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Contradictions Within The Criminalisation Of Ticket Touting: What Should Be The Role Of The Law?

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Summary

The issue of ticket touting has recently become a very visible one with the advent of online trading environments such as eBay and a growth generally of the secondary ticket market. The Government has expressed concern about the issue and has recently held four ticket touting summits with leading ticket agencies, theatre producers, music promoters, eBay, and sporting governing bodies amongst others. Ticket touting was originally criminalised for football in the Criminal Justice and Public Order Act 1994, and those provisions have been fortified recently in the Violent Crime Reduction Act 2006.

This article critically evaluates the arguments for criminalising touting, particularly through the imposition of strict liability, and argues that the Government should have

considered the case for de-criminalisation or, at the very least, amended the provisions to make them fairer for football fans.

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Introduction

Whilst ticket touting is not a new phenomenon, the advent of the internet, and in particular, of online trading environments such as eBay, have made the buying and selling of tickets much easier. The issue has become a very visible one (see Robins, 2006) and on 1 May 2007, the Parliamentary Culture, Media and Sport Committee announced “a new inquiry into touting of tickets for sporting and cultural events” which reported on 18 December 2007 (Culture, Media and Sport Committee 2008). The Government has made it clear that the issue of ticket touting is something that it has concerns about. To date, the Department for Culture, Media and Sport (DCMS) has held four ticket touting summits in November 2005, April 2006, July 2006 and February 2007 and this has involved leading ticket agencies, theatre producers, music promoters, eBay and sporting governing bodies amongst others.

Tessa Jowell, speaking at the third ticket touting summit noted that if the entertainment industry could not self-regulate, the Government would then have to consider legislating (DCMS Press Release, 2006). It is clear that this current debate is based primarily around the problems of fans not getting access to tickets, or being forced to pay exorbitant prices: “(t)he innocent victim of ticket touting is the fan who has to pay through the nose for a vastly over priced ticket to see their sporting, stage or musical hero. These are the people we must protect” (DCMS Press Release, 2006).

The Parliamentary Culture, Media and Sport Committee released their latest report in January 2008 (Culture, Media and Sport Committee 2008) and the Government responded to this in April 2008 (DCMS 2008, 1), noting that;

“The Committee commented that regulation must be a last resort and the Government agrees with this. The Government does not see a case for any general restriction of ticket resale. However, the Government has listened to the arguments that some aspects of ticket resale may restrict access to sport or major cultural events; especially where these events are unique, of national or international significance and meet public interest objectives.”

Whilst we see the Government seeing law as a last resort, and Jowell had previously threatened the wider entertainment industry with legal intervention, legislation has, in fact, been used in the past to regulate touting. Ticket touting in relation to football was

originally criminalised in the Criminal Justice and Public Order Act 1994 (CJPOA) and this was recently amended by the Violent Crime Reduction Act 2006 (VCRA).¹ Rather than focused around the issue of access to tickets as the current debate has been, this legislation was constructed around the premise of preventing outbreaks of public disorder.

This article evaluates the arguments for criminalising touting within football, particularly through the imposition of strict liability, and suggests that the amendments to the legislation represented a missed opportunity to deal with some of the fundamental concerns at the heart of the ticket touting regulations. It argues that the Government should have considered the case for de-criminalisation or, at the very least, amended the provisions to make them fairer for football fans.

The Football Legislation

There are two distinct themes running through the general debate on ticket touting within football, one relating to public order and the other pure profiteering. The former arose from the findings of the Taylor inquiry into the Hillsborough football disaster where 96 people died as a result of overcrowding at Sheffield Wednesday's Hillsborough Stadium (Taylor, 1990). Taylor saw two particular problems. The first was that the presence and activities of the touts themselves can act as a focus for disorder and encourage people without tickets to travel to the ground, potentially causing problems. Secondly, that the indiscriminate sale of tickets had implications for segregation policies at grounds. The proposals he put forward appeared to be concerned with the impact of ticket touting on public order issues, and not on a broader ideological objection to a free market.²

“I am satisfied from what I have read, heard and seen, that outside football grounds the presence and activities of touts have a grossly antisocial effect leading both directly and indirectly to disorder” (Taylor, 1990, para 275).

