COLLEGE ATHLETICS AND CRIMINALITY: HOW *GATTO* HAS OPENED A PANDORA'S BOX IN COLLEGE SPORTS

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INTRODUCTION

College sports have become a staple of American life and consumerism. Evidence of this phenomenon can be seen every Saturday from September through November as well as the entire month of March each year. According to Business Insider, twenty-seven universities made over $100 million in 2017.[1] These high numbers not only come from ticket sales, but merchandise and, mostly, television deals. Who is at the top of all of this? The National Collegiate Athletic Association (NCAA) of course. The NCAA is supposed to be a private association making rules for its member universities. However, its rules are now being enforced by the federal government. This paper will explore a few of the problems that this new FBI backed NCAA regime poses for both individuals involved with college sports, universities, and those who work in university athletic compliance offices.

THE HISTORY OF THE NCAA

The NCAA is a private association made up of around 1,200 universities in the United States.[2] The NCAA promulgates rules that all universities must follow, with a few exceptions of autonomous rules created by individual divisions and the Power 5 Conferences. The most important rules by far are those rules which regulates who is eligible to play in NCAA sanctioned sporting events. The spirit of these rules is that only "amateur" athletes may participate in NCAA athletics. The question is, who

[1] Cork Gains, The 27 Schools that Make at Least $100 Million in College Sports, Business Insider (Nov. 25, 2017), https://www.businessinsider.com/schools-most-revenue-college-sports-texas-longhorns-2017-11.

[2] NCAA, http://www.ncaa.org/about/who-we-are/membership.

qualifies as an "amateur"? Thus, the rules set forth a host of criteria to determine who is an amateur and who is not, and therefore, who is eligible to play and who is not. The NCAA's view of what an "amateur" looks like has changed overtime. This paper will not address the merits of the NCAA amateurism rules; however, one must remember the background against which these criminal prosecutions are taking place. The NCAA is trying to protect its product and enforce its rules. However, as detailed below, they need a lot of help doing both.

ENFORCEMENT OF NCAA RULES

If the NCAA was a governing body of a country, its citizens most likely would live in a state of chaos. This is because the NCAA has virtually no enforcement power over its rules. It can only enforce its rules if the university agrees to the sanctions imposed for breaking said rules. The NCAA is also very limited in it policing power. The NCAA does not have the resources to put investigators at every single NCAA institution to look for violations. Therefore, it relies almost solely on self-reporting by universities. This is done through each universities' athletic compliance office.

Self-reporting to the NCAA via an athletic compliance office creates a host of problems, especially for the athletic compliance officials. Athletic compliance offices are staffed and funded by the university and not the NCAA. This means the university, not the NCAA, has total control over the athletic compliance office, which includes the ability to hire and fire individuals who work in the compliance office. This creates a predicament rarely seen anywhere else: that of an employee being paid by an employer to essentially work for the employer's regulatory body. While the NCAA and the university do not always have an adversarial relationship, they almost always do in the context of compliance. The athletic compliance official is hired and paid by the university. That person's job is to report that university's violations of NCAA rules to the NCAA. What happens though when the university does not want a violation reported to the NCAA? They can simply instruct the compliance office not to do report the violation while threatening termination if for disobedience. Until now, a compliance official acting under

direction from a university was not subject to any direct punishment from the NCAA, as fault fell on the university and the university received NCAA sanctions. Now, however, there is the prospect of punishment far beyond what the NCAA can give. This punishment will be discussed later.

UNITED STATES V. GATTO

On September 25, 2017, federal prosecutors filed an official complaint in the Southern District of New York against James "Jim" Gatto and four others with conspiring to commit wire fraud under 18 U.S.C. § 1343.[3] The charges stemmed from actions in early 2017 in which Gatto and his coconspirators attempted to make cash payments to the families of high school basketball players. Receiving such money is against NCAA rules and would cause the player to be ineligible to play in NCAA sanctioned events. It was not until now, however, that such payments were violations of federal law.

The legal theory that federal prosecutors use in going after Gatto and his coconspirators is intriguing. They claim that he violated 18 U.S.C. § 1343, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[4]

It seems a little strange that making payments to a family in return for a basketball player to play for a school could be considered wire fraud. However, the prosecutors claimed he,

> [P]articipated in a scheme to defraud, by telephone, email, and wire transfers of funds, among other means and methods, the University of Louisville and the University of Miami by

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[3] Indictment at 18, *U.S. v. Gatto*, (S.D.N.Y. 2017) (17 Crim 686).

[4] 18 U.S.C. § 1343.

