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"Business Crimes" in Entertainment and Sports: A Primer and Discussion in the Subtext of the Olympics and International Sports

Richard J. Hunter, Jr.
Seton Hall University, South Orange, NJ, USA

John H. Shannon
Seton Hall University, South Orange, NJ, USA

Héctor R. Lozada
Seton Hall University, South Orange, NJ, USA

ABSTRACT

An important area of law involves crimes committed in the business environment. Part I of this article is a discussion of "business property crimes," such as larceny, burglary, robbery, and others. Part II then introduces the category of offenses termed "White-Collar Crimes." The authors provide examples in the context of sports and entertainment, which intersect in the cases of O.J. Simpson and Norby Walters. Part III offers a discussion on international implications emanating from enforcement actions relating to corruption and bribery under the Foreign Corrupt Practices Act (FCPA) in the context of the Olympic Games and other international sporting events. The authors propose a revision of the FCPA, "The Olympic Bribery Act," to remedy deficiencies in the current statutory framework.

Keywords: Business Crimes; White-collar Crimes; Mail and Wire Fraud; Foreign Corrupt Practices Act; Olympics

INTRODUCTION

Consider these two factoids:

On September 18, 2007, Orenthal James (O.J.) Simpson was charged with three other individuals in a criminal complaint relating to the armed robbery of sports memorabilia collectors in a Las Vegas casino (Criminal Complaint, 2007). The complaint alleged conspiracy to commit a crime, a misdemeanor; conspiracy to commit kidnapping, a felony; conspiracy to commit robbery, a felony; first degree kidnapping with use of a deadly weapon, a felony; burglary while in possession of a deadly weapon, a felony; robbery with the use of a deadly weapon, a felony; assault with a deadly weapon, a felony; and coercion with the use of a deadly weapon, a felony, in connection with events that had transpired on September 13 of that year.

The criminal complaint, which was later amended, initially contained allegations of seven felonies and one misdemeanor. The final complaint contained allegations of ten separate felonies and one misdemeanor (Associated Press, 2007). O.J. Simpson was convicted and was sentenced to thirty-three years in Nevada prisons.

A second instance of criminal activity is occurring in the burgeoning area of youth sports, which offers a unique opportunity for criminality. Pennington (2016) points out that according to the National Center for Charitable Statistics youth sports organizations in the United States (approximately 14,000) take in annual revenue of about $9 billion. What is remarkable is that law enforcement authorities, as well as league officials, experts on nonprofit organizations, and news organizations have reported the prosecution of people who

volunteered as treasurers and other officers for Little Leagues and sports clubs across the U.S. for misappropriating of funds (for example, $220,000 in Washington, $431,000 in Minnesota, $560,000 in New Jersey) from the clubs' coffers (Pennington, 2016). There appears to be haphazard and scattered oversight of those sums of money because no national agency exists in the country to watch over youth sports. Pennington (2016) asserts that investigators and prosecutors in several states have acknowledged that embezzlement investigations involving youth sports have become common, and tend to be committed by unpaid board members who are highly regarded in their communities.

> *It is difficult to say whether the problem with embezzlement has worsened or if the growth of the leagues simply means more cases; there is no clearinghouse comprehensively tracking fraud in youth sports. But investigators say the problem gets little public discussion even as, by some measures, there are signs of mounting cases. In the last five years, there have been hundreds of arrests and convictions in 43 states involving 15 sports, based on a study of news accounts and a database compiled by the Center for Fraud Prevention, an organization that aims to mitigate embezzlement in youth sports (Pennington, 2016: p. A1 of the NY printed edition)*

In most cases, disputes in the area of commercial law are civil in nature—where a party is seeking either a "legal" remedy in the form of monetary damages (Calamari & Perillo, 1977), or a remedy "in equity" in the form specific performance (Schwartz, 1979) in order to "put the injured party in as good a position as that in which he would have been put by full performance of the contract" (Murphy & Speidel, 1970). The remedy of specific performance is generally *not* available in cases of a breach of a personal service contract (*Philadelphia Baseball Club v. Lajoie*, 1902). Damages are often awarded based upon an allegation of breach of contract, or in the sports arena, tortious interference with an existing contractual relationship (Romano. 2009; Dosh, 2011; Heitner, 2011). (See Appendix I). For example, a case was filed in 2004 where Sports Quest, Inc. had asserted a claim against Dale Earnhardt alleging breach of contract, fraud, and tortious interference with its business relationships (*Sports Quest, Inc. v. Dale Earnhardt, Inc.*, 2004).

In this article, we will focus first on an area of law that involves *crimes* committed against business property. After the discussion of "business property crimes," we will proceed into a discussion of a category of offenses often perpetrated by businesspersons in the conduct of a range of illegal activities termed "white-collar crimes." There are many examples in the context of a discussion of sports and entertainment law, the intersection of which is seen in the cases of O.J. Simpson, Norby Walters, and others (Epstein, 2009; Payne, 2015). We will then extend the discussion into the international arena by looking into the potential implications of the Foreign Corrupt Practices Act (FCPA), where we will argue for a revision of the Act to remedy deficiencies in the current statutory framework.

PART I – CRIMES AGAINST PROPERTY

Crimes Involving Theft

The first category involves crimes committed directly against property under the generic rubric of *theft*. These include robbery, burglary, and larceny. In this regard, courts often distinguish between major and minor crimes—for example, petty larceny and grand larceny, which depend on the value of any property that had been taken.

Larceny

Under the common law, *larceny* was defined as the wrongful and fraudulent taking of the property of another. Larceny may involve the illegal taking of tangible property, but may also include the misappropriation of certain forms of intellectual property such as trade secrets

(Ford, 2017) or computer programs. Larceny also involves the commission of what is commonly known as simple theft and may take the form of a party stealing an automobile or its contents, local "kids" removing the football equipment from a storage room of an opponent prior to the "big game," or even an activity commonly known as pickpocketing. Larceny does not involve the use of any force on the part of a perpetrator or the physical entry of a business premise. The civil law equivalent of theft may be known as trespass to chattels—trespass *de bonis asportatis*—more commonly (at least to law students) as *trespass d.b.a.* (Balganesh, 2008).