As a consequence of the Taylor Report, three football specific criminal offences were created to govern spectator behaviour which were contained within The Football (Offences) Act 1991. These were relating to throwing missiles, invading the pitch and racist chanting. A further offence relating to ticket touting was enacted in the Criminal Justice and Public Order Act 1994, s 166(1) which provided that;

It is an offence for an unauthorized person to sell, or offer or expose for sale, a ticket for a designated football match in any public place to which the public has access or, in the course of a trade or business in any other place.

1 Ticket touting is also criminalized in relation to the London Olympics 2012, see London Olympic Games and Paralympic Games Act 2006 as required by the International Olympic Committee. This issue is outside the ambit of this article.

2 Indeed, the free market aspect of ticket touting was celebrated by some, such as Teresa Gorman; ‘As I have said in this House, ticket touts are street traders. They are not necessarily especially nice people; they may be reprobates, but what they are doing is not illegal and by and large it causes no offence – except to people who seem to object to touts making extra profits. That is pure envy.’ Gorman 1994, col 514.

There was much debate during the passage of the Bill as to whether the ticket touting offences should be extended to other sports or areas (see Greenfield and Osborn, 1996). Tom Pendry, for example, noted that

“We recognise that no two sports are the same, and the problems associated with football do not necessarily relate to other sporting events, but there is now one common element to all major sporting events such as cricket, football, rugby, tennis golf and so on – the potential that they offer to the criminal element that tout tickets (Lord Pendry 1994, col 349).”

He went on to cite a number of criminal activities associated with touting itself, outside of the specific rubric of public order cited by Taylor. Pendry made clear his position when he exhorted the house to remember that it was a *criminal justice bill* (our italics) and not just a public order one (Lord Pendry, 1994, col 350). It was evident, however, that the key issue was indeed one of public order, particularly within football given the activities of fans at football grounds and the particular fierce rivalry engendered between football clubs.³ Indeed there were some flippant asides made by some members opposing Pendry’s attempt to broaden the ambit of the offence to other sports.⁴

Whilst these provisions do pertain solely to football, s 166(6) does provide that the Secretary of State can extend the measures to other sporting events although this has not, as yet, occurred. The section was amended by the Football (Offences and Disorder) Act 1999 to broaden the definition of designated football match (see Statutory Instrument 790 2007). This was to extend the measure to cover the touting of tickets for international matches.

The VCRA 2006 amends s 166 further by extending it to cover internet sales,⁵ something not considered in 1994, and by re-writing the definition of ‘sale’ to deal with some of the problems that the original wording relating to this had created. This included loopholes that were identified within the original drafting such as bypassing the provisions by offering a ticket for sale as part of a package, for example by offering a football programme or other gift for sale with a “free ticket”, and also the ambiguity of sale within a “public place”.

The VCRA s 53 amends the CJPOA s 166 so that the offence now provides that it is an offence for an unauthorized person to sell or otherwise dispose of a ticket, and it

3 See for example Joseph Ashton’s point ‘...I am glad that the Home Office has accepted the Football Association’s advice that the issue is one of public order and of preventing disturbance. With respect to (Pendry), at Wimbledon and other sporting events and at pop concerts the difference is that everyone is on the same side. At Wimbledon there are not two sides who will have a punch up if someone’s favourite loses the match. There is no such problem at pop concerts, or at the Derby or other horse races. Although I am against touts making a profit out of those events, at least one can say that the market economy can prevail there. I am glad that the minister of state has accepted the argument on violence at football matches –an argument that does not apply to Twickenham or other places’ (Ashton 1994, col 352). Interestingly, at the Australian Tennis Open in 2007 violence did break out between rival supporters, see Halloran (2007).

4 See for example David Maclean’s point that ‘If, in due course, there is rioting at the ice dance championships or public disorder at the synchronized swimming events, I shall consider legislating in those cases only’ (Maclean 1994, col 354).

