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From the Basketball Court to Federal Court:

Perils of the Prosecutorial Approach to Wire Fraud in
the NCAA Basketball Cases

Three similar criminal cases involving college basketball are currently progressing through the Southern District of New York. The first to go to trial, *United States v. James Gatto, Merl Code, and Christian Dawkins*, No. 17 Crim. 686, culminated in a guilty verdict on October 24, 2018, with all three defendants found guilty on charges of wire fraud and conspiracy to commit wire fraud.

The United States Attorney's Office for the Southern District of New York alleged that the *Gatto* defendants participated in a scheme in which the defendants—former Adidas employees Gatto and Code, as well as aspiring sports agent Dawkins—made payments to the families of college-bound athletes in exchange for the athletes' agreement to play basketball at universities with teams sponsored by Adidas.¹ Prosecutors characterized this conduct as a criminal conspiracy, rather than a mutually beneficial business transaction, because the payments violated the amateurism policy of the National Collegiate Athletic Association (“NCAA”), the private organization that regulates college athletics at member institutions. NCAA regulations provide that athletes lose their eligibility to participate in NCAA sports if they receive payment for their athletic skills, and the NCAA imposes sanctions on universities for noncompliance by their athletes. The NCAA also requires that both student-athletes and coaches submit to their schools annual certifications of compliance with NCAA rules.²

Trials of two other groups of defendants were previously scheduled for later this year. In both cases, the charges involve schemes wherein student-athletes received payments in violation of the NCAA's amateurism rules.

In the next case to go to trial, the defendants include Auburn University Assistant Coach Chuck Person and suit-maker Rashan Michel, who are charged with participating in a scheme in which a financial advisor and business manager made payments, facilitated by Michel, to Person in exchange for Person's efforts to persuade student-athletes to retain the payers' services once the athletes turned professional and entered the National Basketball Association (“NBA”). Person is alleged to have directed payments to student-athletes and their families as well.³

The defendants in the third case—former Oklahoma State coach Lamont Evans, former Arizona University assistant coach Emanuel “Book” Richardson, and former University of Southern California assistant coach Tony Bland—all pleaded guilty following the *Gatto* verdict.⁴ The scheme charged was nearly identical: certain financial advisors and business managers allegedly made payments to Evans, Richardson, and Bland in exchange for the coaches' efforts to persuade student-athletes to retain the payers' services after they entered the NBA. Evans, Richardson, and Bland were also alleged to have directed payments to student-athletes and their families.⁵

Robert Khuzami, Deputy U.S. Attorney for the Southern District of New York, announced that the *Gatto* convictions “expose an underground culture of illicit payments, deception and corruption in the world of college basketball.”⁶ And these three cases certainly did bring to light widespread NCAA rule violations within college basketball. However, as this article will discuss, the basketball cases also challenge the courts, lawmakers, and

¹ See *United States v. Gatto*, No. 17 Crim. 686, Dkt. 170.

² *United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018).

³ See *United States v. Person*, No. 17 Crim. 683, Dkt. 17.

⁴ ESPN News Services, *Lamont Evans pleads guilty to bribery charge*, ESPN (Jan. 31, 2019), http://www.espn.com/mens-college-basketball/story/_/id/25885440/lamont-evans-pleads-guilty-bribery-charge; Mark Schlabach, *Ex-Arizona assistant Book Richardson reaches plea deal in bribery case*, ESPN (Jan. 7, 2019), http://www.espn.com/mens-college-basketball/story/_/id/25708527/ex-arizona-assistant-book-richardson-reaches-plea-deal-bribery-case; Mark Schlabach, *Ex-USC assistant Tony Bland reaches plea deal in hoops scandal case*, ESPN (Dec. 20, 2018), http://www.espn.com/mens-college-basketball/story/_/id/25582237/former-usc-trojans-assistant-tony-bland-reaches-plea-deal-hoops-scandal-case.

⁵ See *United States v. Evans*, No. 17 Crim. 684, Dkt. 39.

⁶ Adam Zagoria, *Jury Finds All Three Defendants Guilty in Adidas Basketball Corruption Trial*, KANSAS CITY STAR (Oct. 24, 2018), <https://www.kansascity.com/sports/college/big-12/university-of-kansas/article220554680.html>.

commentators to consider whether these prosecutions have shown that there is a need to narrow the contexts in which federal prosecutors can use the wire fraud statute to enforce with criminal penalties the rules that private organizations impose on their members.