> making and concealing bribe payments to high school student-athletes and/or their families in exchange for, among other things, the student-athletes' commitment to play basketball for the University of Louisville and the University of Miami, thereby causing the universities to agree to provide athletic scholarships to student-athletes who, in truth and in fact, were ineligible to compete as a result of the bribe payments.[5]

Essentially, Gatto and his coconspirators were using telephone, email, and wire transfers to bribe certain players to play for certain universities. The universities contend, however, that they offered scholarships to these athletes believing they were amateurs who would be able to compete in NCAA sanctioned events. These payments, however, caused these players to be ineligible, depriving the university of an amateur athlete.

It must be noted that the payments themselves were not the basis for the complaint. Instead, it was the fact that payments were made to encourage players to falsify documents pertaining to their NCAA eligibility. The NCAA requires all athletes to complete several "clearinghouse" documents, meant to certify athletes as amateurs and, therefore, they are eligible to compete in NCAA events. After being paid, the athletes would no longer be eligible to compete in NCAA events. However, the athletes that were paid filled out and signed these clearinghouse documents stating that they had never been paid for being an athlete and were eligible to compete. At first glance, it seems that the athletes were the ones committing fraud. If they knowingly falsified the documents, then they were. However, that is a debate for another day. The reason Gatto and his coconspirators can be charged with fraud pertaining to those documents is because they induced the athletes to lie on these documents. Gatto and his coconspirators knew that the athletes would be lying on these documents, whether the athletes knew they were doing so or not. Therefore, Gatto and his coconspirators, using telephone, email, and other forms of wired communication, induced athletes to lie on documents that universities relied on in making scholarship decisions, thus fraudulently inducing universities allot their

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[5] Indictment, *U.S. v. Gatto* at 19.

resources to these players who, in fact, could not benefit the university, and could harm the university, because they were not eligible to compete in NCAA events. This is how federal prosecutors were able to charge Gatto and his coconspirators under 18 U.S.C. § 1343.

The question that does not seem to have a firm answer is why federal prosecutors are just now going after people who engage in this activity. This kind of behavior has been prevalent in college basketball and football for a long time. It is probably even more prevalent in college football than in college basketball. Surely the FBI and federal prosecutors know this, so why not go after people who commit similar offenses in the college football context? Is it because the NCAA generates literally all its revenue, around a billion dollars, from college basketball? Did the NCAA ask the FBI and federal prosecutors to get involved? If so, why? Is the NCAA tired of not having the ability to enforce its rules and, therefore, needs the FBI to help? Unfortunately, these questions are yet to be answered, but they are important questions that need to be answered in order to fully understand why only now people are being charged under 18 U.S.C. § 1343 for actions that have been going on for decades.

PROBLEMS FOR ATHLETIC COMPLIANCE OFFICIALS

As discussed earlier, the NCAA has no way of policing universities except via self-reporting. This is done almost exclusively via athletic compliance departments that are completely staffed and funded by the university. This presents a problem for compliance officials because their duty is to both protect the university and report its violations to the NCAA, violations which often carry some sort of penalty. Until now, the most trouble a compliance official could get into was if the university directed him or her not to report a violation and then did report said violation, they could be fired. The possibility of not having a job is enough for some compliance officers to not report, and even cover up violations. Now, however, compliance officials may not only lose their jobs, but may indeed be charged with the crime of conspiracy or misprision.

Conspiracy

Under 18 U.S.C. § 371, a person can be charged with conspiracy if they conspire to commit any federal crime.[6] Under federal law, conspiracy simply means "two or more persons conspire to commit any offense."[7] Generally, however, each chapter regarding crimes in the United States Code has its own conspiracy section that specifically applies to the crimes within the chapter. Chapter 63 of Title 18 of the United States Code, where the wire fraud statute is found, indeed has its own conspiracy section. 18 U.S.C. § 1349 states, "any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[8] This means that anyone who knowingly participates in any part of a crime, even simply planning, can be charged as if they had actually committed the crime themselves.

This presents a problem for athletic compliance officials. One of the main jobs as a compliance official is to "clear" incoming athletes and certify they are amateurs for NCAA purposes. Therefore, compliance officials can clear athletes who may not truly be eligible and, because they are the ones monitoring violations, such violation would not get reported to the NCAA. In some scenarios, they could get swept into a conspiracy to commit a federal crime. Consider this hypothetical:

> A prospective athlete completes all the clearinghouse paperwork honestly and is cleared because they meet NCAA amateurism requirements. However, after being cleared through the NCAA Clearinghouse, the athlete then gets paid (or his father or his uncle or whoever) to sign with a certain university. This of course violates NCAA rules and would make the athlete ineligible to compete in NCAA events. However, a person involved with paying to get the athlete to the universities alerts a compliance official of the payment and lets the official know that the athlete knows about the payment and is weary of signing documents declaring he still maintains amateur status. Furthermore, the athletic director

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[6] 18 U.S.C. § 371.

