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**The Ethics of NCAA Division I Sports Team Scheduling: University Presidents  
Take the Field Part II**

**THE ETHICS OF NCAA DIVISION I SPORTS TEAM SCHEDULING:  
UNIVERSITY PRESIDENTS TAKE THE FIELD  
PART II**

Gregory M. Huckabee<sup>1</sup>

“Signor Antonio, many a time and oft in the Rialto you have rated me about my moneys and my usances. Still have I borne it with a patient shrug, for sufferance is the badge of all our tribe.”<sup>2</sup>

**I. INTRODUCTION**

Do ethics play a role in intercollegiate sport when it involves Football Bowl Subdivision (“FBS”) higher competitive tier teams that pay Football Championship Subdivision (“FCS”) lesser tier teams for games? Research reveals that these games are considered noncompetitive.<sup>3</sup> Proponents argue competitiveness does not matter because these games are played by college athletes and other economic values take precedence over considerations of competitiveness. Data reflect that over 90% of games played between FBS and FCS teams are statistically noncompetitive.<sup>4</sup> Do economic factors moot ethical considerations in scheduling such

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<sup>2</sup> William Shakespeare, *The Merchant of Venice*, Act 1, Scene 3, at 5.

<sup>3</sup> Gregory M. Huckabee, *Is It Ethical to Sell a Lower Tier College Sports Team to Play Another Team of Far Greater Competitive Skill?*, 16 U. DENV. SPORTS & ENT. L.J., 89-135 (2014) [hereinafter Huckabee, *Is It Ethical*].

<sup>4</sup> *Id.*

FBS versus FCS football contests when judged by university presidents and chancellors?

This is a two-part study. Part I involved identifying and addressing the ethics of scheduling FBS versus FCS games and an analysis of intercollegiate sport and its purpose. It discussed factors that affect intercollegiate sport and its true educational purpose, but also the purported ethics that surround it. The study also addressed the factors affecting why these games are noncompetitive and why such competition may be unethical in FBS versus FCS games.<sup>5</sup> It is recommended Part I be reviewed prior to considering Part II's analysis to obtain a more informed understanding of the issue.

Part II of the study provides qualitative data, acquired through candid interviews with 10 Division I ("DI") university presidents and chancellors addressing 14 questions involving the ethics of sports scheduling. Most, but not all, were conducted face-to-face. Ultimately responsibility for what happens and fails to happen on college campuses should be attributed to the leadership and decision-making of the campus chief executive. The interviews provide insight as to why these university executives believe intercollegiate sport exists, the ethics that apply to this subject in higher education, what they have learned from unethical conduct in the college sports arena, and whether they believe FBS versus FCS scheduling as currently practiced is ethical. In order to gain access and candor in the interview process, the responses are anonymous, with one exception.

One respondent, Robert J. Spitzer, S.J., retired president of Gonzaga University, a DI school (but without football), agreed to answer questions on the record. He has special qualifications that make his responses thought provoking, if not authoritative, in that he is not only the President of the Spitzer Center of Ethical Leadership, dedicated to helping Catholic and for-profit organizations develop leadership, constructive cultures, and virtue ethics, but also

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<sup>5</sup> *Id.*

the President of the Magis Center of Reason and Faith, a non-profit organization dedicated to developing educational materials on the complementarity of science, philosophy, and faith.<sup>6</sup> Respondents will be referred to as P1 through P10, with Fr. Spitzer being P10. Due to space limitations, questions and responses have been edited. Interviews ran 45 minutes to one hour, therefore, it is not feasible to provide them in their entirety.

## II. STARTING POINT

### A. Ethics

Contrary to some opinion, the concept of ethics can be defined. Whether it is understood may be a different matter. Socrates, 2,500 years ago, observed “Ethics consists of knowing what we ought to do.”<sup>7</sup> Robert Solomon suggests the Greek word *ethos* (meaning character or custom) “...[B]egins with a concern for the individual — including what we blandly call “being a good person” — but it is also the effort to understand the social rules which govern and limit our behavior, especially those ultimate rules — the rules concerning good and evil — which we call morality.”<sup>8</sup>

Aristotle argues “It is thought that every activity, artistic or scientific, in fact every deliberate action or pursuit, has for its object the attainment of some good. We may therefore assent to the view which has been expressed that ‘the good’ is ‘that at which all things aim.’”<sup>9</sup> If we consider ethics in terms of simple rectitude, “Ethics has also been called the study and philosophy of human

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<sup>6</sup> See *Spitzer Center*, SPITZER CENTER, [www.spitzercenter.org](http://www.spitzercenter.org) (last visited Oct. 26, 2015); *Our Mission*, MAGIS CENTER, [www.magiscenter.com](http://www.magiscenter.com) (last visited Oct. 26, 2015).

<sup>7</sup> See Claire Andre & Manuel Velasquez, *Can Ethics be Taught?*, SANTA CLARA UNIV. (Mar. 8, 2014), <http://www.scu.edu/ethics/publications/iie/v1n1/taught.html>.

<sup>8</sup> ROBERT C. SOLOMON, *MORALITY AND THE GOOD LIFE* 3 (1984).

<sup>9</sup> F.H. SANDBACH, *THE ETHICS OF ARISTOTLE* 25 (J.A.K. Thompson trans. 1953).

conduct, with an emphasis on determining right and wrong.”<sup>10</sup> Collectively using these definitions as a baseline of knowledge and fact, ethics is not only about doing good, it should also be about doing right. Knowing how university presidents and chancellors understand this key point is a lens through which management decisions are made and judged.