I. THEORY OF PROSECUTION IN THE BASKETBALL CASES: HOW IS THIS WIRE FRAUD?

NCAA rules are, of course, not promulgated by any government, but rather by a private organization that has its own set of investigators, adjudicators, and non-criminal penalties for violations. Consequently, it may never have occurred to the defendants in any of the basketball cases that their conspiracy to violate the NCAA's amateurism policy could also violate the law, let alone be a crime. As one of Gatto's lawyers told the jury during opening statements at trial, "NCAA rules were broken. [Gatto] and Adidas helped out financially a few families whose sons are among the most talented athletes in America. That happened. [But] the NCAA's rules are not the laws of this country. The NCAA is not the U.S. Congress."⁷

Indeed, the NCAA has repeatedly argued that it should not have to function like a court or governmental body, or be bound by constitutional or statutory rules that protect individual rights by constraining government investigators and prosecutors. Violations of amateurism rules and other NCAA regulations occur frequently, and the NCAA frequently investigates and punishes schools and individuals who violate its rules.⁸ In investigating and punishing schools and athletes for rules violations, NCAA officials have asserted that the organization is "not bound by any judicial due process standards" and that the process for imposing NCAA sanctions cannot raise due process concerns because "[t]he opportunity to play intercollegiate athletics does not rise to [the] level" of "a substantive property or liberty interest."⁹

Then how is it that federal prosecutors have come to enforce NCAA rules? Enter the wire fraud statute. That statute, 18 U.S.C. § 1343, along with the nearly identical mail fraud statute, 18 U.S.C. § 1341, is a tool frequently employed by prosecutors to target a broad range of fraudulent conduct.¹⁰

To support a mail or wire fraud conviction, prosecutors must prove the following three elements: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires [which encompasses the use of ubiquitous technology such as the telephone or email] to further the scheme."¹¹ Of importance here, courts have held that the second element of mail or wire fraud can be satisfied even where there has been no intended loss of tangible property or money; in some circumstances, harm to an intangible property interest will suffice. In that vein, the Second Circuit has expounded a "right to control" theory of intangible harm, where the

⁷ Marc Tracy, *Three Found Guilty in N.C.A.A. Basketball Recruiting Scheme*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/sports/ncaa-basketball-adidas-guilty.html>.

⁸ In just one high profile example, in 2010, the NCAA sanctioned star University of Southern California football player Reggie Bush based on a determination that Bush's family received "improper benefits," including free transportation and rent, from sports agents. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>. Around the same time, football player Cam Newton was embroiled in an amateurism scandal after his father solicited a university for payment in exchange for Newton's matriculation. *Auburn Releases Cam Newton Docs*, ESPN (Nov. 5, 2011), http://www.espn.com/college-football/story/_/id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal.

⁹ Branch, *supra* note 8.

¹⁰ See Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After Skilling*, 112 COLUM. L. REV. 359, 359 (2012).

¹¹ *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004) (internal quotation marks and alterations omitted). As an alternative to the "money or property" element, in the limited circumstances of bribes or kickbacks accepted in violation of a fiduciary duty, a "scheme or artifice to defraud" may also include "a scheme or artifice to deprive another of the intangible right of honest services." *Skilling v. United States*, 561 U.S. 358, 368 (2010) (interpreting and limiting 18 U.S.C. § 1346).

second element of wire fraud is satisfied if the defendant withholds from the victim information that could impact the victim's financial decisions and such withholding exposes the victim to the risk of tangible economic harm.¹²

Applying the “right to control” theory to the basketball cases, federal prosecutors have characterized the universities as the relevant “victims.” Prosecutors have successfully argued that, by hiding from the universities information concerning the payments made to athletes in violation of NCAA rules, which payments would render those incoming athletes ineligible to play college basketball if the NCAA learned of them, the defendants exposed the universities to the risk of tangible harm in the form of NCAA financial penalties for NCAA rule-breaking.¹³

Throughout the basketball cases, federal prosecutors have never claimed that there is any federal law that, on its own, prohibits college athletes from accepting payment for their athletic skills. They agree that the amateurism rule is entirely the product of the NCAA, a private organization. But the prosecutors exercised their discretion to apply the wire fraud statute and the right to control theory to use the criminal justice system to enforce the NCAA's rules, and the first group of basketball defendants are now convicted criminals.