Because of the frequency of credit and debit card transactions in the modern economy, a crime of theft (and, perhaps, forgery) occurs if a person steals and uses a credit or debit card or their "personal identification number" (PIN), which permits the thief to access a wide variety of personal and business accounts. For example, a cashier at a local sports memorabilia convention steals the credit card information from a patron and uses it to buy an expensive autograph for his or her own self.

The business of "sports authentication" has provided fertile grounds for the possibility of theft (Jamal & Sunder, 2007). One such case involved a professional "sports authenticator."

State v. Regan (2014)

In November of 2012, Forrest Ewing arranged for the purchase of a baseball card via Craigslist from Appellant, Frank Regan. The card was encased in plastic and had been alleged certified by Professional Sports Authenticator Frank Regan. Regan had used various aliases to sell the cards, as well as an untraceable email address and cell phone number. Forrest Ewing paid $8,700 for the purchase of the proffered Mickey Mantle baseball card from Regan. Ewing then placed the baseball card on EBay, and subsequently learned the card was not genuine. Ewing reported the transaction to the Westerville Police Department, who then contacted Regan. Appellant (Regan) offered to repay the money for the card, but the investigating officers would not accept the payment without bringing charges. Regan was then indicted on one count of theft, a felony of the fourth degree, and one count of forgery, a felony of the fifth degree.

The investigation uncovered appellant's previous sale of similar fraudulent baseball cards in Mentor, Ohio and Bergen, New Jersey. Neither New Jersey nor Ohio had prosecuted appellant due to his offer to repay both parties the money paid for the fraudulent cards on the prior occasions.

The case then proceeded to trial. The jury returned a verdict of guilty on both counts of the indictment. The trial court sentenced appellant to a term of five years community service, with the conditions that he pay restitution, pay the costs of prosecution, and serve one-hundred and fifty days in the county jail.

Burglary

Burglary was defined under the common law as "breaking and entering a dwelling at night" with the intent on the part of the perpetrator to commit a felony. For example, in May of 2017, three football players at the University of Illinois were dismissed from the team following charges being brought against them for attempting to rob a fellow student. The players claimed that it was a "prank gone wrong." Authorities disagreed (Farnelli, 2017). Today, most jurisdictions have modified their criminal statutes to include theft that occurs during the daytime hours and thefts from commercial as well as from a residential dwelling. The concept

of "breaking" has largely been abandoned as well. As a result, any unauthorized entry into a building through an unlocked door would qualify under the "breaking" requirement. A burglary accompanied by the element of being armed is sometimes termed *aggravated burglary* and would normally involve the imposition of more serious criminal penalties.

Robbery

Under the common law, *robbery* is defined as the taking of an item of personal property from the person of another accompanied by or effected using force or fear. The critical distinction between robbery and other types of takings requires the element of force and fear. For example, a robber enters into the local convenience store at night and threatens the cashier with physical harm unless the young person surrenders the contents of the lottery cash drawer—this is a classic commission of a robbery. A second example occurred in March of 2010 when a college basketball player, who had been dismissed from the Seton Hall University basketball team, was arrested on the charges of kidnapping and armed robbery. The player eventually pleaded guilty and was sentenced to probation (Associated Press, 2011). However, the actions of the surreptitious pickpocket undertaken without the use of force or fear, while clearly a larceny, are not the actions of a robber. Similar to an aggravated burglary, a robbery accomplished with a deadly weapon such as a gun or knife is considered aggravated robbery and will likewise result in the imposition of a much harsher penalty.

The actions of the recently paroled O.J. Simpson qualified as both robbery and burglary—with the element of aggravation involved.

Receipt of Stolen Property

Suppose that an individual is approached with a “great deal” on two Leroy Neiman lithographs being sold for $1,500 each—when it turns out that the real price would be at least $15,000 apiece. Under these circumstances, might the buyer find him or herself in some legal jeopardy? It is also a crime to be *in possession* of stolen property under certain circumstances. Louis Bland, then a linebacker at Washington State University, was arrested in 2011 for possession of marijuana, possession of a controlled substance, *and* possession of stolen property—a stolen stop sign (Floyd, 2011). No matter the seriousness of the allegation, the elements of proof are standard.

First, the recipient must knowingly have received the stolen property. Second, the receipt of the property must be with the intention to deprive the rightful owner of that property. However, as described below, the requirements of knowledge and intent can be inferred from the circumstances. The stolen property can be any item of tangible property.

For example, the criminal code of Georgia (OCGA, 2016) states that a person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen. In *Whitehead v. State of Georgia* (1984), the defendant contended that the evidence presented by the state was insufficient to show that he knew or should have known that the item at issue, a stereo system, was stolen property. The facts of the case are interesting and instructive.

A stereo system, identified as one of a number stolen in late November 1982 from a J. C. Penney Warehouse, was found by police officers in appellant's bedroom on January 27, 1983. The serial number on the stereo had been purposefully scratched out. In December 1982, appellant bought the stereo from his friend, Walter Gibbs, who approached appellant to buy it and who told appellant that it had been left in the trunk of Gibbs' car. At the time appellant first saw the stereo, it was one of three in Gibbs' home. Appellant paid Gibbs between ten and forty dollars.

The price included the cancellation of a debt owed by appellant to Gibbs. Neither appellant nor Gibbs could testify as to the exact cash amount which was paid or even an approximate amount of the debt. Appellant knew the stereo to be new and worth between $169 to $189. The investigating officer estimated the value of the stereo to be $149.