Our first question asked of all 10 respondents inquired: **“How do you define ethics?”** While P1 simply observed it is “A set of moral principles that frame right versus wrong,”<sup>11</sup> P2 said:

I guess in the context of this conversation I would use it as a kind of working definition of ethics as behaving in a manner that is respectful of the individuals affected by the activities that you are undertaking, that means the individuals that are both directly involved in it, but also in this case the spectators and the fan base, the university community, the city and all that, conducting business in a way that is respectful of all the people potentially affected by the activity that we are talking about, and abiding by sort of core principle that you are going to generally consider the welfare and the feelings of the people who are engaged in the activity. Again either as participants or spectators or whatever.<sup>12</sup>

P3 was more succinct stating “I’m a practical person, not a philosopher, so in my mind ethics would be doing the right thing — defined by being able to say what you did in a public setting and not blink when you say it.”<sup>13</sup> P4 followed a similar train of thought reflecting: “Well I gave that some thought, I’m looking for sort of a simplistic definition that one could use on a daily basis. I

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<sup>10</sup> O.C. FERRELL, JOHN FRAEDRICH & LINDA FERRELL, *BUSINESS ETHICS: ETHICAL DECISION MAKING & CASES 5* (2005).

<sup>11</sup> Interview with P1 (Jun. 2, 2015) [hereinafter P1 interview].

<sup>12</sup> Interview with P2 (Apr. 7, 2015) [hereinafter P2 interview].

<sup>13</sup> Interview with P3 (Jan. 26, 2015) [hereinafter P3 interview].

guess I think doing the right thing, I don't know that I can be any more specific than that without particular sets of facts or whatever, but in generally speaking, is it the right thing?"<sup>14</sup> As if there is a presidential ethics primer and quiz for all campus chief executives, P5 also said "Doing the right thing. Individual, personal integrity, and doing the right thing."<sup>15</sup> P6 was far more philosophical about this subject offering:

To me, ethics is a system. It's a framework that is rooted in and oriented toward a particular set of values, that should be, can be engaged in coming to a determination of when a virtuous moral decision is to be arrived at. And I really think that it is essential, whether it's embedded and implicit, or whether it's explicit, that university administrators, and that includes those in leadership in athletics, work to uncover and understand what the system of ethics that they are making decisions along is. Because there are going to be, I think, very challenging questions that emerge in the complex environment of the kind of competing desires, that without having done that work or at least having very clear and significant sense of what guides one, can allow really horrific consequential decisions to occur as a result. So to me it's kind of a stem of framework, again rooted and based in a set of values about what one believes will lead to a virtuous decision.<sup>16</sup>

Surprisingly one interviewee, P7, declined to engage in the definition analysis: "I'm not going to attempt to define *ethics* or *sport*," perhaps not wanting to engage in a perceived polemic.<sup>17</sup> It is noteworthy though that a college president would decline even

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<sup>14</sup> Interview with P4 (Jun. 10, 2014) [hereinafter P4 interview].

<sup>15</sup> Interview with P5 (Nov. 17, 2014) [hereinafter P5 interview].

<sup>16</sup> Interview with P6 (Apr. 9, 2014) [hereinafter P6 interview].

<sup>17</sup> Interview with P7 (Mar. 26, 2015) [hereinafter P7 interview].

an attempt to define either poignant term. What might that leader's decision-making philosophy be in supervising what is a multi-million dollar football enterprise at a DI school? P8 had no reluctance taking on this definition observing "...I always figure it's doing the right thing even when no one is looking. And all too often that's a tough decision. I got 12,000 18-23 year olds who, unfortunately in the characteristic age group, the research would show don't make wise decisions. But I think ethics is all about right things, doing it right, living with doing it right..."<sup>18</sup> P9 had a similar view offering "Well I think ethics can be defined as the boundaries of behavior beyond which you will not cross. It's the way we interact with each other on an upright and moral basis."<sup>19</sup>

Among the 10 campus chief executives, P10 is an ethicist by training and profession currently serving as the president of the Spitzer Center of Ethical Leadership. Serving perhaps as a baseline for comparison, he says "Well of course ethics is the study of good conduct, but it generally involves three areas. Virtues are habits or attitudes that we carry with us that lead towards the good and away from what might be called evil or the unjust or the bad."<sup>20</sup> This is a good start.

## B. Sport

As part of the definitional foundation serving as a precursor for succeeding questions, the interviewees were asked to define sport as well. We can probably find agreement among sports aficionados that there is a distinct difference between professional and amateur sport. What is that difference and does that matter?

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<sup>18</sup> Interview with P8 (May 4, 2015) [hereinafter P8 interview].

<sup>19</sup> Interview with P9 (May 6, 2015) [hereinafter P9 interview].

<sup>20</sup> Interview with P10 (Sep. 8, 2015) [hereinafter P10 interview]. Continued "So principle virtues that Socrates and Aristotle would have talked about would have been justice or fairness, courage and that more or less referred to as moral courage, prudence or wisdom, knowing what matters. Then fortitude which really comes down to you—know stick-to-it-ness and commitment to get things done when the going gets rough and temperance, that means staying away from things that are going to cause you trouble, or that will get you into bad conduct."



Understanding what sport is and how it relates to the transformative educational experience would seem an indispensable qualification for every collegiate president or chancellor. But consider if they did not appreciate the true meaning of sport; would that matter in their supervision and administration of students' participation in athletic and academic programs?

A good baseline definition of sport is provided by a historian who has given a great deal of thought to what it truly means: "In summary it can be said that sport, as a culturally valued practice, can be thought of as: A competitive rule-bound physically demanding activity in which its internal goals and standards are pursued in a moral way for their own sake."<sup>21</sup>

Clearly there is a misunderstanding of sport and its role in education among some national tier schools as the Wall Street Journal ("WSJ") reported in "Dark Days in Chapel Hill." Its finding observed "If you ran a college and knew there was substantial money to be had from sports but no requirement to educate athletes, you might cut corners — that's exactly what the University of North Carolina ("UNC") did for nearly two decades."<sup>22</sup> A book has been written by Jay Smith and Mary Willingham titled "Cheated" that documents an all too vivid example of what the WSJ characterizes as a "shameful record."<sup>23</sup> What does this "shameful record" involving sport at UNC look like?

A report commissioned by the university and issued last year found that, over nearly two decades, 3,100 Chapel Hill students, about half of them athletes, took fake classes that required no work. The average grade in the fake classes was a A. No-show

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<sup>21</sup> PETER J. ARNOLD, *SPORTS, ETHICS, AND EDUCATION* 16 (1997) [hereinafter ARNOLD].