II. THE CONSEQUENCES OF PROSECUTORS ENFORCING PRIVATE SECTOR RULES

Perhaps we are comfortable with the result of *Gatto*. After all, with the descriptions throughout the case of clandestine financial arrangements and packets of money changing hands, the conduct described may feel like it *should* be a crime. But there may yet be something problematic about the way the conduct has been prosecuted.

One risk worth considering is that without necessarily even intending to, the NCAA, or any similar private organization, may now bestow any of its rules, no matter how controversial or ill-advised, the weight of law essentially by requiring affirmations of compliance to be submitted by mail or wire and then imposing monetary sanctions in connection with noncompliance. A vast range of private sector rule-breaking could fall under the ambit of the mail or wire fraud statutes.¹⁴ Granting private organizations this kind of power is problematic,

¹² *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (“[M]isrepresentations or non-disclosure of information cannot support a conviction under the ‘right to control’ theory unless those misrepresentations or non-disclosures can or do result in tangible economic harm.”); *United States v. Viloski*, 557 F. App’x 28, 32 (2d Cir. 2014) (“We have recognized the ‘right to control’ as a property interest that is protected by the mail fraud statute.”); *United States v. Carlo*, 507 F.3d 799, 801–02 (2d Cir.2007) (“[T]he interests protected by the mail and wire fraud statutes . . . extend to all kinds of property interests, both tangible and intangible. Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the statutes include the interest of a victim in controlling his or her own assets.” (citations omitted)).

¹³ See 17 Crim. 686, Dkt. 170; 17 Crim. 684, Dkt. 39; 17 Crim. 683, Dkt. 17. None of the basketball indictments actually alleged any actual loss of money or property suffered by the universities due to actually having to pay an NCAA fine as a consequence of the defendants’ actions.

¹⁴ The NCAA is, of course, not the only private organization that has a regulatory function, sets its own rules within an industry, and imposes financial penalties for violation of such rules. Another prominent example is the Financial Industry Regulatory Authority (“FINRA”), a non-governmental organization that regulates many aspects of the securities industry and seeks “to protect America’s investors by making sure the broker dealer industry operates fairly and honestly.” Fin. Indus. Reg. Auth., *About FINRA*, FINRA, <http://www.finra.org/about>. “One cannot deal in securities with the public without being a member of FINRA,” and FINRA “is responsible for conducting investigations and commencing disciplinary proceedings against FINRA member firms and their associated member representatives relating to compliance with the federal securities laws and regulations.” *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 571, 576 (2d Cir. 2011) (quotation marks and alteration omitted). “FINRA has the power to initiate a disciplinary proceeding against any FINRA member or associated person for violating *any FINRA rule*, [Securities and Exchange Commission (“SEC”)] regulation, or statutory provision.” *Id.* at 572 (emphasis added). Although many FINRA rules “parallel” requirements of the Securities Exchange Act of 1934, FINRA also imposes certain duties on its members that extend beyond SEC rules, including “the duty to ‘observe high standards of commercial honor and just and equitable principles of trade.’” Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization’s Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 971 (2012) (quoting Duties and Conflicts R. 2010, in FINRA Manual, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504). The Second Circuit has held that Fifth Amendment due process claims may not be brought against FINRA “because FINRA is not a state actor that can be held to

particularly because such rules are developed through a process with far fewer restraints and protections than the process required for enacting a law or promulgating a regulation. Again, the NCAA is not an elected body; the citizenry does not vote on its regulations and may not even fully understand them or agree with them. Even people directly affected by NCAA rules, such as players and their families, are not given meaningful input in making them.

In fact, the specific NCAA rule at issue in the basketball cases—the amateurism rule—is wildly controversial. Critics have stressed the unfairness of corporations and universities making billions of dollars—including through ticket sales, merchandising, concessions, and lucrative contracts with television networks—from the labor of unpaid student athletes who are, in some instances, personally so impoverished they cannot afford basic necessities such as transportation.¹⁵ Only a minuscule percentage of college athletes will go on to play their sport professionally and receive any compensation for it after leaving college, let alone lucrative compensation.¹⁶ The rest only receive payment for their athletic efforts (which include not only playing in the games that make so much money for their universities, but countless hours of practice as well) in the form of being given the opportunity to attend the university, typically with an athletic scholarship—a financial value dramatically outstripped by the profits reaped by the universities, involved corporations such as broadcasters, and the NCAA itself. The NCAA alone reported, for example, nearly \$846 million in revenue in the 2011 fiscal year, largely accounted for by a contract with CBS and Turner Broadcasting for its signature men’s basketball tournament.¹⁷ Critics have claimed that the CBS contract “sort of highlighted the amount of money that’s really at issue, what people see as hypocrisies and inequities between the NCAA and schools and kids.”¹⁸ As one former student athlete told *The Atlantic*, “[You] see everybody getting richer and richer . . . And you walk around and you can’t put gas in your car? You can’t even fly home to see your parents?”¹⁹