[7] Id.

[8] 18 U.S.C. § 1349.

> or the university president now asks the compliance official to "ease the athlete's mind" and encourage him to sign the papers. The compliance official knows it is a violation of NCAA rules and that by encouraging the athlete to falsify these papers, the university could be sanctioned should the NCAA find out what occurred. However, the pressure from above, and the desire to keep his job, forces the compliance official to encourage the athlete to falsify the documents, and the athlete does. Everyone seems to win! Then, however, the NCAA finds out and declares the athlete permanently ineligible. Now the university has lost an amateur athlete by way of fraud. Now, everyone involved can be charged with conspiracy to fraudulently deprive the university of an amateur athlete, by way of wire fraud or other fraud, including the compliance official.

This is an unfortunate situation. Some may say the compliance official in the hypothetical should have simply quit, not encouraged the athlete to sign the papers, or report the violation to the NCAA. However, many athletic compliance officials do not understand how criminal law works. When they are being pressured by their boss to not report to the NCAA, they generally understand that they work for the university and the repercussions breaking an NCAA rule will not ultimately fall upon the compliance official. Unfortunately, in the situation described above, the compliance official probably feels that he is simply breaking an NCAA rule and it is no big deal. Compliance officials do not report stuff all the time to protect the university from NCAA sanctions. Now, however, by simply following orders, the compliance official has now been swept into a conspiracy to commit a federal crime and can be charged, convicted, and sentenced just as if he committed the actual crime himself. While it may seem unlikely, such a situation is not out of the question after *Gatto*.

Misprision of a Felony

While conspiracy is not out of the question for athletic compliance officials, the problem they most likely face is misprision of a felony. Misprision simply means to conceal after

the fact. The primary misprision statute is 18 U.S.C. § 4 which states:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[9]

Essentially, concealment of or failure to report a felony is a federal crime.

This has huge implications now for athletic compliance officials because their job sometimes, in order to protect the university, is to cover up NCAA violations. As we now know, some NCAA violations are now crimes. Consider the previous hypothetical with a few changes:

> The athlete has falsified several documents under the direction of someone who has paid him to do so. The compliance official does not actively help encourage or facilitate the falsification of these documents but is now made aware that they are falsified. The athletic director and the president of the university instruct the compliance official to not report the violation. Further, the compliance official is instructed to conceal the violation by any means possible. The compliance official does so, but the NCAA still finds out, declares the athlete permanently ineligible, and the university has now been fraudulently deprived of an amateur athlete. Therefore, those involved with the conspiracy to have the athlete falsify the documents are charged as coconspirators. The athletic compliance official, however, is now charged with misprision of a felony because he covered up the false documents.

This is another unfortunate situation for compliance officials. By simply doing their job at the direction of their superiors, they can be on the hook for misprision of a felony. As stated earlier, compliance officials do not report NCAA violations all the time. Therefore, their regular business actions of covering up violations

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[9] 18 U.S.C. § 4.

to protect the university now opens them up to criminal liability under misprision.

DEPRIVING A UNIVERSITY OF AN AMATEUR ATHLETE?

What exactly constitutes "depriving a university of an amateur athlete?" This may seem straightforward like in the two hypotheticals above. These hypotheticals lay out the most obvious situation when a university is deprived of an amateur athlete, i.e., when the athlete is declared permanently ineligible. Is this the only time a university is considered deprived of an amateur athlete or are there other scenarios in which a university is considered to be deprived of an amateur athlete? Take for example an athlete who is given $50 to eat by a university booster. This is an unauthorized benefit according to NCAA rules and could cause the athlete to be suspended. A suspension is another way of saying the athlete is ineligible, but only temporarily. In this situation, has the booster deprived the university of an amateur athlete? Probably not, but it is now possible. The more likely scenario is an instance where the athlete is declared ineligible for a year. Would a violation induced by fraud by someone constitute depriving the university of an amateur athlete for a year? Unfortunately, that question is still to be answered. After *Gatto*, there is literally no way of knowing just how far this could go.

PROBLEMS FOR UNIVERSITIES

As mentioned above, universities are considered the victims of the fraud perpetrated by men such as Gatto. This does not mean, however, that universities are immune to being caught up in a similar federal investigation. While it is less likely that universities would be targeted for such investigations, there is at least one scenario in which the university could run into problems: corporate criminal liability.