<sup>22</sup> Gregg Easterbrook, *Dark Days in Chapel Hill*, WALL ST. J., Mar. 1, 2015, at C5 [hereinafter Easterbrook].

<sup>23</sup> *Id.*; JAY M. SMITH & MARY WILLINGHAM, *CHEATED* (2015) [hereinafter CHEATED].

grades pulled up the GPAs of sports stars who otherwise would not have met the NCAA's modest eligibility standard of a C-minus average.<sup>24</sup>

Two decades is a long time. How many UNC employees in the academic, athletic, and administrative operations voluntarily, intelligently, knowingly, and willingly knew and participated in this corruption? Co-author Willingham writes with authority as she is a history professor at UNC and served for many years as an academic counselor, which is a routine duty for faculty at most DI institutions. In this capacity she brought to light the knowing ethical and unlawful conduct of UNC personnel when she granted interviews with the Raleigh News & Observer.<sup>25</sup> The authors of this expose "...accuse their state's prestige public campus of 'broad dishonesty' and of stocking its teams in football and basketball — the 'revenue sports' — with athletes to generate a profit, then breaking its promise to educate them."<sup>26</sup> As with many whistleblowers, the authors "recount being shunned in Chapel Hill for helping bring the scandal to light..."<sup>27</sup> Professor Willingham resigned and sued the school. UNC subsequently settled the litigation with her.

So what role does UNC's president, and his understanding of sport, play in a two decades old practice of "cheating?" Like the Watergate era and its persistent media and congressional investigative inquiry, what did the chief executive know or what should he have known about the purpose of sport and its role on his campus? One researcher has argued at its most basic formulation "...[T]he historical normative framework associated with sport is essentially an ethical one."<sup>28</sup>

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<sup>24</sup> Easterbrook, *supra* note 22; CHEATED, *supra* note 23.

<sup>25</sup> Easterbrook, *supra* note 22; CHEATED, *supra* note 23.

<sup>26</sup> Easterbrook, *supra* note 22; CHEATED, *supra* note 23.

<sup>27</sup> Easterbrook, *supra* note 22; CHEATED, *supra* note 23.

<sup>28</sup> ARNOLD, *supra* note 21, at 39.

**When asked to define “sport,”** P1 offered that sport is “An athletic endeavor that entails a combination of mental and physical skill, mental and physical stamina, and competition with others.”<sup>29</sup> P3 took a more thoughtful approach observing:

I think the origins of sport — you can go back to Greek times, and what still should be the case now, is the opportunity for someone to prepare, train, and test their preparations and training against an opponent in an athletic venue, and if you will, place themselves with the outcome of the game. Not necessarily winning, but competing, and you know why students enroll in sports? The thrill of victory — the agony of defeat. Nonetheless some of my most memorable experiences whether in athletics or in life have come from losing and what I’ve learned from losing as much as what I have from winning, probably more so the losing side.<sup>30</sup>

P4 was less incisive in defining sport indicating “You know I thought that was a really interesting question and I don’t really know that I can answer it other than a competitive exercise in one way or another that involves athletic ability, although I don’t really think that that’s a particularly good definition.”<sup>31</sup> P5 seemed to appreciate a deeper meaning believing sport to be: “Individual and team competition in an organized fashion to allow the competitors to experience the game, but yet also have an opportunity to experience the agony of defeat and the glory of victory. It so happens in an organized way early on in the U.S. culture, much more so than it has before. There’s no pick-up games at the local parks anymore.”<sup>32</sup> Why is that do you suppose?

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<sup>29</sup> P1 interview, *supra* note 11.

<sup>30</sup> P3 interview, *supra* note 13.

<sup>31</sup> P4 interview, *supra* note 14.

<sup>32</sup> P5 interview, *supra* note 15.

P8 offered “I don’t know, I’m going to give you a simple answer. I mean, if you go back 3,000 years, competitive physical activity, competition, partition, rules, and some outcome in mind. Sport is something that you engage in with, I won’t say win or lose, but some outcome in mind, even if it is only the competition. I’m one of those guys who never felt like it was so bad to tie. We’ve kind of gotten away from that, you know someone’s got to win.”<sup>33</sup> P9 had a surprising different answer. “I think sport is the playing of any league game for personal satisfaction guaranteed by winning.”<sup>34</sup> Guaranteed by winning? Sport is not true sport unless you win, is that true? That is a poignant view by a campus chief executive. How might this view affect his athletic program decision-making?

The P10 ethicist defines sport as: “Well you know sport can have a couple different meanings. Sometimes sport is just development of competitiveness and fair play, to use a sports analogy ‘on a level playing field.’” Sport is meant to be physical, but the physical part is not an end in itself. The key element of sport is to use sport to develop a sense of competitiveness, but competitiveness that is fair at the end of the day.”<sup>35</sup>

### III. MORAL VALUES

#### A. Intrinsic Values

Our third question posed to our campus chief executives asked “**What are sports’ intrinsic values?**” The concept of the practice of sport, it has been argued, is intrinsically concerned with moral value.<sup>36</sup> Historically there is a consensus that a number of identifiable values can be viewed as intrinsic to sport. Those intrinsic values are “*Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair*

<sup>33</sup> P8 interview, *supra* note 18.

<sup>34</sup> P9 interview, *supra* note 19.

<sup>35</sup> P10 interview, *supra* note 20.

<sup>36</sup> ARNOLD, *supra* note 21, at 5.

*play, sportsmanship, magnanimity, concern for others.*<sup>37</sup> (Emphasis added). When sport is viewed as a transformative part of the overall collegiate educational experience, the moral values previously listed can be characterized as important in learning and character development, in and of themselves — all good educational objectives.