Some critics have also argued that the amateurism rule is racist, with one commentator recently asserting that the “vast majority” of the student athletes who “generate the most revenue for universities, brands and TV networks” are African-American and are treated by the NCAA as “slave laborers who should be grateful for the opportunity to toil on the college sports plantation.”²⁰

In addition to these concerns about whether the amateurism rule is unfair or reflects racial prejudice, former college players have already filed lawsuits in federal court, claiming that the NCAA’s prohibitions against student athlete salaries and sponsorship violate antitrust law.²¹

constitutional standards.” *Santos-Buch v. Fin. Indus. Regulatory Auth., Inc.*, 591 F. App’x 32, 34 (2d Cir. 2015). FINRA also does not recognize the Fifth Amendment privilege against self-incrimination and imposes FINRA penalties for refusal to answer questions at FINRA hearings. Cara Salvatore, 5th Amendment Doesn’t Shield FINRA Testimony, Agency Says, LAW360 (Mar. 13, 2015), <https://www.law360.com/articles/631360/5th-amendment-doesn-t-shield-finra-testimony-agency-says>. (

¹⁵ Branch, *supra* note 8.

¹⁶ *Id.*

¹⁷ Rachel George, *Many Taking the Fight to the NCAA These Days*, USA TODAY (Apr. 25, 2013), <https://www.usatoday.com/story/sports/ncaaf/2013/04/25/ncaa-lawsuits-jerry-tarkanian-todd-mcnair/2114469/>. Universities benefit from the reputational advantages of having a winning sports team, and the NCAA has also profited tremendously from selling the likenesses of athletes. College athletes recently began fighting against this source of revenue, and a lawsuit filed in 2009 against the NCAA, video game manufacturer Electronic Arts, and the Collegiate Licensing Co. resulted in a multi-million dollar settlement after thousands of athletes’ names, images, and likenesses were used in college sports video games without compensation. Steve Berkowitz, *Checks are in the mail for college, pro athletes in video games suit*, USA TODAY (Apr. 6, 2016), <https://www.usatoday.com/story/sports/ncaaf/2016/04/06/electronic-arts-video-game-collegiate-licensing-lawsuit/82725984/>.

¹⁸ George, *supra* note 17.

¹⁹ Branch, *supra* note 8.

²⁰ Brandi Collins-Dexter, *NCAA’s Amateurism Rule Exploits Black Athletes as Slave Labor*, THE UNDEFEATED (March 27, 2018), <https://theundefeated.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/>.

²¹ See Sean Gregory, *How the College Basketball Corruption Verdict Could Help End Amateurism*, TIME (Oct. 25, 2018), <http://time.com/5433913/college-basketball-verdict-amateurism/>. Closing arguments were recently held in bench trial in *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, N.D. Cal., No. 14-md-02541, and legal commentators have suggested that statements by the court during

Deputy U.S. Attorney Khuzami claimed that the basketball defendants “tarnished an ideal which makes college sports a beloved tradition by so many fans over the world.”²² But what kind of “ideal” has the prosecutors who brought these cases decided to enforce? With college sports already intensely commercialized such that corporations and universities are making fortunes, is the “ideal” really to have young, often economically-struggling, predominantly African-American athletes—whose efforts are actually generating millions of dollars in revenue—the only ones not allowed to make a reasonable profit from their own skills and labor? Taking aim at the NCAA’s claims that amateurism rules preserve the purity of the sport amidst growing commerciality, and that the rules preserve the integrity of the student athlete’s academic experience,²³ a recent *Huffington Post* article argued that “[i]t’s time to abandon the fanciful conceits that athletes devoting 50 hours a week to their sports are also able to fully devote themselves to being students — and that amateurism is morally superior to fair compensation and transparent contractual relationships.”²⁴