5 This was to bring the legislation in line with the EU Directive on Unfair Commercial Practices (2005/9).

also extends and clarifies what is meant by the selling of a ticket. The new, amended, s 166 **Sale of tickets by unauthorized persons** now provides that

- (1) It is an offence for an unauthorised person to-
 - (a) sell a ticket for a designated football match, or
 - (b) otherwise to dispose of such a ticket to another person.
- (2) For this purpose--
 - (a) a person is "unauthorised" unless he is authorised in writing to sell or otherwise dispose of tickets for the match by the organisers of the match;
 - (aa) a reference to selling a ticket includes a reference to-
 - (i) offering to sell a ticket;
 - (ii) exposing a ticket for sale;
 - (iii) making a ticket available for sale by another;
 - (iv) advertising that a ticket is available for purchase; and
 - (v) giving a ticket to a person who pays or agrees to pay for some other goods or services or offering to do so.
 - (b) a "ticket" means anything which purports to be a ticket; and
 - (c) a "designated football match" means a football match of a description, or a particular football match, for the time being designated for the purposes of this section by order made by the Secretary of State.

As well as extending and clarifying the definition of selling, the new provisions add a s 166A which removes the need for the 'sale' to take place in a 'public place', therefore encompassing internet transactions and providing that host websites such as eBay can also be caught by the new legislation. Seen by Parliament as an attempt to improve the law (see Lord Pendry 2006, cols 822 to 825), these ticket touting provisions were still avowedly focused on the relationship to disorder rather than a condemnation of the commercial dimension to ticket resale;

“these amendments....make it clear that any disposal of a ticket not authorised by the match organizer is a touting offence, subject to the terms and conditions of that ticket. This is to maintain public order rather than for commercial considerations. Ticket touting is a public order concern, notably in respect of domestic football matches, as it can compromise arrangements for segregating rival supporters (Lord Bassam 2006, col 673).”

There has been some clear support for the extension of the provisions (see Scott, 2006, Duthie and Giles, 2006, Campbell, 2006).⁶ However we would argue that there are a number of unresolved theoretical and principled issues and that there is a general confusion as to the underlying rationale for the offence.

⁶ FA Chief Executive Brian Barwick said: "This is positive news for everyone involved in football, especially the millions of genuine fans up and down the country whose incredible loyalty to their team could be exploited by touts. The new laws mark another positive achievement for the partnership between football, the government and the police to improve safety and security at matches." <http://www.thefa.com/TheFA/NewsFromTheFA/Postings/2006/11/ticketlaws.htm>.

Criminalising Touting

There are two distinct strands to the criminal dimension of touting. First and most obvious is the link to disorder at football itself that was the driving force of the legislation. The second point raised by Tom Pendry during the debates on the Criminal Justice and Public Order Bill, was whether touting could be located within a context of a more general criminality by the participants.⁷ This general argument was once again aired in the debates during the passage of the Violent Crime and Reduction Bill.⁸ Placing ticket touting in the wider context of public order at football matches, and a more general criminality, helps to explain why the decision to criminalise it was initiated.⁹

However there is a further principled issue concerning the creation and extension of an apparent strict liability offence. There are no reported cases on s166, but there does not appear to be a mental element to the offence and it would also appear to conform to the general principles of strict liability as set out by Lord Scarman in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, 14:

(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue.

The distinction the Courts draw between cases involving 'truly criminal' activities and those involving 'quasi criminal' activities is an important one for distinguishing strict liability offences. Horder argues that

"...the difference in approach towards the two kinds of cases reflects an underlying assumption that liberty is at stake, and must hence be protected by an implication of mens rea, only in cases involving 'truly criminal' wrongdoing, wrongdoing conviction for which attracts stigma" (Horder 2002: 459).¹⁰

7 'The actions of the criminal element now regularly include fraud, theft, deception, intimidation, forgery and, in some circumstances, activities of a very serious criminal nature, such as gang and Mafia-type operations' (Lord Pendry 1994, col 350). Similarly Menzies Campbell stated 'as has already been pointed out, there is now convincing evidence of organised criminal behaviour. The notion of the ticket tout as a friendly Flashman-type figure has long since been removed from the consciousness of those who have made any study in the matter. Consequently, the amendments are intended to bring home as graphically as possible that ticket touting is a serious criminal matter' (Campbell 1994, col 351).