Under these circumstances, the court stated: "we find the foregoing sufficient evidence on which to base the revocation of appellant's probation. Knowledge that the goods are stolen is an essential element of the crime. This guilty knowledge may be inferred from circumstances which would excite suspicion in the mind of an ordinary prudent man." Perhaps most importantly, and in a reflection of common sense, the court noted that "buying at a price grossly less than the real value is a sufficient circumstance to excite suspicion" (citing *LaRoche v. State*, 1976).

PART II – WHITE-COLLAR CRIMES

Crimes More Likely To Be Committed By Businesspersons

Evidence indicates that certain types of crimes are more likely to be committed by businesspeople than others in society. These types of crimes rarely, if ever, involve physical force or threats of force; rather, white-collar crimes normally involve deceit, fraud, a breach of a fiduciary duty by an agent, trustee, corporate treasurer, accountant, lawyer, etc., or acts which amount to undue influence (*Odorizzi v. Bloomfield School District*, 1966).

Forgery

In addition to forging a signature of a party, the crime of *forgery* may be committed under circumstances where a written document is fraudulently created and/or altered such as to affect the liabilities or rights of a party. (Recall that forgery serves as an absolute or real defense in cases involving the legitimacy of collection efforts relating to commercial paper in determining whether a holder of the paper is a "mere holder" (subject to all defenses—both real and personal) or is a "holder in due course" who is subject only to "real defenses" against the instrument).

Common examples of forgery as a business crime would involve counterfeiting, falsifying a public record (for example, altering a birth certificate to qualify an age-inappropriate athlete for participation in a Little League tournament—referred to as "age cheating"), or the material alteration of a legal document (for example, forging the signatures of parents indicating consent to participate in interscholastic (high school) activities, or, once again in the area of commercial paper, adding or deleting a security party or surety in an application for a business loan).

Perhaps the most egregious example of "age cheating" occurred in 2001. Danny Almonte (who was actually born April 7, 1987) played in the Little League World Series for his Bronx, New York, Little League All-Star team despite being over the cutoff age for the league. His parents had provided a "doctored" birth certificate misrepresenting his birth year as 1989. A writer for *Sports Illustrated* discovered the discrepancy when Almonte's Dominican elementary school records gave his correct birth year (Armas, 2011)

Forgery is likewise an "intent crime," and is not one of strict liability. Thus, signing another person's signature without the intent to defraud is not necessarily forgery. Cheeseman (2002) points out that a spouse does not commit an act of forgery if one spouse signs the payroll check or other similar document for deposit in a joint checking or savings account.

In other cases, the facts may point clearly to the existence of a crime. In *Foster v. State of Georgia*, the State's evidence established that there had been a burglary in which a checkbook and a check encoder machine had been stolen. Two of the checks from that checkbook were then cashed. The authorized individual on the account testified that she was the only one authorized to sign checks on the account, and that she did not sign either check cashed. A handwriting examiner testified the same person had endorsed both checks.

> *Once again, the State of Georgia provides a statutory exemplar where a person commits the offense of forgery in the first degree when with intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing (OCGA, 2016).*

In *Foster*, the jury had properly been instructed on the elements of forgery, and on the burden of proof placed upon the prosecution to prove the essential elements of the crime, including the *intention* to defraud and *knowledge* that a signature is unauthorized, and that the elements of knowledge and intention could be shown by indirect or circumstantial evidence. In fact, the court noted that criminal intent and knowledge are factual issues which can seldom be proved by direct evidence (*Foster*, citing *Johnson v. State*, 1981). In a case of the sale of an antique sports card, if the seller had traced the real signature of a famous player for the purpose of presenting it as genuine, that act could be considered as forgery as well.

Extortion

Extortion involves obtaining property from another party which is induced by actual (real) or threatened force, violence, or fear. (In a literary reference known to most readers: "I'll make him an offer he can't refuse.") An infamous case involving Norby Walters, an erstwhile collegiate sports' agent, provides a striking example of extortion, where Walters threatened a college athlete who had reneged on his promise to avail himself of his representation with a "broken leg." The case is also important because it also implicates issues relating to mail and wire fraud. These aspects of the case will be discussed separately below.

Extortion may extend to circumstances where a person threatens to publicly expose something about another person unless the extorted party gives money or property. The crime of extortion is commonly referred to as "blackmail." One such case occurred in 2010, with the alleged blackmail of Kansas Athletic Director Lew Perkins by a former athletics department employee who had accused Perkins of accepting $35,000 of exercise equipment in exchange for securing “premium men’s basketball tickets” for the equipment of the company’s owners (Corcoran, 2010).

Adjunct Computer Crimes

Three statutes are relevant to the discussion of “white-collar crimes,” as the means by which criminal activity is conducted. Congress enacted the *Counterfeit Access Device and Computer Fraud and Abuse Act* (1984) (Henderson, 2013). The Act focused on computer use related to:

1. Improper accessing of government information protected for national defense or foreign relations;
2. Improper accessing of certain financial information from financial institutions; and
3. Improper accessing of information on a government computer (Podgor, 2004).

There are seven types of criminal activity enumerated in the Act: obtaining national security information, compromising confidentiality, trespassing in a government computer, accessing

to defraud and obtain value, damaging a computer or information, trafficking in passwords, and threatening to damage a computer. An attempt to commit these crimes is also criminally punishable. Specifically, the Act makes it a federal crime to access a computer knowingly to obtain:

- restricted federal government information;
- financial records of financial institutions; and
- consumer reports of consumer reporting agencies such as TransUnion, Equifax, and Experian.

The Act further makes it a crime to use counterfeit or unauthorized access devices, such as code numbers or access cards to obtain "things of value" in order to transfer funds or to "traffic" in such devices (*United States v. Morris*, 1991).

A second statute, the *Electronic Funds Transfer Act* (1978), regulates the payment and deposit of funds using electronic funds transfers into a variety of financial institutions, and transactions involving automatic teller machines (ATMs). The Act makes it a federal crime to "use, furnish, sell, or transport" a counterfeit, stolen, lost, or fraudulently obtained ATM card, code number, or other device used in conducting electronic funds transfers. The Act contains penalties of up to 10 years imprisonment and fines up to $10,000 per violation (15 U.S.C. Section 1693; Brandel & Schellie, 2011).