An intuitive oddity in the prosecutors’ theory in the basketball cases has been the prosecutors’ insistence that the victims of the defendants’ wire frauds are the universities. If one accepts the NCAA’s arguments about the amateurism rules being designed to protect the integrity of college sports and the student experience, then it might follow that the victims of violations of those rules would be some conception of the sport itself, the fans, or even the young amateur athletes being lured into a world of venality by corporate “advisors” and agents ready to prey on the athletes’ economic vulnerability. It may be difficult to understand how the universities—already reaping large financial profits through the athletes’ unpaid labor—are being truly victimized by athletes receiving payment. Yet, regardless of whether one doubts the merits of the amateurism rule, the risk remains that it is far too easy for a private sector organization to establish an affirmation-and-sanction regime whereby the breaking of any rule becomes a federal crime. In prosecuting the basketball cases, the U.S. Attorney’s Office for the Southern District of New York has powerfully illuminated the perils of the courts’ current expansive interpretation of the mail and wire fraud statutes. Prosecutors have an enormous amount of discretion in wielding these statutes. This unchecked prosecutorial power only compounds the risks of unchecked private sector power.

III. BEGINNING TO MINIMIZE THE CONSEQUENCES

Legal commentators discussing *Gatto* have acknowledged the case’s affirmation of the continued viability of the right to control theory.²⁵ Indeed, in denying a defense motion to dismiss the indictment in *Gatto*, the district court rejected challenges that the indictment failed to allege the necessary intended harm to support a wire fraud conviction.²⁶ But for legal professionals (and sports fans) who are concerned with the implications of the prosecutors’ approach in *Gatto*, the question remains: what sort of curtailment of the right to control theory could lower the risk of a private sector power grab without entirely gutting the theory of intangible harm to property satisfying the “money or property” element of mail and wire fraud?

One way to begin might be to restrict the concept of “risk of tangible economic harm” in terms of the *sources* of that potential harm. In its decision in *Gatto* on the defendants’ motion to dismiss, the district court explained that,

argument “didn’t bode well for the NCAA in its effort to fend off a ruling that could allow individual conferences and well-off schools to negotiate compensation terms for the first time to attract athletes.” Pamela MacLean, *NCAA Didn’t Think It Broke Antitrust Law*. *Wrong, Says Judge*, BLOOMBERG LAW (Dec. 19, 2018), <https://news.bloomberglaw.com/mergers-and-antitrust/ncaa-didnt-think-it-broke-antitrust-law-wrong-says-judge-1>.

²² Tracy, *supra* note 7.

²³ Branch, *supra* note 8.

²⁴ Patrick F. McDevitt, *The NCAA’s Amateurism Rules Are Indeed Madness*, HUFF. POST (March 2, 2018), at https://www.huffingtonpost.com/entry/opinion-mcdevitt-ncaa-amateurism_us_5a987314e4b0479c0250a58d.

²⁵ Kan Nawaday and Stephen Salsbury, *NCAA Corruption and The “Right to Control” Theory*, LAW360 (Nov. 15, 2018), <https://www.law360.com/trials/articles/1101836/ncaa-corruption-and-the-right-to-control-theory>.

²⁶ *Gatto*, 295 F. Supp. 3d at 348.

as charged, the defendants’ conduct had “interfer[ed] with the universities’ ability to control the use of their assets, including the decision of how to allocate a limited amount of athletic scholarships, and expos[ed] the universities to *tangible economic harm, including monetary and other penalties imposed by the NCAA.*”²⁷ By allowing the NCAA penalties to be the source of the required economic risk, the district court appears to have extended the theory beyond the factual circumstances present in prior cases where the Second Circuit endorsed the right to control theory. Specifically, in those cases the economic risk to which the victim was subjected was the result of neutral market factors²⁸ or government-enacted laws or regulations, rather than a private organization’s rules.

For example, in *United States v. Viloski*, the defendant worked as a broker and a consultant for a sporting goods company and gave part of his consulting fee to a company employee in exchange for directing business from the company to the defendant.²⁹ The Second Circuit found that depriving the sporting goods company of information regarding these kickbacks could support a conviction on a right to control theory, as “the deprivation of information regarding . . . kickbacks was material and potentially could result in tangible harm because [the sporting goods company] could have negotiated better deals for itself.”³⁰ This form of harm differed from the harm alleged in the NCAA cases because, in *Viloski*, the sporting goods company was exposed to a risk of missing out on negotiating “better” deals that would have been “better” due to neutral market factors rather than due to those “better” deals being in compliance with a private organization’s rules. In contrast, in the NCAA cases, while universities were exposed to a risk of missing out on issuing their limited number of athletic scholarships to “better” athletes, those athletes would only be “better” not due to any neutral factor (such as skill at playing basketball) but rather due to the athletes’ compliance with the NCAA’s amateurism rules.