How well do university presidents' and chancellors' appreciation of these intrinsic values of sport correlate (i.e., do they know what we get out of sport that gives it a rightful place in the institution's transformative education experience program)? Using the above listed 13 intrinsic values as a reference point, it is useful to see how many values a chief campus executive may readily identify. P1 identified "Physical fitness, teamwork, followership, leadership, and mental toughness,"<sup>38</sup> essentially 4/13. P2 characterized intrinsic values more thematically:

...[t]he intrinsic value is that it is a lifestyle that is satisfying to them and challenging to them and in many cases adds vibrancy to their life and adds core existence to many of their lives and so I think the intrinsic values in that case for the student athletes themselves is just a personal lifestyle choice and that's important. I think the intrinsic value to the campus community of sports is one in which people take great pride in having a vibrant and enthusiastic work environment that's a part of, along with the arts and culture, the entertainment aspects of the campus...For the fan base whether they are alumni or community members, I think the inherent value of sports is, I don't know, it's part of the human psyche—that's why half the world sat around the TV last night watching Wisconsin and Kentucky. There's just something about the human makeup

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<sup>37</sup> *Id.*

<sup>38</sup> P1 interview, *supra* note 11.

that enjoys, is entertained by, is challenged by the notion of competition.<sup>39</sup>

Assuming “lifestyle” is related to self-reliance and self-discipline, this president captured 1/13. P3, provided a slightly different perspective:

Well, I think we give ourselves the opportunity to be tested and it is easy to look in the mirror and see one thing, but when you look in the mirror after an athletic competition it’s hard to deny what happened. I’m stretching the analogy too far there, but whether you play an opponent who’s weaker than you, evenly as matched as you, or better than you, it’s an opportunity to test yourself, test your preparation, test your training, test your level of competitiveness, and get a reality check on where that’s at... Much more complicated though in the example of football where it’s you, and sensibly at one time ten other people. One person with different goals and aspirations than the other ten can have dramatic impact on the game both positive and negative.<sup>40</sup>

Assuming we see courage, self-reliance, self-discipline, and perseverance here, this respondent identified 4/13 intrinsic values. P4 took a different tack:

I guess I think that intrinsic values is contributing to the growth of the individual participant in some way or another, hopefully in more than one way. Hopefully not only physically, but hopefully academically if nothing else because you usually can’t play football for instance if one isn’t in college...but I think building physical and moral character I sup-

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<sup>39</sup> P2 interview, *supra* note 12.

<sup>40</sup> P3 interview, *supra* note 13.

pose is developing skills as well. That's as good an answer as I can give.<sup>41</sup>

If we see respect, self-reliance, self-discipline, perseverance, and sportsmanship as involving growth physically and morally, this campus leader identified 5/13. P5 offered a broader perspective observing:

I think that participants enjoy doing it... As an individual you enjoy it, so that's an intrinsic value. From participating you can gain some experiences that will serve you well in other applications—teamwork, strategy, understanding that work and effort might have good outcomes, and if you lack applying yourself, the outcomes might not be as good if you worked hard at it. I think those are some intrinsic values in participating in sports. You can't undersell the value of just enjoyment from the participants. And we organize the heck out of them these days so parents get enjoyment out of them as well.<sup>42</sup>

If we equate enjoyment with self-reliance and perseverance, with teamwork and self-discipline, this leader captured 4/14. P6 went deeper in his analysis:

I think fundamental to sport is a sense of how it can contribute to one's sense of identity—their construction of an individual's sense of one's capabilities, one's ability to be competitive, to be successful in a competitive environment, to have the ability to measure agency in relationship to environment. We have, as a family, encouraged all three of our [children] to engage in sports, team sports, and their sense of self-confident identity has been a big part

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<sup>41</sup> P4 interview, *supra* note 14.

<sup>42</sup> P5 interview, *supra* note 15.

of what has been at the core of that encouragement. I think that particularly in the team sport environment a sense of how one can learn how to cope with adversity to gain the capacity for greater resilience, to understand what defeat feels like and that it doesn't necessarily equate to failure, are all really important components of what, for me as a psychologist, are sort of ego identity issues.<sup>43</sup>

If we view "identity" as encompassing self-reliance, self-discipline, magnanimity, and concern for others, together with teamwork and courage, P6 identified 6/13. P8 captured some but less with 3/13 offering "Well on the one hand I think competition and on the other hand it's almost like, I was thinking about this the other day it's like even in prison you have the inmate rules, there's certain crimes you don't want to commit when you go to prison because you're going to be put over here. I would say that an intrinsic value of sport is the short word 'fair'."<sup>44</sup> P9 again seemed to focus on "winning" as an intrinsic value observing "...I think maybe individual students, others, gain a great deal of personal satisfaction by competing ..., and the satisfaction that comes with winning, with defeating your opponent. I think there's a great deal of personal satisfaction in that... Sport is a never ending circle of competition and achieving personal best against an opponent that might be a little bit better."<sup>45</sup> Is it interesting to note this campus chief executive did not identify any of the 13 values involving "*Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others.*" (Emphasis added). How much has he thought about the role of sport as a component in his transformative educational experience program? P10 identified three intrinsic values of significance to him:

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<sup>43</sup> P6 interview, *supra* note 16.

<sup>44</sup> P8 interview, *supra* note 18.

<sup>45</sup> P9 interview, *supra* note 19.



Well I think there are certainly the big three. The number one value, of course, from which we take the analogy right out of sports is to have a level playing field. In other words to be fair, not to cheat, to make sure everyone competes on the same footing... The second idea... of course, fair play co-involves with justice. Not just not cheating, being just to people giving them their due, making sure you don't take something that doesn't belong to you. I think fair play really comes under the rubric of justice... The third area gets into these cardinal virtues that we talked about, and this wouldn't necessarily be a principle, it's more of a virtue—a habit... It's also part of the whole idea of ethics and one of the key habits . . . are what I call moral courage and temperance. The whole idea of learning what can undermine you and the idea of having the courage and fortitude to pursue things to the point of excellence.<sup>46</sup>

Fair play and justice can equate to sportsmanship as well as courage and temperance/fortitude involves magnanimity, so our Jesuit ethicist finds 4/13 of Arnold's values in sport.