Finally, the *Wiretap Act* (1968, as amended 1986) establishes criminal liability and/or civil penalties for anyone who "intentionally intercepts, endeavors to intercept, or procures any person to intercept or endeavor to intercept, any wire, oral, or electronic communication" (Barnes, 2006). State law provisions that criminalize acts dealing with the unauthorized use of computers, tampering with computers, computer trespass, and the unauthorized duplication or use of computer-related materials (New York Session Laws, 1986) frequently bolster federal protections.

Other White-collar Crimes

Embezzlement

Embezzlement is the fraudulent conversion of property by a person to whom property had been entrusted. A classic case that embroiled a host of entertainment and sports figures involved Bernie Madoff, who embezzled an estimated $20-$65 billion dollars from clients in his "fictional" investment advising firm, promising returns of "50% on investments in only 90 days" (Hunt, 2010; Yang, 2014). Some notable examples of individuals caught in this version of a classic "Ponzi Scheme," which targeted sports, entertainment, and other celebrities, were Mort Zuckerman, the (Senator Frank) Lautenberg Family Foundation, Elie Wiesel, Kevin Bacon, Sandy Koufax, and the Wilpon Family (owners of the New York Mets).

Embezzlement differs from theft (robbery, burglary, and larceny) because the crime of embezzlement requires the element of *entrusting* of property in the first instance. The criminal actions of the local Little League Treasurer or "Pop Warner" League President (discussed earlier) would qualify as embezzlement (Pennington, 2016).

Criminal Fraud

Criminal fraud is an act that is accomplished through some form of deception or trickery (Green, 2005). Criminal fraud is often involved with receiving property through false pretenses. The elements of deception or trickery have their roots in the requirement of

scienter (knowledge of falsity or reckless disregard of the truth) which is likewise an element of proving civil fraud (*Spiess v. Brandt*, 1950).

The criminal code of Utah (1953) provides a representative statement of the legal requirements for proving fraud, also called theft by deception:

> *(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof. (2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group" (U.C.A., 1953).*

In order to prove that a defendant has committed theft by deception, the State must prove beyond a reasonable doubt that the defendant has (1) obtained or exercised control over the property of another; (2) by deception and; (3) with a purpose to deprive that person of the property.

The Code continues:

> *Deception occurs when a person intentionally: ... Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed (U.C.A., 1953).*

Criminal fraud is often accomplished through *mail or wire fraud*, which can also be prosecuted as crimes in themselves if the government is unable to meet its burden of proof relating to the underlying allegation of criminal fraud. However, as shown in the *Walters* case, the use of the mail or wire (telegram/telegraph) must be an integral part of the crime itself, a not a mere incident to it (Wang, 2015).

Issues relating to mail and wire fraud provided the backdrop to the criminal prosecution of Norby Walters, a case that also involved the crime of extortion, discussed above (*United States v. Norby Walters*, 1993; Cox, 1992).

A Reprise of Norby Walters: A "Nasty and Untrustworthy Fellow"

Seeking to enter the lucrative field of athletic representation, Walters recruited fifty-eight football players "willing to fool their universities and the NCAA" by signing with an agent prior to exhausting their athletic eligibility. However, Walters soon discovered "that they were equally willing to play false with him." Only two of the fifty-eight players whom Walters had recruited fulfilled their end of the bargain; the other fifty-six kept the cars and money provided by Walters, and then signed with other agents. The athletes relied on the fact that their representation contracts had literally been locked away until after the collegiate bowl season and had been dated in the future. In fact, the success of the scheme depended on the element of secrecy. The court noted that it was highly unlikely that Walters would initiate a suit to enforce the athletes' promises under these circumstances. In addition, when the fifty-six athletes refused to accept Walters as their agent (nor would they return the payments), Walters resorted to threats. One player, Maurice Douglass, was told that his legs would be broken before the pro draft unless he repaid Walters' firm.

Walters and his partner Lloyd Bloom were charged with criminal conspiracy, extortion (based

on the physical threat), and mail fraud. The government alleged that Walters and Bloom had committed fraud by causing the universities where the athletes were enrolled to award athletic scholarships to students who had become ineligible as a result of entering into agency contracts. The indictment alleged that Walters and Bloom had committed mail fraud, in that each university had required its athletes to verify their eligibility to play, and then the universities had sent copies of these eligibility statements by mail to the conferences in which the universities were competing. The court, however, was not convinced. Did the defendants commit mail fraud?

Mail fraud derives from the actions of a party who conceives of a scheme to defraud, for the purpose of obtaining money or property, by means of false pretenses, and then who causes "any matter" to be sent or delivered by way of the United States Postal Service. The United States Code defines mail fraud as follows:

> *Whoever, having devised ... any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... or knowingly causes [such matter or thing] to be delivered by mail commits the crime of mail fraud (18 U.S.C. Section 1341, 1948).*
>
> *The United States Supreme Court has amplified upon this definition by stating that mailing by a third party (in this case, by the individual universities) suffices if it is "incident to an essential part of the scheme" (Pereira v. United States, 1954).*

Thus, the use of the mails must be an integral part of the underlying fraud and not a mere incident to it. The question turned on whether Walters had caused the universities to use the mail system. While stating that Walters was a "nasty and untrustworthy fellow," the court found no evidence that Walters actually knew that the college would mail the athletes' forms. The court concluded: "Ultimately, the forms verifying the eligibility of the athletes to play did not help Walters plan succeed; the mailing to the Big Ten Conference had nothing to do with the plans success."

While the use of the mails can turn ordinary fraud into mail fraud, the Supreme Court has limited the reach of the mail fraud statute by stating that the statute "does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud" (*Kann v. United States*, 1944). In *Kann*, the Court raised several questions that would be helpful in determining if mail fraud had occurred: "Did the schemers foresee that the mails would be used? Did the mailing advance the success of the scheme? Which parts of a scheme are "essential"?