8 Tom Pendry once again noted; 'touting creates a range of public order and public nuisance concerns, from allowing the black market economy to flourish, to undermining policing and security arrangements' (Lord Pendry 2006, col 823).

9 A further explanation for the policy is to see it as part of the general raft of measures that affected football spectatorship which were themselves informed by the then Government's distaste for the activities of football hooligans and the political embarrassment such activities generated particularly when they occurred abroad. See Williams, Dunning, Murphy, 1989.

10 See *Sweet v Parsley* [1970] AC 132, *B (a minor) v DPP* [2000] 2 AC 438, *R v K* [2001] 3 WLR 471 where the House of Lords presumed a mens rea for offences involving drugs and sexual offences.

In contrast, Duff states that those who seek to justify strict liability argue that ‘at least for offences that regulate voluntary, specialised activities that create significant risks to public health or safety (especially those motivated by profit), and conviction for which attracts neither serious moral or social stigma nor oppressive penalties, strict liability can be justified if it is necessary to make the law more effective’ (Duff 2005: 128).

But whilst the criminal law may draw distinctions between what is ‘truly criminal’ and what is ‘quasi criminal’ (or stigmatic and non-stigmatic) this distinction is not always clear. Simester has argued that

“using the ‘criminal’ law in non-stigmatic offences necessarily links such transgressions to the paradigm of censure and sanctions by which crimes are distinguished from other forms of legal wrong. It is no surprise, therefore, that the line between quasi-criminal regulations and ‘true’ stigmatic crimes is not easy to draw” (Simester 2005: 40).

A reliance on the criminal law as the mechanism to punish both quasi-criminal regulations and ‘true’ stigmatic offences may blur the distinction between the two, but there does appear to be agreement on the objections to strict liability offences generally. Simester states that:

“The imposition of strict liability in the criminal law is widely thought by scholars to be unjustified. There is, moreover, a broad consensus about why it is wrong. Strict liability leads to convictions of persons who are, morally speaking, innocent. Convicting and punishing those who do not deserve it perpetrates a serious wrong. Thus strict liability is a misuse of the criminal law – an institution which, because of its moral significance and grave implications for the lives of convicted defendants, should be reserved only for the regulation of serious wrongs done by culpable wrongdoers” (Simester 2005: 40).¹¹

Applying this to ticket touting, it is clear that s.166 would fall within a quasi-criminal regulatory offence, rather than one which is ‘truly criminal’ and where a mens rea would be imposed. Following Lord Scarman’s reasoning in *Gammon*, the presumption of mens rea would be displaced for this offence in the statutory context (see, for example, *Sherras v De Rutzen* [1985] 1 QB 918), because other sections in the CJPOA do require a mens rea and this one does not, but also in the context of a social concern such as public safety. The punishment for the offence is a maximum £5,000 fine which would also imply this is a strict liability offence.

The strict liability aspect of s.166 does not appear to have been amended by the VCRA as it relates to persons selling or disposing of tickets. However, the new s 166A, which relates to service providers such as eBay, does appear to include a mens rea as ‘service providers’ will not commit an offence unless they know that tickets are

¹¹ Similarly, Duff has argued that “the simple objection to offences of morally strict liability is that they result either in the unjust condemnation of those who have not been proved to deserve it, or in the misuse of the criminal law to penalize without condemning (which subjects the innocent to simulacra of criminal punishment, and allows the guilty to escape the condemnation they deserve)” (Duff 2005: 128-129).

being sold illegally at the time the tickets are advertised or they become aware that tickets are being sold illegally but do not take immediate steps to remove the advertisements (see Duthie and Giles 2006).