While comparison of these academic leader responses to the 13 intrinsic values posed by Peter Arnold in his treatise *Sports, Ethics, and Education* may be viewed as arbitrary, the qualitative nature of these responses should give pause. How deeply have these presidents and chancellors thought about the intrinsic value of sport in what is a burgeoning multimillion dollar business being conducted on their campuses? If viewed in its most favorable light, the UNC Chapel Hill chancellor had no idea what was going on for two decades on his campus regarding fake classes involving 3,100 students, while literally hundreds of faculty, administrators,

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<sup>46</sup> P10 interview, *supra* note 20.

and athletic staff participated in this ruse. Is not that remarkable, or is it creditable?

Like many large universities, Chapel Hill has a committee that grants admission waivers to top sports recruits. “Cheated” says that the committee admitted players who scored below 400 on the verbal SAT—that’s the 15<sup>th</sup> percentile [nationally], barely north of illiterate—or who were chronically absent from high school except on game days. There is no chance that a student so poorly prepared for college will earn a diploma. All he can do is generate money for the university.<sup>47</sup>

How could a chancellor miss all this? In view of the ever increasing importance of money and its corruption in collegiate sports, are the intrinsic values of sport something presidents and chancellors should be thinking more deeply about? Did UNC’s chancellor give any consideration to the role and importance of sport’s intrinsic values on his campus at all? The evidence would indicate otherwise. Does this have impact?

#### B. Extrinsic Values

What external values might be connected to an intercollegiate sport, in particular football, that can undermine the internal ones discussed above? *Power, status, prestige, and money* have been identified as external values that can corrode or corrupt the sport of football’s intrinsic values.<sup>48</sup> (Emphasis added). “Put dif-

<sup>47</sup> Easterbrook, *supra* note 22.

<sup>48</sup> *Id.* at 17. “Whereas a practice is concerned with its own internal good, standards of achievement and conduct, institutions, although expressing concern with these same things, are characteristically concerned as much, if not more, with the control and distribution of external goods in the form of power, status, prestige and money. When a practice like sport becomes institutional, its organization and administration become bureaucratized. Officials are expected to fulfill a number of particular functions concerned with such matters as its promotion, sponsorship, and ritualization.” *Id.*

ferently institutions are likely to corrupt practices when they demonstrate an undue interest in the promotion and extension of external goods at the expense of the preservation and cultivation of internal ones.”<sup>49</sup> Does this sound like UNC Chapel Hill? Let’s examine this case in point more closely.

Last year, according to [U.S.] Education Department data, UNC-Chapel Hill cleared \$30 million in profit on football and men’s basketball, a number that does not include whatever part of the \$297 million in gifts and grants received by the school last year prompted by athletics, or \$130 million in assets held by the athletic foundation affiliated with the college.<sup>50</sup>

Is the UNC-Chapel Hill case an anomaly or illustrative of a contagion? Money, money, money, show me the money. The Wall Street Journal reports “Across the big-college landscape, around \$3 billion annually flows from networks to schools in rights fees for national TV broadcasts of football and men’s basketball. Ticket sales and local marketing add to the total. Meanwhile, the NCAA almost never sanctions colleges that don’t educate scholarship athletes.”<sup>51</sup> This must be the worst kept secret in college football and basketball.

Does it seem intrinsic values are being sacrificed on the altar of extrinsic ones? The National Collegiate Athletic Association (“NCAA”) received about \$800 million alone from broadcasting rights from this year’s March Madness Tournament (2015).<sup>52</sup> This is not only a 500% increase from two decades ago, but is only a small portion of \$12 billion in revenues that are generated by col-

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<sup>49</sup> *Id.* at 19.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Allysia Finley, *A March Madness Underdog: Free Enterprise*, WALL ST. J., Mar. 28-29, 2015, at A11 [hereinafter *March Madness*].

lege athletic programs, principally football and basketball.<sup>53</sup> Is the matchup fair between intrinsic and extrinsic values? Former Duke basketball player and current ESPN sports analyst Jay Bilas reveals another worst kept secret: “This is a multibillion-dollar business. It’s professional in every way except in how the athletes are treated...When you are profiting off someone else while restricting them from earning a profit, that’s exploitation.”<sup>54</sup>

As Part I of this study documents, intrinsic moral values and ethics are subject to being overwhelmed by external ones.<sup>55</sup> As college presidents and chancellors will testify, it has almost become an arms race when it comes to generating revenue in intercollegiate sports. The University of California, Los Angeles (“UCLA”) generated \$84 million in 2013 while the university spent \$31 million on coaching and staff. Even their head football coach Jim Mora commanded \$3.25 million which turns out to be four times what the head coach made in 2006. On top of this, UCLA spent \$136 million renovating its Pauley Pavilion basketball stadium. What is striking is that UCLA only spent \$11.6 million on all its sports scholarships.<sup>56</sup>

### C. Sport and Moral Value

The concept of the practice of sport, it has been suggested, is intrinsically concerned with moral value. Our fourth interrogatory asked “**Is that true? If so, what moral value?**” P1 said “I don’t believe this is true. It depends on how one approaches the effort as to whether or not it has moral value.”<sup>57</sup> P2 provided a deeper explanation:

I guess I’m not sure that I see sports motivated any more or less by moral value than the rest of the ac-

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Huckabee, *Is It Ethical*, *supra* note 3.

<sup>56</sup> *March Madness*, *supra* note 52.