Corporate Criminal Liability

Before discussing how universities can be held criminally liable as a corporation, it is important to first understand the basis for corporate criminal liability. The United States Code explicitly allows for businesses and organizations to be held

criminally liable. In defining terms that apply to federal statutes the Code states, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[10] Unfortunately, the Code does not define who makes up a corporation or entity. Put another way, because corporations are made up of several people, there is the question of whose actions can be attributed to the corporation as a whole? Fortunately, the Supreme Court clearly answered this question in *New York Central & Hudson River Railroad Company v. United States*. In this case, the Court stated, "a corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized."[11] Essentially, the Court is saying that when an employee, acting within the scope of his employment, acts to benefit the corporation, the actions of the employee are attributable to the corporation, whether they be harmless, tortious, or criminal in nature.

There is an issue, however, with defining universities as corporations for legal purposes. The most obvious problem is the difference between public and private universities. Virtually every single private college and university in the United States is a legally incorporated institution. This makes private universities easy to bring under the umbrella for corporate culpability. However, public universities in some states are legally chartered as corporations while others are the result of a legislative act. In fact, almost every state flagship university was created by legislative act and not by granting incorporation. Does this mean that public institutions cannot be charged with a crime as a corporation?

Public universities generally are more difficult to sue because they usually enjoy the same immunity from suits as the state itself. This also seemingly prevents a state, and a state university, from being held criminally liable for its actions. However, one exception to sovereign immunity is that the United States can sue

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[10] 1 U.S.C. § 1.

[11] New York Cent. & H.R.R. Co. v. U.S., 212 U.S. 481, 493-94 (1909).

a state in federal court. This idea has existed since at least *United States v. Texas* decided in 1892. In that case, there was a dispute between the United States and Texas concerning a border. A crucial question in the case, however, was if the Constitution allows the United States to sue a state. The court stated, "[i]t would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state."[12] While there is no case that explicitly states the United States can charge a state with a federal crime, this case certainly leaves open the possibility.

Victim of Its Own Crime?

As discussed above, it is possible that both private and public universities can be charged with federal crimes. What is interesting, however, is that if a university is charged with the same crime as Jim Gatto, the crime of "depriving a university of an amateur athlete," the university then is both the perpetrator and the victim of the same crime. Could this really be possible? Consider this hypothetical:

> A university is actively recruiting a star high school football player. The player is still undecided as to where he wishes to play in college. A friend of the university's president, who is also a booster for the university's athletic department, approaches the president and tells him that he is willing to pay the player a large sum of money in order to lure him to the university. Knowing this would violate NCAA rules, but desperate to obtain such a talented player who would benefit the university as a whole, consults with the vice president of admissions, the athletic director, the football coach, and the associate athletic director for compliance. All of them conclude that the benefit of having the player outweighs any potential NCAA violations that may occur. Each individual is willing to do their part to bring him to campus. The president directs the booster to pay the player (or more likely his father) $1 million in exchange for choosing to play at the university. Once the player commits, the coach then encourages him to

[12] U.S. v. Texas, 143 U.S. 621, 645 (1892).

> sign all the certification documents as true and accurate, including the ones that say he has never been paid for playing football. The player then sends these documents to both the school and the NCAA, some via mail and some via an internet portal. The athletic director and the associate athletic director for compliance both order all the compliance officials who come across the player's file to certify him without question. The player is then given a full scholarship to play football at the university. The FBI then investigates a tip that came from an NCAA official about the university potentially paying players to play at the university. The FBI then uncovers the scheme and decides to charge each individual involved. The FBI then decides that it has enough of the university's agents committing the crime to benefit the university that it can hold the university corporately liable for the criminal acts of the individuals who acted collectively. The federal prosecutor then charges the university with both mail fraud and wire fraud under the theory that the university was "deprived of an amateur athlete" because of the criminal actions of the university.

Under the facts above and the outcome of *Gatto*, it is entirely possible that a university can be both the perpetrator and the victim of the same crime. While it is highly unlikely that federal prosecutors would go after a university in this way, it is not something that is completely off the table if *Gatto* were taken to its logical end. If the above hypothetical was to actually take place, and federal prosecutors did go after the university, it would be possibly the only instance in United States criminal law in which a person or entity can be the victim of its own crime.

CONCLUSION

The world of college sports is a glorious thing. Nothing brings people together and gets them more fired up than a college sporting event. Unfortunately, the efforts to preserve college sports as they are have caused many unintended consequences. One of these consequences is the now opened door to criminal prosecution for violating rules meant to protect college sports. While the idea of amateurism and its rules are subject of great debate, whether one agrees with such rules or not, the question people should be asking is whether federal prosecutors should be

helping the NCAA enforce such rules. After *Gatto*, athletic compliance officials are given the tough choice to either follow orders and potentially be charged with a federal crime or disobey orders and lose their job. Is this really necessary just to preserve the integrity of college sports? Furthermore, to preserve college sports is it necessary to create the greatest of all criminal paradoxes: a perpetrator that is the victim of a crime it commits? These are the questions that need to be asked and answered in the aftermath of *Gatto*.