It would appear that the social concern at the time the offence was enacted was public disorder and safety at football matches, rather than the issue of ticket touting itself.¹² It is possible, on the basis of the rationale for the creation of the offence, to draw a distinction between the 'professional' tout and the genuine fan who has a spare ticket. 'Professional' touts who regularly sell tickets outside football grounds will be more likely to have tickets for all sections of the stadium, rather than just for home or away supporters, and would also tend to be outside the stadium on a regular basis, so football fans would know they could purchase tickets from them. As such, the activities of the professional tout potentially contribute to disorder. But the offence does not differentiate between sellers who have entirely different motivations for ticket resale. The offence not only criminalises the 'professional tout', that is to say someone who buys and sells tickets with a view to making commercial gain, but also succeeds in criminalising those genuine football fans who have bought a spare ticket who then sell it to a friend, in order to recoup their costs. The legislation therefore results in criminalising the behaviour of a genuine football fan which does not happen to those selling tickets for other sports or other forms of entertainment (for examples of unfairness, see Greenfield and Osborn 1996).

Justifying The Extension Under The VCRA 2006

The Taylor Report had no empirical evidence with which to assess the problem caused by ticket touting and it is instructive to now consider the extent to which the offence is prosecuted. Given that statistical evidence is now available this could have formed the basis of some review of the existing legislation before it was extended by the VCRA 2006. As we have observed there are concerns about the original offence and its extension. It is not apparent that such behaviour should be criminalised and even if a case can be demonstrated whether phrasing an offence in terms of strict liability is justifiable.

As discussed above, the backdrop of the CJPOA was widespread concern about disorder connected to football. There is a clear pattern over 10 years with a large increase in attendances coupled with a decline in total arrests for disorder at football.¹³ Both the Government and the Football Association have enthusiastically praised the decline and attributed it to the range of legislative measures and effective policing.¹⁴

12 See for example, Neil Parpworth who argues 'the ticket touting provisions were included in the Criminal Justice and Public Order Bill not out of a desire to criminalise ticket touting per se. Indeed, there may be many buying up tickets and then selling them onto others at inflated prices. We live in a commercial world and it might be argued that 'professional' ticket touting represents the free market in operation. Rather the purpose underlying s166 is reflected in the second part of the short title to the 1994 Act; public order. The problem with ticket touting, at least in terms of football, is that it may have very serious consequences for public safety (Parpworth 2001: 741).

13 The Home Office statistics cover a range of offences (Violent Disorder, Public Disorder, Throwing Missiles, Racist Chanting, Running on the pitch, Alcohol Offences, Ticket Touting, Misc). They indicate a general decline of total arrests as follows 2001-2: 3,898; 2002-3: 4,413; 2003-4: 3,982; 2004-5: 3,682; 2005-6: 3,462. Home Office 2006, table 2.

14 'New figures published today show arrests for football-related offences decreased by seven per cent in 2005/06 to 3,462. This follows an 11 per cent decrease in 2004/05 and a 10 per cent decrease in

As stated above, there are of course a whole host of legislative measures, of which ticket touting is but a minor part. What is apparent from the statistics is that ticket touting when measured by the number of arrests is a minor, and declining, problem that affects relatively few football clubs as detailed in Table 1 below;

Table 1: Arrests for ticket touting by year and number of clubs where touting arrests occurred ¹⁵

Season	2001-2	2002-3	2003-4	2004-5	2005-6
Ticket Touting Arrests	167	132	83	146	99
Number of Clubs Affected	17	20	9	14	14

The small number of football clubs affected can be explained by understanding the nature of the market for tickets. It is only those matches that are sold out where a significant resale market exists. If tickets are available through official sources up to, and possibly including, match day, a tout seeking to sell a ticket beyond face value is unlikely to find many takers.