<sup>57</sup> P1 interview, *supra* note 11.

tivities that we engage. I don't think somebody who views himself or herself as a particularly moral person is attracted to sports necessary or vice versa. I guess I'm not sure that it is uniquely or distinctly connected to moral issues relative to the rest of what we do in society. I mean I don't know that there is anything more moral about sports and athletics than there are arts and entertainment, or business or whatever.<sup>58</sup>

P4 had a different view saying "I think it should be, I'm not entirely sure that it is. I suppose it's the NBA versus the chariots of fire as a view of athletes as pure, at least not professional athletics, pure form of competition where there is a set of values that have to be adhered to, and winning isn't necessarily the only thing... I think that is a moral value — Sportsmanship."<sup>59</sup> P5 was more distanced responding "I don't know what moral value is. Well we just talked about intrinsic values so if intrinsic value has virtue in the eyes of the holder, then in fact they inspire to capture those values by participating."<sup>60</sup> P6 offered a more in depth philosophical description about moral value in sport:

Well that's an interesting issue. I would suggest it can be, but not necessarily innately connected to the development of or experience of moral values building. I think that sport is largely looked at objectively, an activity and the way in which sport is contextualized and the ways in which individuals are taught within that context can translate, as is the case with many activities, into tremendous opportunities for the development of a system of morals or, alternatively, the opposite. I think about, for example, these incidents that were videotaped a couple of years ago of this young female soccer player who

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<sup>58</sup> P2 interview, *supra* note 12.

<sup>59</sup> P4 interview, *supra* note 14.

<sup>60</sup> P5 interview, *supra* note 15.

was caught in the context of a competitive, highly competitive, kind of high school sport environment of bullying and physically assaulting other players on the opposing team and thinking, as I think many people did, “I wonder where she got the idea that that was appropriate behavior in the context of this environment?” Alternatively, I think that there are, in particular from the influence of coaches, many opportunities for young women and young men to develop through modeling, and through the ways in which the construction of practice and sport and engagement and also other related activities have down time to spend, so social activities create opportunities for people to really build a very solid system of morals, so I’m not sure that its intrinsic to the sport, but I think it creates the possibility for that.<sup>61</sup>

P8 was more pragmatic reflecting “I think there’s an intrinsic concept of, there’s a set of rules that govern the game, you play it and at the end of the game there’s an outcome, win, lose, or draw, it was competitive it was fair... So I think the moral value surrounds all the things we do about the press and the reporting of sport. Do kids on campus get an undue advantage because they are student athletes? That’s part of the moral value of sport. I would fall on the stick no more than a kid that does well in any other class gets an advantage in terms of what they’re doing.<sup>62</sup> A similar view was provided by P9 observing “...[I] think the moral value is fundamental honesty...[h]ave you prepared yourself honestly and well or do you enhance your abilities through a variety of physiological advantages—steroids, deceit, cheating; so I think the main thing about ethics in sport is to compete on a honest open level playing field.”<sup>63</sup>

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<sup>61</sup> P6 interview, *supra* note 16.

<sup>62</sup> P8 interview, *supra* note 18.

<sup>63</sup> P9 interview, *supra* note 19.

There was some agreement that sport involved moral value with P10 arguing “Yes. Certainly the ones that I was mentioning—fair play is incredibly important. Honesty is incredibly important, and of course, I think another one in light of today’s sports is do not do harm to others, don’t injure anyone, don’t harm anyone unnecessarily, is an incredibly important value... [t]hese three things for sure are at the top of the list.”<sup>64</sup> He went on to poignantly add “The idea that you can be honest on the playing field and not be honest in your personal life, but somehow you have this compartmentalized personal and professional ethic, is you know, a complete fiction.”<sup>65</sup>

It appears not all of these educational leaders see sport as intrinsically concerned with moral value, but left open the possibility that it could, depending on the context of coaching and the nature of the particular sport’s competitive environment. Admittedly the athletic environment is quite different in football when compared to tennis or swimming or crew.

#### IV. WINNING

After laying a descriptive foundation of sport and ethical moral relationships, the 10 interviewees were probed about the role of winning in sport. They were asked “**Is winning the primary or central criterion of a sport team’s success?**” P1 was succinct and to the point: “It is a central criterion. We play the games to win.”<sup>66</sup> Do other campus leaders see it the same way — is that what sport is all about in the educational realm? P2 agreed with P1, but offered more context.

Well, that’s a good question. I think that in the context of athletics that you know the fundamental tentative of athletics is competition, and in competition there are winners and losers. Whether it’s team

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<sup>64</sup> P10 interview, *supra* note 20.

<sup>65</sup> *Id.*

<sup>66</sup> P1 interview, *supra* note 11.

based, whether it's individual based, I mean I think that kind is almost by definition what athletics in the context of competitive sports is about. So winning is, I would say, approaching the sport with an idea of winning is inherent in athletics. That does not mean 'not winning' is that there is something wrong with that, or that it means that you have failed an overall sense of quality of life or whatever. But I think winning is important to athletics almost definitionally—it is about coming out on top. That doesn't mean that everything about athletics has to be geared toward winning. I think it's geared towards getting the best out of people as individuals, getting the best out of a collection of individuals that make up the team, but with the goal of performing better than the other guys.<sup>67</sup>

Perhaps demonstrating reasonable minds can legitimately disagree, P3 contrasted the above views arguing:

Oh no, absolutely not...It's the challenge of that competition in placing one's self that is core and central. Winning is essentially the goal, but I wouldn't define winning is having the most points or the fastest time. Winning, for an example, winning for someone who is physically handicapped could possibly be running, and running successfully and running at the best time for people with a handicap... They are accomplishing things that perhaps they thought they could never accomplish or told they could never accomplish. So again it's facing the challenge, preparing for it, training for it, performing essentially to the best of your abilities given those set of parameters. That's the intrinsic core

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<sup>67</sup> P2 interview, *supra* note 12.



value of competition and athletics, at least in my mind.<sup>68</sup>

P4 said “It is primary, but it isn’t everything.”<sup>69</sup> P5 flatly said “no” that it is not a primary or central criterion to a sport team’s success.<sup>70</sup> P6 disagreed saying “I think it is one, yes.”<sup>71</sup> P7 provided a more nuanced observation:

Winning—and thus losing—are central components of traditional sports. However, student athletes at universities I’m familiar with typically stay enrolled and graduate with GPAs equivalent to or better than those of non-athletes. They are engaged with the university and with community service in ways that many other students aren’t. I would argue that a college team could be termed successful through their academic success and contributions to the campus and community—definitions of success that would not pertain to a professional team.<sup>72</sup>

The concept of winning drives sports programs. But is it the only thing or primary objective that is sought from these programs? Preoccupation with winning by itself can be a corrosive external force. Therein lies the pitfall. “Their collective message is that the intrinsic values of sport are replaced by those that are external to it, there is the distinct possibility that it will be manipulated or worse irredeemably undermined and corrupted.”<sup>73</sup> P8 countered, “At this place, no... So I think character, integrity, winning and losing are critical elements of sport that I see causes different kinds of people that come out of the other end... There’s nothing better than winning. There’s nothing better than getting a

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<sup>68</sup> P3 interview, *supra* note 13.