In dismissing the mail fraud count against Walters, the court concluded that as a matter of law, "no reasonable juror could give an affirmative answer" to these questions. (*Walters* also involved the application of the *Racketeered Influenced and Corrupt Organizations Act* (1970), better known as RICO, but which was held to be inapplicable in the case on a similar basis.)

It is also a crime to engage in *bribery—an* act in which something of value is paid either to a private business or to a government official (*Dixson v. United States*, 1954) in return for something of value—usually in the form of awarding a contract. In the case of bribery, intent is once again a critical element of proof. As noted by Cheeseman (2002, p. 190), there are *two potential crimes* that may be committed in the context of bribery. The offeror of a bribe

commits a crime at the point the bribe is tendered or offered. The offeree is guilty of the crime of bribery when the bribe is actually accepted. The person who tenders the bribe may be found guilty of the crime even if the offeree rejects the offer (Holden & Rodenberg, 2016).

Instances of Sports Bribery

Sports.com (2017) notes that "[e]xamples of sports bribery abound throughout modern history, as almost every sport has, at some point or another, been rocked by such a scandal." The history sports in the United States are riddled with examples (ISLaws.com, 2016; Farmer, 2011). Of special note are the activities of Ty Cobb and Tris Speaker fixing baseball games in 1926; the CCNY basketball bribery basketball scandal of 1951-1951; the University of Michigan basketball scandal in the '90s in which bribes were paid to players in order to launder money from sports gambling (Hakim, 2002); the 1961 point-shaving scandal at Seton Hall University; seven University of Toledo football and basketball players who pleaded guilty to conspiracy for accepting money, meals, groceries and gambling chips to either alter their play or provide "inside" information about their team or their opponents from 2004 through 2006 (White, 2015); and the Southern Methodist University football scandal of 1986 when collegiate football players were bribed with thousands of dollars, which resulted in Southern Methodist being given the "Death Penalty" by the NCAA in 1987 (Farmer, 2011).

The issue of sports bribery (Holden & Rodenberg, 2016) has been specifically addressed in a provision of the United States Criminal Code (U.S. Code, Section 224, 1994) which states:

> *Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined under this title, or imprisoned not more than 5 years, or both.*

On the international level (Frecka, Cleveland, Favo & Owens, 2009; Ramasastry, 2011), Roger Pielke (2016), writing for the *Transparency International Global Corruption Report: Sport*, comments on the following well-known instances of corruption and bribery in the international arena:

- The International Olympic Committee (IOC) was involved in a scandal in the 1990s over the Salt Lake City Winter Olympic Games concerning alleged bribes for votes. The episode led to the IOC instituting reforms to encourage greater transparency and accountability, including the creation of an Ethics Commission and the introduction of conflict of interest guidelines.
- The Fédération Internationale de Football Association (FIFA), the body that oversees international football (soccer), has faced a barrage of allegations over its process for selecting the venues of the 2018 and 2022 World Cups, won by Russia and Qatar, respectively. The accusations range from the sordid – cash in brown paper envelopes – to the incredible – alleged gifts of paintings from the archives of Russia's State Hermitage Museum in St Petersburg – and everything in between (Ramasastry, 2011; Esposito, 2016; Sheu, 2016),
- The International Weightlifting Federation (IWF), located in Budapest, Hungary, has faced accusations of financial mismanagement because of its lack of accountability for millions of dollars provided by the IOC.
- The International Volleyball Federation, (FIVB), located in Switzerland, has faced accusations of illegitimate political actions to keep a leadership regime in power, as well as complaints of financial mismanagement of funding.
- The Union Cycliste Internationale (International Cycling Union or UCI), also located in Switzerland, has faced accusations of bribery and financial conflicts of

interest. Additionally, it was entangled in the doping scandal involving Lance Armstrong and his teammates.

- The International Association of Athletics Federations stands accused of covering up institutionalized doping by Russian athletes and of other corrupt practices.
- CONCACAF, one of the regional football federations within FIFA, discovered alleged bribery and tax evasion within its leadership in a 2013 integrity investigation.

Because so many U.S. businesses involved in both sports and entertainment now operate in the highly competitive international market, including seeking out sponsorships and advertising opportunities, combating bribery has taken on a new importance. American companies may find themselves in legal jeopardy if they involve themselves in instances of bribery and corruption with state actors throughout the world on international sports.

PART III – POSSIBLE IMPLICATIONS OF THE FOREIGN CORRUPT PRACTICES ACT: A CONUNDRUM AND A POSSIBLE SOLUTION

An Introduction to the Foreign Corrupt Practices Act

The *Foreign Corrupt Practices Act of 1977* (FCPA) makes it illegal for an American company, or its officers, directors, agents, or employees, to bribe a foreign official, a foreign political party official, or a candidate for foreign political office with the intent to influence the awarding of new business or the retention of an ongoing business activity.

The Guidelines offered by the Fraud Section, Criminal Division of the Department of Justice (2017), note that "The Foreign Corrupt Practices Act of 1977, as amended, … was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business." The Guidelines continue:

> *Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.*

However, payments made to secure ministerial, clerical, or routine government actions have generally been found *not* to violate the Act. These payments are often referred to as "facilitation" or "grease payments." Facilitation payments may include:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers, such as visas and work orders;
- Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspection related to transit across country; or
- Providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration.

In addition, under the terms of the 1988 Amendments, it is not a violation of the Act if a payment is legal under the written laws of the country or where a defendant is able to show that the amount of the payment was reasonable and was in fact a bone fide expense related to the furtherance of or execution of a contract.

Under the terms of the Act, an American company must keep "accurate books and records" of all foreign transactions and must install internal accounting controls to assure that any payments or transactions are legal and are fully authorized (Hunter, Mest & Shannon, 2011; Hunter & Mest, 2015). A firm can be fined up to $2 million for each occurrence of bribery, and an individual can be fined up to $100,000 and imprisoned for a period up to five years for a violation of the Act.

