is then copied onto the ticket. Then, only that individual would be allowed to enter the event with the ticket. For those who could not attend an event after purchasing tickets, resale could take place at a controlled site, and each new buyer's identification could be copied over the old.

69. This article has focused on events that are not replicable and are held in facilities with given capacity constraints. However, for some events—rock concerts, for example—promoters sometimes book a second show if the arena is available and demand is strong. The increased supply of seats reduces scalpers' profits, especially if the alternative times are highly substitutable for consumers, but there are naturally additional costs for the promoter.

70. For example, the University of Alabama imposed a \$100-2500 surcharge per seat for season tickets to Alabama home football games. The idea was to discourage scalper purchases of large blocks of seats. In this case, the reaction of the public was generally unfavorable. So such an approach might serve to cut sales, and may cost promoters money. N.C.A.A. News, April 22, 1987, at 9.

significant nuisance effects or illegal concomitants to an activity. Existing antiscalping regulations appear overly broad in their attempts to eliminate public policy concerns since their result is to eliminate not only nuisances, but valuable service functions. If a state's primary concerns are the use of scalping funds, or the regulation or licensing of scalping, then a prohibition on sales in the same interests is a more appropriate approach. If the state's concern is harassment, then time and place regulation would become more appropriate. Finally, if the goal is preservation of the promoters' interests, whether it be profits, an appropriate audience or goodwill, then regulation to control ticket sales is best left to their—that is, the promoters'—own devices.

CONCLUSION

While there are public policy interests involved in regulating scalping, it remains unclear whether, first, its complete prohibition is necessary, second, existing regulations address these policy interests or, third, due to existing inconsistencies such regulation is even effective. Various constituencies are present, and regulation of scalping requires addressing the needs of those sponsoring the event—from city-owned facilities to free-market promoters—as well as those of the participants in the events. Current regulation uniformly decries scalping *per se*, and defines regulation from that perspective. But regulation, in this instance, should be defined not from the perspective of the perpetrator but from that of the alleged victim who, in the case of ticket scalping, may well be a beneficiary.