<sup>69</sup> P4 interview, *supra* note 14.

<sup>70</sup> P5 interview, *supra* note 15.

<sup>71</sup> P6 interview, *supra* note 16.

<sup>72</sup> P7 interview, *supra* note 17.

<sup>73</sup> ARNOLD, *supra* note 21, at 5.

hundred on a test, but in the same way I think part of something we have to do more of in a celebrated sport is the fact that I lost and I got back up tomorrow and I put the soccer shoes on, the baseball cap on, swimming suit on and I went back out and did it. Again I think that builds character, strong bones, and teeth and good citizens for the next 50 years.”<sup>74</sup>

Similar to P8, P9 responded, “No, I would have to say that in the ideal world the way you play the game, if you do your personal best, ...whether you win or lose it’s what you walk away with from that field of competition...”<sup>75</sup> P10 went deeper connecting winning at a higher level.

Well when you’re looking at sport just from the vantage point of physical competitiveness and excellence, winning is of course important. But it cannot be an end in itself. Two thoughts about this. The first is the old principle of Saint Augustine which most of us still hold in our ethical lives today. The end does not justify the means. So we may have the end of physical excellence, the end of winning, the end of bringing pride to our team, our region, or whatever it may be, but this is an objective, and an end we’re seeking, but we have to use means of getting there that are fundamentally ethical.<sup>76</sup>

He further qualified “winning” within a narrow context:

So for all intents and purposes winning is not the sole end. And second, we have to call the end of sports ‘winning with good character’, with fair play which develops good leadership, is a good example for those who are being entertained by it, and ...

<sup>74</sup> P8 interview, *supra* note 18.

<sup>75</sup> P9 interview, *supra* note 19.

<sup>76</sup> P10 interview, *supra* note 20.

role modeling for the children who are not only being entertained by it, but are being informed by it. It's all of those things wrapped up into the objective of winning, and without those other things—winning is meaningless. Winning is basically empty, period.<sup>77</sup>

As these campus chief executives reveal, they see a connection between winning and the positive learning outcomes produced by competition. While it is a truism that everyone involved in sports competition — athletes, coaches, staff, and spectators, view success in terms of winning, it is refreshing to see that at least some institutional leaders see value in competition by itself. In all athletic competitions, especially football, there are winners and losers. What do losers take away from the experience? Some might argue nothing, but these interview responses indicate something more. These campus leaders see value, perhaps even moral value in competition alone. That is a good thing.

#### IV. WHAT ELSE BESIDES WINNING?

Our collegiate presidents and chancellors were next asked to “**Rank order your top three criteria for determining success in sport.**” This required deep reflection. P1 succinctly stated “The contest was fair; participants did their best; a sense of accomplishment was realized by the participants.”<sup>78</sup> P2 viewed the criteria differently:

That's easy and I won't rank them in order, I will give the three of them to you that are all equally critical. And its excellence in competition, its excellence in the classroom, and its excellence in the community. And I have that mantra that I tell every time I get together with any athletic related group whether it's the students or the boosters or whoever-

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<sup>77</sup> *Id.*

<sup>78</sup> P1 interview, *supra* note 11.

er—it's those three things... By the community we mean responsible behavior, we mean public outreach, community service, those kind of things. And the lack of any one of those is less than a successful program.<sup>79</sup>

This is a broader view than that taken by other interviewees. P3 opined:

Preparation to the best of your abilities, and knowledge and experience prepared for the competition, facing that competition, and how you handle that competition, and again whether you're the superior, equal or lesser force in that competition. And third and last would be the winning aspect. There are certainly pundits who would argue that nice guys finish last, or it's all about you either won or you lost, and I simply don't see it that way. An example here is we would have had an undefeated season if we didn't lose to [identification deleted] University, that was very important for us to achieving a historic [deleted] championship. We had had players who have never known a loss since they have been on the team—juniors who had been on the team. We had players who had forgotten what it was like to lose a game. It leaves an undoubtable bad taste in one's mouth. To lose when you're used to winning. And they learned far more by losing that game than if they would have squeaked it out and won. I think most coaches would say sometimes losing is a good thing. It teaches you that you have to prepare, that you have to train, and that you have to apply that to succeed to win the game. It's not just about showing up, and there are undoubtedly some great examples of athletic upsets across the

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<sup>79</sup> P2 interview, *supra* note 12.

span of sports where teams thought they'd win by showing up and found out that a better prepared team was more competitive and won... Because motivation, preparation, and training can be factors that change everything.<sup>80</sup>

This is insightful. Yet, P4 viewed the criteria differently focusing on winning, fairness, and related values.

...[I] don't know if it's one, two, or three, but winning is important. Winning in a fair fashion is important. And developing the athlete in so doing is important. I mean double shots of steroids prior to the game and winning doesn't contribute to the physical and academic growth of the athlete. Maybe it's not right, but it is really hard to say winning isn't the top criteria, it is, but also winning in a fair fashion and a sportsmanlike fashion is important, and a program that contributes to the physical and moral well-being of the student, physical, academic, moral well-being of the athlete.<sup>81</sup>

P5 offered a similar view.

First, I think is student athletes have to be successful students. If we are going to engage in intercollegiate athletics, we have to provide the opportunity for those students to be successful athletically and academically. So they then need to have that avenue that they can see that they can pursue to achieve their aspirations both as students and athletes. And team success or individual success, depending on the sport, is part of the criteria for determining success in that sport.<sup>82</sup>

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<sup>80</sup> P3 interview, *supra* note 13.