Statistics show, however, that issues relating to the FCPA have persisted until today. Critics alternatively argue that the law is too weak and riddled with exceptions, or that the Act has placed many U.S. businesses at a competitive disadvantage in conducting international business in markets or regions of the world where commercial bribery is a fact of the market and where actions of competitors are not so constrained (see Koehler, 2010).

The FCPA, Corporate Sponsorships, and the Olympics: Signs of Danger?

The stakes are enormous when discussing the economics of the Olympic Games. Chapman (2016), while acknowledging that the modern Games began as a celebration of non-professional sport, now asserts that "the movement has long-since thrown off any facade of amateurism and is now more flush with corporate cash than ever before." We agree with Chapman. The obvious reason is the influx of big money into what was once considered the worldwide showcase of amateur athletics.

The IOC generates revenues from two major sources: corporate sponsorships and media (ISPO, 2016). Chapman (2016) notes that in 2016 the IOC received more than $4 billion from TV companies for the rights to screen the 19-day Rio Games. Additionally, the eleven global sponsors that financed Rio 2016 had a combined market value of over $1.5 trillion, and used that financial might to lavish more money on the event than ever because of the expectation that the Games would bring in about $9.3 billion in marketing revenues (Chapman, 2016).

To expand on the above, here are the IOC (2017) sources of income over the past six quadrenniums (in millions of U.S. dollars):

Source (in USD millions)	1993-1996	1997-2000	2001-2004	2005-2008	2009-2012	2013-2016
Broadcast	1,251	1,845	2,232	2,570	3,850	4,157
TOP Programme	279	579	663	866	950	1,003
OCOG Domestic Sponsorship	534	655	796	1,555	1,838	2,037
OCOG Ticketing	451	625	411	274	1,238	527
OCOG Licensing	115	66	87	185	170	74
Total	**2,630**	**3,770**	**4,189**	**5,450**	**8,046**	**7,798**

Partner-sponsors are permitted to use Olympic trademarked terms such as "Olympics" and "Rio 2016." More importantly, partners are also allowed to use the Olympic logo alongside their individual brand logo in any advertising campaigns. Coca-Cola is one of the oldest Olympic partners, dating back to 1926.

The sponsors of the most recent 2016 Olympic Games in Rio provided an estimated two billion Euros (US $2.36 billion) for the International Olympic Committee (IOC) just for these Games. In fact, these partnership-sponsorships are the second largest sources of income for the Summer Games, next to the value of broadcast (mainly TV) rights holders.

There were different groups or levels of sponsors at the Olympic Games 2016 in Rio. Eleven international "giants" are permitted to call themselves **"***Worldwide Olympic Partners***,"** who conclude longer-term contracts over at least one Olympic cycle of four years (Epstein, 2014). Those were Coca Cola, McDonald's, Visa, Bridgestone, Samsung, Panasonic, Omega, Procter & Gamble (P&G), General Electric (GE), Dow, and Atos. Each of these companies paid an estimated 100 million Euros (US $118 million) to the IOC for the four-year period from 2013 to 2016, and in return can advertise directly with the Olympic Games.

The second group was the **"***Official Sponsors of the 2016 Rio Olympic Games,***"** contributed directly to Rio's Olympic Organizing Committee. Aside from the automotive partner Nissan, these were mostly Brazilian companies like Embratel, Bradesco, Claro, Net, and Correios.
According to ISPO (2016), there have been three major Olympic Sponsors in the past:

- Coca Cola began its support at the Olympic Games in the Summer Games of 1928, when the drink was offered for the first time to athletes and spectators. As such, he beverage giant has the longest connection with the Olympics. In social media, Coca Cola uses the hashtag #THATSGOLD. At the 2016 Olympics decathlon star Ashton Eaton and soccer player Alex Morgan, were among the athletes featured.
- The Swatch Group's master brand Omega has been responsible for timekeeping at the Olympic Games, with a few exceptions, since 1932 in Los Angeles. When a running a time or world record time is displayed, the logo goes around the world. As a sponsor, the company has also been a "Worldwide Olympic Partner" of the IOC since 2004. Its hashtag: #OmegaVivaRio at the 2016 Olympics featured Michael Phelps, among others.
- In the Olympic sports facilities you can only pay with cash or a Visa credit card. The company has been involved as a top sponsor since 1986, and is especially famous for its spots with significant Olympic moments. The hashtag: #TeamVisa at the 2016 Olympics featured the refugee team at the Rio Olympic Games made of over 350 athletes from around the world.

In the category of **"***Official Supporters of the Rio 2016 Olympic Games***"** were ten companies, including Cisco, Globo, and Latam Airlines. Another thirty companies were **"***Official Suppliers of the Rio 2016 Olympic Games.***"** Among them were firms such as Nike, Microsoft, Airbnb, Eventim, and C&A.

There have been some recent developments. Beginning in 2017, Intel has joined the group of Olympic "top-partners" along with Alibaba, and Toyota. Surprisingly, McDonald's has decided to end its partnership after forty-one years (Buss, 2016)

In this mix, opportunities for corruption and bribery loom everywhere (Lane, 2016). Corporations are not only competing for lucrative sponsorship deals with the IOC, but also for the right to be associated with individual athletes both during the Olympics themselves and during the professional careers. Seddon (2016) identified sixteen examples of "alleged" corruption in the Sochi games. The Rio games were no different (Purcell, 2017). Sports such as boxing, wrestling, and track and field were rife with allegations of doping (Dimant & Deutscher, 2015) and wide-spread cheating on the part of individual athletes and national Olympic committees (Hunter & Shannon, 2016).

There is a major problem however, in seeking to apply the FCPA to cases of bribery in the Olympics setting: The Act *may* not apply.