The statistics demonstrate that touting is either not a significant offence or an offence which is not given much priority by the police.¹⁶ Given that touting is more likely to exist at high profile popular games these are also likely to be games with the highest risk of disorder. Consequently arresting touts will not be the main concern of the police who will give priority to preventing public disorder between fans. Therefore, it is difficult to see a case for extending, or even maintaining, a strict liability offence that has the capacity to catch not only the professional tout, but also the fan seeking to recoup the costs of a spare ticket. But given the contemporary political debate around the raft of football legislation, abolition or some reduction in the original offence was always unlikely.¹⁷

Regardless of the debate over whether the offence should be criminalised and extended there is concern over the position of the genuine fan who finds himself with a spare ticket and wants to recoup his expenses.¹⁸ The section equates such a fan with

2003/04. For the second year running the total number of arrests at League matches were the lowest since records began while 43 per cent of all matches were police free, allowing police resources to be re-deployed elsewhere in the community' (Home Office Press Release 2006).

¹⁵ Figures extracted from the Statistics on Football-Related Arrests and Banning Orders published annually by the Home Office, table 13.

¹⁶ The Home Office Criminal Statistics roughly confirm the Football - Related statistics with the numbers of convictions under the CJPOA s166; 2002, 91(convictions); 2003, 74; 2004, 61; 2005, 98. *Criminal Statistics* 2002, 2003, 2004 and 2005 table S1.1A(ii).

¹⁷ See the comments of Home Office Minister, Vernon Coaker: "I am very encouraged by the new figures. A seven per cent decrease in football-related arrests coupled with a seven per cent increase in football banning orders shows that *tough legislation* (our emphasis) and targeted policing continues to be effective. I am particularly pleased to see a 96 per cent rehabilitation rate of individuals indicated by the low number of repeat banning orders' (Home Office Press Release 2006)

¹⁸ There are often networks of fans based around internet sites that facilitate the reselling of tickets at face value only. Attempts at touting will be met by a ban. See <http://www.fredtissue.co.uk>.

the professional tout who seeks only to maximise profit and has no other considerations. The Government has made it clear that for all other sports and forms of entertainment, the criminal law is not being invoked to deal with the problem of ticket touting. For example, Tessa Jowell stated after the fourth ticket touting summit in February 2007 that “it would be unfair if consumers were unable to sell their own tickets, for whatever reason, and get their money back – we don’t want to criminalise genuine fans” (DCMS Press Release 2007).

It is not clear why the same considerations should not apply to genuine football supporters, and it is further perplexing as to why the statutory provisions are currently being fortified at a time when public disorder at football matches, and the number of people being arrested for touting, is in decline. At the same time as this regulatory framework is being extended in football, a middle way of secondary ticket exchanges is evolving via football clubs themselves and bodies such as viagogo.¹⁹ An analysis of these approaches is beyond the scope of this article, but it is important to note that extra-legal responses are evolving outside of any attempts to regulate.

If it is the Government’s view that criminalising ticket touting is proving effective at reducing public disorder at football matches then this would help to explain why the decision was made to fortify the statutory provisions rather than decriminalise the offence. But this does not explain why the genuine football fan should not be viewed in the same way as the genuine cricket or rugby fan who is able to sell a ticket to a friend in order to recoup the money spent on the ticket without fear of criminalisation, notwithstanding the fact that this may be in breach of the ‘non-transferability’ clause of the contract. The distinction between the touting of a ticket which could lead to public disorder, and the selling of a ticket to merely recoup the money spent, could have been made by making some minor amendments to the offence in order to make the provisions fairer for the genuine football fan.

The provisions relating to selling could have been amended to cover selling for profit, or selling for commercial gain in order to exclude the genuine fan from its ambit. A presumption to the offence could also have been added that if the sale of the ticket was for commercial gain then it could be conclusively presumed that disorder was likely to be caused. The amended section, with our proposed amendments italicised below, could therefore have read:

S 166 Sale of tickets by unauthorised persons

(1) An unauthorised person who-

(a) sells a ticket for a designated football match, or

(b) *otherwise disposes of such a ticket to another person*

is guilty of an offence if having regard to all the circumstances public disorder is likely to be caused thereby.

(2) For this purpose--

(a) a person is "unauthorised" unless he is authorised in writing to sell or otherwise dispose of tickets for the match by the organisers of the match;

(aa) a reference to selling a ticket includes a reference to-

¹⁹ See <http://www.viagogo.co.uk> (date last accessed 4 June 2008) which has six Premiership football clubs on its books including Manchester United and Chelsea.