In another key right to control case, *United States v. Dinome*, the Second Circuit affirmed the mail and wire fraud convictions, on a right to control theory, of a defendant who had defrauded a bank into issuing him a mortgage loan by making false statements about his income.³¹ The bank “would not make a loan to any applicant whose income did not constitute twenty-eight percent of the debt service on the mortgage.”³² The Second Circuit explained that “the information withheld . . . significantly diminished the ultimate value of the mortgage transaction to the bank as defined by its standard lending practices, whether or not a subsequent default ensued.”³³ The Second Circuit explained that the bank’s lending practices were informed by neutral market factors: “A mortgage loan that is more exposed to default because of an inadequate income stream to fund the required periodic payments is reduced in value as an asset, and mortgages are often conveyed as assets in the secondary mortgage market. Further, an increased likelihood of default, and the resulting necessity for foreclosure, is in any event a less appealing prospect to a lender than an uninterrupted flow of periodic payments.”³⁴ Thus, “[t]he information withheld . . . significantly diminished the ultimate value of the mortgage transaction to the bank as defined by its standard lending practices.”³⁵ Again, the mortgage transaction was of a lesser ultimate value because of a neutral

²⁷ *United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018) (emphasis added).

²⁸ Here, the term “neutral market factors” refers to economic forces, or economic implications within a particular industry, which have not been intentionally engineered through the rule-making of a particular private organization.

²⁹ 557 F. App’x 28 (2d Cir. 2014).

³⁰ *Id.* at 34; see also *Finazzo*, 850 F.3d at 114-15 (merchandizing executive for apparel retailer, who took kickbacks from clothing vendor in exchange for causing apparel retailer to use clothing vendor as its supplier, could be convicted on a right to control theory because “jury could reasonably conclude that [the apparel retailer] could have negotiated a better deal for itself if it had not been deceived” (quotation marks omitted)).

³¹ 86 F.3d 277, 284 (2d Cir. 1996).

³² *Id.*

³³ *Id.* (internal quotation marks and alteration omitted).

³⁴ *Id.* at 284 n.7.

³⁵ *Id.* at 284 (internal quotation marks and alteration omitted).

factor—the higher exposure to default—rather than because of any noncompliance with a private organization’s rules.³⁶

Similarly, in *United States v. Chandler*, the defendant misrepresented her identity to a bank in order to obtain a line of credit.³⁷ Explaining that “[i]ntent to harm . . . can be inferred from exposure to potential loss,” the Second Circuit noted that the bank “was necessarily exposed to potential loss because it extended credit to someone whom it did not know had more than one identity.”³⁸ The potential harm in *Chandler* derived from risks naturally associated with extending a line to credit to a person whose true identity is unknown or misrepresented.³⁹ In contrast, in the NCAA cases, no misrepresentations were made about the *identities* of athletes receiving scholarships, or about any other factor unrelated to the athletes’ compliance with a private organization’s rules.

Limiting the source of potential economic harm to neutral market factors, or government-imposed penalties rather than private sector sanctions,⁴⁰ would not run afoul of Second Circuit cases like *Viloski*, *Dinome*, and *Chandler*. To be sure, such a restriction might not eliminate the ability of prosecutors to criminalize private sector rule violations through the creative and aggressive application of the notoriously malleable wire fraud statute. Notably, the proposed restriction might not even result in a different result in *Gatto*; there, prosecutors argued not only that the defendants’ scheme deprived the universities of money or property in the form of the intangible right to control their assets, but also in the tangible form of valuable athletic scholarships.⁴¹ That particular argument could be countered through the imposition of an additional restriction that, where harm is based on the “wrongful” issuance of a monetary payment and such payment was “wrongful” exclusively due to noncompliance with a private organization’s rule (rather than, for example, in the NCAA cases, any discrepancy as to an athlete’s identity or skill level), such harm cannot form the basis of a wire or mail fraud conviction. Nonetheless, even the former proposed restriction alone would be a modest and valuable beginning to the process of ensuring that our legal system adequately distinguishes between private-sector rules, like the NCAA’s questionable amateurism policy, and the criminal law.