On its face, the FCPA may not strictly apply to an American corporation allegedly bribing an official of the IOC or an official of a national Olympic committee (unless the national Olympic Committee it is organized as an "official government entity" or is recognized as such because of government influence, direct or indirect financing, or organizational control) because such a party might not strictly qualify under the definition of a "covered party" (government official, etc.) subject to being bribed.

Possible Solutions to the Problem of Sports Bribery

What solutions might be possible?

One solution would be for the Department of Justice, which is charged with FCPA enforcement, to adopt a broad interpretation of the term "foreign official." In analyzing the discreet elements of the FCPA, it might be argued that the IOC should in fact not be considered strictly as a "private party" and should instead be considered as a *quasi-public organization* (see, e.g., Kosar, 2011) with deep ties to national Olympic committees (many of which are closely aligned with sponsoring governments), thus subject to the FCPA. As a result, potential corporate sponsors from the United States would be required to take precautions not to run afoul of prohibitions associated with bribery and other illegal activities. Is their any precedent for moving in this expansive direction?

The Department of Justice might be persuaded to use the definition of a quasi-public entity or institution found in American case law and apply that definition either to the IOC or to a national Olympic committee. Under *Hy-Grade Oil v. New Jersey Bank* (1975), for example, a quasi-public institution was held to be one that "deals with a large number of people," solicits the public's business, or one that "deals in a necessary and/or vital service" (Hunter, Shannon, Amoroso & O'Sullivan, 2017, p.183). The argument can be made that the IOC or a national Olympic committee is such an institution or entity.

However, given the reluctance of the courts, as exemplified in *Walters*, to move beyond the literal meaning of the words found in a criminal statute—and in the FCPA itself—that approach may be problematic.

Is there a second solution? If the FCPA is not applicable, an American company who engages in bribery in connection with the Olympics might still be prosecuted under more conventional statutory authority.

Commercial bribery (Rose-Ackerman, 2010; Klaw, 2012) is a form of bribery that involves corrupt dealing with the agents or employees of potential buyers to secure an advantage over business competitors. Commercial bribery is a form of corruption that does not necessarily involve government personnel or facilities. However, would a commercial bribery statute reach activities in connection with Olympic Officials who are not strictly "buyers" of services or goods, but rather who offer "commercial opportunities" in connection with the various forms of Olympic sponsorships?

We acknowledge that there is no *federal* statute that by its terms expressly prohibits commercial bribery. Commercial bribery is punishable under state law. At present, thirty-six states have enacted laws specifically prohibiting commercial bribery. Among them are California, Delaware, Massachusetts, New Jersey, New York, and Texas. New Jersey supplies a

representative state statutory approach:
Commercial Bribery and Breach of Duty to Act Disinterestedly (2013):
a. A person commits a crime if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

(1) An agent, partner or employee of another;
(2) A trustee, guardian, or other fiduciary;
(3) A lawyer, physician, accountant, appraiser, or other professional adviser or informant;
(4) An officer, director, manager or other participant in the direction of the affairs of an incorporated or unincorporated association;
(5) A labor official, including any duly appointed representative of a labor organization or any duly appointed trustee or representative of an employee welfare trust fund; or
(6) An arbitrator or other purportedly disinterested adjudicator or referee.

b. A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, real properties or services commits a crime if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.
c. A person commits a crime if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under this section.
d. If the benefit offered, conferred, agreed to be conferred, solicited, accepted or agreed to be accepted in violation of this section is $75,000.00 or more, the offender is guilty of a crime of the second degree. If the benefit exceeds $1,000.00, but is less than $75,000.00, the offender is guilty of a crime of the third degree. If the benefit is $1,000.00 or less, the offender is guilty of a crime of the fourth degree.

Professor Boles (2014) expounds upon the New Jersey approach, which centers on a breach of a fiduciary duty (pp. 692-693):

> *Fiduciary duty violations also form the crux of private bribery agreements. Employees and other agents in the private sector owe their principals a fiduciary duty of loyalty that requires the agents to act in their principals' best interests by putting the principals' interests above all others in matters connected to the agency relationship. This affirmative duty arises by virtue of the principal-agency relationship, and virtually all employment agreements encompass the duty as an implied contractual condition. If private sector agents accept bribes from third parties when performing their workplace obligations, they violate this duty of loyalty. Agents do not demonstrate undivided loyalty to their principals if the agents solicit or receive bribes in exchange for acting on their bribers' behalf when conducting their principals' affairs. By accepting bribes, agents further their own interests at their principals' expense, in automatic violation of their fiduciary duty. Indeed, legislatures criminalize private bribery "on the theoretical premise that such acts represent a violation of the duty of loyalty that an employee owes to an employer (Boles citing Noonan, 1984, p. XI).*

However, one obvious disadvantage of this approach is that not all states have chosen to *criminalize* "commercial bribery" and prosecutions would be subject to a variety of state approaches and statutory schemes. Professor Boles (2014, p. 686) offers this general comment on the efficacy of state statutory regimes:

> *Within the United States, state legislatures radically differ in their treatment of private bribery. Some states criminalize the offense, while others do not. Those states that criminalize private bribery can be separated into further categories. Some states*

> *penalize the offense as a felony carrying potentially heavy incarceration sentences and fines, whereas other states choose to penalize the offense as a misdemeanor with minimal jail time and/or minor fines. State governments rarely prosecute private bribery, and the offense has earned a reputation as "the most under-prosecuted crime in penal law (Boles, 2014, citing Wacker, 1988, p. B1).*

It might also be possible to prosecute commercial bribery as a "scheme or artifice to defraud" if the mail or interstate wire facilities are used in the commission of the illegal act. However, recall that under *Walters*, the use of the mails or wire must be an integral part of the criminal act itself and not merely incidental to it. The same legal reasoning would apply if a prosecution were brought based on the RICO statute. Professor Bowles (2014) notes that these statutes contain application provisions that limit their ability to address domestic and transnational bribery comprehensively.