- (i) offering to sell a ticket;
 - (ii) exposing a ticket for sale;
 - (iii) making a ticket available for sale by another;
 - (iv) advertising that a ticket is available for purchase; and
 - (v) giving a ticket to a person who pays or agrees to pay for some other goods or services or offering to do so.
- (b) a "ticket" means anything which purports to be a ticket; and
- (c) a "designated football match" means a football match of a description, or a particular football match, for the time being designated for the purposes of this section by order made by the Secretary of State.

(2A) If in the proceedings for an offence to which subsection 1 applies it is proved that the defendant sold or otherwise disposed of the ticket for commercial gain it is to be conclusively presumed that disorder is likely to be caused.

In framing the offence in this way, a distinction could have been drawn between the professional tout who is potentially causing public disorder by his presence outside football stadia and selling tickets to both home and away supporters, and the genuine fan who has a spare ticket and wants to recoup the money spent. The genuine fan is unlikely to be selling for commercial gain in the sense of profiting from the transaction, as he or she will just want to be compensated for the money expended on the ticket. This proposed amendment would have ameliorated some of the unfairness of invoking the criminal law to deal with touting at football matches and ensured that those who the offence is aimed at are targeted, namely the professional ticket tout. These factors should have been considered by the Government given its reluctance to criminalise the behaviour of genuine fans of other sports and the objections to strict liability offences generally, as discussed above.

An alternative approach could have been to adopt the wording of the legislation of the offence created to deal with touting at the Commonwealth Games in Glasgow in 2010. The Glasgow Commonwealth Games Bill²⁰ provides in s 17(2) that

“A person touts a Games ticket if the person does any act falling within subsection 3 [which covers selling a games ticket, offering to sell, exposing for sale, advertising a ticket as available for purchase, making a ticket available for sale by another person or giving away a ticket on condition that the person pays a booking fee or other charge] in a public place, in relation to the sale, or proposed sale, of a Games ticket for an amount exceeding the ticket’s face value, or with a view to making a profit.”

We would argue that the approach framed in the Glasgow Commonwealth Games Bill, particularly provisions s 17(2) b and c above, provides a more pragmatic and fair approach to the issue as the legislation clearly makes a distinction between resale at face value and resale to make a profit. This would have been a fairer way of drafting

²⁰ The Bill received Royal Assent on 10 June 2008.

the football legislation, notwithstanding the fact that legislation may have been an inappropriate response in any event.

Conclusion

The initial decision to criminalise ticket touting was taken in response to public disorder at football matches and as part of a raft of measures to deal with the problem. The decision to fortify the provisions was taken at a time when public disorder at football matches is in decline and ticket touting is high on the Government's agenda. The Government has made clear that it does not want to criminalise touting for other sports and forms of entertainment and this article has sought to argue that amending the original legislation was a missed opportunity by the Government to review how the original offence was working in practice and to consider whether the offence should be decriminalised in line with the decline in public order offences at football matches and current Government thinking on ticket touting generally. This ties into the views of the Select Committee and Government that legislation should only be used as a last resort, and that criminal law should not ordinarily be used as means of policing the problem. Emerging self-regulatory approaches and initiatives as noted above seem to support this contention and we support the idea that the law is not the answer to the problem.

However, if the Government was not going to decriminalise the offence, the amendments in the VCRA were also a missed opportunity to address the concerns of genuine football fans who have spare tickets and wish to recoup their money. If current Government thinking is not to criminalise fans of other sports in the same predicament, this article has argued that genuine football fans should be subject to the same considerations. If there is a justification for criminalising touting at football matches because of public order considerations, minor amendments could have been made to the legislation to draw a distinction between the professional tout who is potentially causing disorder and the genuine fan recouping 'losses'. The legislation should be clearly aimed at the professional tout, and steps could have been taken to ensure that it is this person's behaviour that is criminalised rather than that of the genuine fan.

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