³⁶ In another example, *United States v. Bunday*, defendants tricked insurers into issuing to them a type of life insurance policy that could be resold to third-parties (called a stranger-oriented life insurance (“STOLI”) policy). 804 F.3d 558 (2d Cir. 2015). The insurers ordinarily “refused to issue STOLI policies for economic reasons” because “generally . . . their companies expected that STOLI policies would have different economic characteristics that could reduce their profitability.” *Id.* at 573. The Second Circuit found that there was a “legally sufficient basis for a jury to find that the defendants’ misrepresentations exposed the insurers to an unbargained-for risk of economic loss, because the insurers expected STOLI policies to differ economically, to the insurers’ detriment, from non-STOLI policies,” with respect to multiple neutral market factors including a difference in “lapse rates.” *Id.* at 274.

³⁷ 98 F.3d 711, 716 (2d Cir. 1996).

³⁸ *Id.* The Second Circuit has also found allegations sufficient to support a right to control theory of harm where a defendant misrepresented information relevant to the economic viability of a real estate project, which difference in viability was unrelated to the breaking of any private organization’s rules. See *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) (“[The defendant] knowingly gave false and misleading information to real estate developers about the status of funding he was trying to arrange for them in the hope that they would continue their projects, at great risk and expense, while he pursued an ever-dwindling chance of actually securing funding. . . . By causing the developers to make economic decisions about the viability of their real estate projects based on misleading information, [the defendant] harmed the developers’ property interests.”).

³⁹ See also *United States v. Lowe*, 664 F. App’x 38, 43 (2d Cir. 2016) (“By having a [bank] employee transmit a false account-verification form to [a lender] in support of his loan application, [the defendant] evinced a similar intent to deprive that lender of the accurate information it required in deciding how to dispose of its assets.”).

⁴⁰ See *United States v. Schwartz*, 924 F.2d 410 (2d Cir.1991) (where a government contractor explicitly “insisted its product not be exported from the country illegally” and “would not be used to violate the arms export laws and regulations,” the “defendants’ conduct deprived [the government contractor] of the right to define the terms for the sale of its property in that way, and cost it, as well, good will because equipment [the] government contractor[] sold was exported illegally”); cf. *United States v. Paccione*, 949 F.2d 1183, 1197 (2d Cir. 1991) (affirming mail fraud conviction where defendants deceived customers into “believ[ing] they were purchasing careful, competent, and licensed services, together with a reduction of the risk of civil and criminal penalties for improper disposal,” when in reality defendants “frequently and flagrantly violated numerous SDEC regulations,” such that their “customers were exposed to substantial regulatory risks”).

⁴¹ *Gatto*, 295 F. Supp. 3d at 348 (“Defendants do not dispute, nor could they, that both athletic scholarships and the right to control one’s assets constitute “money or property” for purposes of the wire fraud statute.”).

For centuries, the Supreme Court has prohibited federal common law crimes, instead requiring federal criminal law to be codified.⁴² This prohibition both ensures fair notice to members of the public of what conduct they must avoid on pain of criminal penalty and maintains vital democratic checks on prosecutorial power. Just months ago the Second Circuit reaffirmed the principle that “federal crimes and punishments can be established only by statute.”⁴³ However well intentioned, the use of the mail and wire fraud statutes and the “right to control” theory to criminally enforce a private organization’s rules calls these principles into serious question.

⁴² *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32–34 (1812) (rejecting federal common law crimes).

⁴³ *United States v. Aquart*, 912 F.3d 1, 67 (2d Cir. 2018).

About:

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This brief was authored by Paul Tuchmann. Paul is a partner in Litigation Department at Wiggin and Dana, working from its New Haven and New York City offices. Prior to joining Wiggin and Dana, Paul was an Assistant United States Attorney in the Eastern District of New York where he served as co-director of the office's FIFA Task Force, and as deputy chief and acting chief of the Public Integrity section. During his tenure in the U.S. Attorney's office, Paul led and supervised numerous complex investigations and prosecutions, including various types of fraud, corruption, racketeering, campaign finance offenses, obstruction of justice, and tax crimes. Targets of these prosecutions included a member of Congress and multiple members of the New York state legislature. As part of the Department of Justice's investigation of corruption in FIFA, the governing body of international soccer, Paul also prosecuted and convicted numerous soccer officials and sports marketing executives from around the world for their receipt of millions of dollars in bribes. For his work on the FIFA case, Paul was recognized by the Department of Justice with the Attorney General's award.

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