Another possible basis of liability lies in the application of the *Travel Act* (1961). Subsection (a) of the statute sets forth the elements of the offense. This act prohibits interstate or foreign travel, or use of the mails or any facility in interstate or foreign commerce, for the purpose of distributing the proceeds of an unlawful activity, committing a crime of violence in furtherance of an unlawful activity, or to promote, manage, establish, carry on an unlawful activity. Subsection (b) of the statute defines *unlawful activity* as including illegal gambling, the sale of liquor on which the Federal excise tax has not been paid, controlled substance offenses, prostitution, arson or extortion or bribery which violate either Federal law or the laws of the state in which the acts are committed. The inclusion of state-crimes in the Act provides the means to federalize certain state laws that may not have *analogous provisions* at the Federal level (Diamant & Fleming, 2012), such as laws prohibiting commercial bribery.

The case of *United States v. Control Components, Inc.* (2009) is an example of the relationship between the FCPA and the Travel Act. In 2009, Control Components pleaded guilty to charges that it violated both the FCPA and the Travel Act. Violations of the FCPA related to corrupt payments to officials and employees of foreign state-owned companies, and the Travel Act related to similar payments to employees of foreign and domestic private companies. Charges were based on Section 641.3 of the California Penal Code (2009) which prohibits commercial bribery.

The circular dilemma is once more present in attempting to apply the Travel Act to alleged bribery in the Olympic setting. Under the FCPA, the *bribed party* must be either a foreign public official or an employee of a state-owned company; or the state in which the alleged act of bribery was committed must have adopted a *commercial bribery statute* that covers the alleged conduct. Boles (2014) asserts that if the bribery transpires within a state that has not criminalized the offense, federal prosecutors may not use these federal statutes to prosecute the offense.

So, is there another solution? Faced with ethical and practical challenges presented by the fact of corruption and bribery in the Olympic setting and elsewhere in international sports, we would urge Congress to enact a new statutory framework, in the form of the *Olympic Bribery Act,* and to do so as an amendment to the FCPA. The amendment should be broad in its approach and application. It will make it a crime for *any person, entity, corporation or organization* in the United States to commit *any act of bribery* in connection with *any aspect* of the Olympic Games through the "use of the mails" or "any facility or instrumentality in interstate or foreign commerce." We would also urge Congress to extend the reach of the statute to *any* "international sports competition."

Whether this approach would receive the support of the business community is another matter. Recall who are among the major American Olympic *partners* and *sponsors*: Coca-Cola, Intel, Visa, Bridgestone, General Electric, Dow, Nike, and Microsoft. Given that currently it appears that bribery by corporate Olympic sponsors might be beyond the reach of either the FCPA or many state commercial bribery statutes, there might be reluctance on the part of Congress to undertake such a process in the current regulatory environment.

PART IV— CONCLUSION

Our intention here was multi-purposed. First, we introduced and discussed the many business "property crimes" that have afflicted the sports and entertainment sector in recent times. We presented examples of these crimes (ranging from theft to forgery, to extortion) and discussed how they involved and affected sports figures and the world of sports.

In Part II, we focused on how, in advancing a business plan or capitalizing on a business opportunity, businesspersons often resort to "white-collar" crimes. The term white-collar crime now refers to a full range of fraudulent activities committed by business and government professionals. These crimes are characterized by deceit, concealment, or result from a violation of a fiduciary duty, and are not dependent on the application or threat of physical force or violence. Because the motivation behind these crimes tends to be financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage (see FBI.gov, 2017) —our position is that the sports and entertainment industry has been quite susceptible to such types of criminal activities.

To extend the discussion, we introduced in Part III the potential implications of the *Foreign Corrupt Practices Act*, as it may relate to prominent international sports events, most especially the Olympic Games. Allegations of corruption plagued both the Rio and Sochi Games (Lane, 2016; Seddon, 2016). Because of this, our objective is to shine a light on the financial entanglements that may complicate business transactions such as sponsorships in these types of events. We have provided a statutory remedy that we believe might be effective in the fight against corruption and bribery in the Olympics and in other international sporting events, the Olympic Bribery Act.

What our study indicates is that while doping and sexual assault scandals have come to the forefront in very prominent displays, the perils of white-collar crimes are equally evident in the sports world. Athletes, sports teams, regional, national and international sports and business organizations face high economic stakes, particularly at the international level. We believe that this makes them more vulnerable not only to allegations of doping, but also to allegations of white-collar crimes— especially corruption in the form of embezzlement or bribery. We expect this discussion to become more heated as we approach international sporting events such as the 2018 Winter Olympics in PyeongChang, South Korea, FIFA's 2018 World Cup in Moscow, and the 2020 Summer Olympics in Tokyo. To support our claim, please note that baseball and softball will be coming back at the 2020 Summer Games. Both sports were part of the Olympics up until the 2008 Games in Beijing after which they were voted out because of concerns around building stadiums, a lack of professional players, and doping. Caple (2016) asserts that the IOC wants baseball, specifically, to send its very best major leaguers, as do most other sports, such as basketball. This would heighten the interest in TV coverage.

While the opportunities for international exposure through the Olympics and other international sports sponsorships are great, given the record of persistent and pervasive illegal

activities, so are the potential risks. American business must be aware of their jeopardy if they engage in questionable or illegal activities of any kind in pursuit of their own "Olympic Gold" and should realize they will pay a steep price if they do so.

APPENDIX I: ELEMENTS OF TORTIOUS INTERFERENCE

The elements of a tortious interference cause of action, although varying from jurisdiction to jurisdiction, include:

- The existence of a contractual relationship or beneficial business relationship between two parties;
- Knowledge of that relationship by a third party;
- Intent of the third party to induce a party to the relationship to breach the relationship;
- Lack of any privilege on the part of the third party to induce such a breach;
- The contractual relationship is in fact breached; and
- Damage to the party against whom the breach occurs.

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