<sup>81</sup> P4 interview, *supra* note 14.

<sup>82</sup> P5 interview, *supra* note 15.

P6 related a more individually nuanced view to the concept of sport as distinguished from the criterion of winning:

My personal first one is a sense of fulfillment and individual achievement in relationship to the experience. I think, I can't help but think about this in terms of our collegiate environment, because everything we do should in some way be related to human development and education. And regardless of where it happens, otherwise in my view it doesn't belong in the collegiate environment. I think that success, the second element of success, is the ability to gain a sense of fulfillment in team sports as an individual experiencing oneself as part of a collective, and a sense of ability to really experience fulfillment as a part of a collective identity, as well as that individual identity. I think the third element of success actually does come down to an ability to claim a fulfillment in the context of virtue, rather than as a tradeoff. I think about the immense pride I've seen teams who have lost really important contests having as they walk off the court or off the field defeated in a sense that they didn't win the game, but filled with pride that they gave it their all, that there were moments and opportunities and they were seized and fulfilled for success in the midst of the contest, and a sense that who they are as a program manifested itself throughout the experience. So, without question others are going to look at the ultimate criteria of success as winning or its alternative, but I don't.<sup>83</sup>

P8 was an outlier arguing, "I wrote that down. I wrote down teamwork success, character building, and competitiveness. And no, winning and losing are not in the top three."<sup>84</sup> P9 said,

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<sup>83</sup> P6 interview, *supra* note 16.

<sup>84</sup> P8 interview, *supra* note 18.

“Well I think putting in your best performance is number one... It doesn’t matter whether you win or lose... I think the second thing might be how you conduct yourself... professionalism, with dignity, integrity as you play the game. I guess the third thing is that . . . it is good to win once in a while.”<sup>85</sup> P10 valued similar points without rank ordering them accentuating their co-equal importance:

...[Y]ou would have to have physical excellence in competitiveness towards winning. Number two—I would say co-equal... the character and the fair play and honesty at which that winning was pursued. And number three, again not rank ordering it, but co-equaling it at the same time, being a good role model—an example, so as to develop excellent leaders and the group, especially the young, who are being entertained by that sport.<sup>86</sup>

Is not the difference in view by these campus executives fascinating? While winning is one of the top three criteria for gauging athletic program success in many of these responses, these experienced institutional leaders connect other goals as well. Those other goals may even be viewed as equal to or superior to the goal of winning. Heresy!

## V. THE LESSONS OF PENN STATE

When considering the above discussion, together with the proposition that external values (i.e., power, status, prestige, and money) might be connected to the intercollegiate sport of football that can undermine internal ones, our interviewees were next asked **“What have you learned about the Penn State scandal involving football, coaches, and university presidents?”** P1 drew a leadership lesson stating: “Athletic programs must always be carried out consistent with an institution’s values and mission. No

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<sup>85</sup> P9 interview, *supra* note 19.

<sup>86</sup> P10 interview, *supra* note 20.

program or coaching staff, no matter how successful, can be allowed to set itself apart from the university's regular governance structures and practices, or from the management and leadership of senior administrators."<sup>87</sup> And yet, the prestigious and well-funded Penn State did just that. How many people at Penn State in the athletic, academic, and administration willingly, knowingly, voluntarily, or at least negligently, aided, abetted, contributed to the transgressions that occurred? As investigation reports reveal, it is not a small number, which says something about the institution's culture and the corrosive effect of external values overwhelming internal ones. P2 also approached this incident from a leadership perspective:

Well I think from my position as university president, I have learned that attentiveness and oversight are absolutely essential on the part of the president. That there are enough people involved in athletics that things can definitely go wrong whether they are intentional or through negligence or what have you, things can go wrong. Just like they can with any other aspect of society. I think if we are not attentive to the ethics in the classroom, athletics aside, if we are not attentive to ethics and morals in the classroom, things can go wrong there. Things can go wrong downtown. I mean I think attentiveness and responsible oversight are absolutely essential in everything. It's just absolutely fundamental.<sup>88</sup>

P3 shockingly was not surprised by what happened at Penn State. He provides a chilling inside reality check of what it is like to be the chief executive of an institution where external and internal values collide.

It wasn't anything that was new to me, for better or for worse, as I mentioned earlier. In some of the

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<sup>87</sup> P1 interview, *supra* note 11.

<sup>88</sup> P2 interview, *supra* note 12.



larger BCS level football programs in the nation, and also basketball schools, I knew the extraordinary pressures that go from being an expectation to literally being a demand which presidents and university leaders would be likely to lose if they tried to challenge it head on. It's easy to say why don't university presidents stand up to this, but unless you're in a culture where winning is the lowest standard you can achieve, winning everything is the goal — where there is no excuse for doing anything less, where that becomes a cultural belief of the institution and that anything less than that will be ruin for the institution.<sup>89</sup>

Candid, observant, honestly insightful, P3 revealed a truth most campus chief executives fear to address continuing:

The power of that, when it becomes a collective social psyche, is hard to understand unless you've experienced it. And hard to deny if you have experienced it. It had the leadership of Penn State assuming it would presume that they knew of this, and frankly I find it hard to believe that they didn't, and particularly knowing Coach Paterno and how he ran his program and the high level of ownership he had for everything that happened around that program, standing in the way of that program would have led to virtually immediate removal of anyone who dared do that. In fact, one vice president at Penn State several years prior to the scandal did try to stand up and was summarily dismissed very quickly, very efficiently. The culture would not hear of it. On the other end of the spectrum, another major football program that was very used to being in national championships was the culture of the

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<sup>89</sup> P3 interview, *supra* note 13.

entire state when they only won 9 games. They fired the head coach at the time. It was another 10-15 years before they won 9 games again. But they were so obsessed with doing more than what was anywhere else considered very good...<sup>90</sup>

This is a discerning warning of the subjugation of sport's intrinsic values by extrinsic ones. The experienced campus chief executive went on to conclude:

This collective social consensus becomes so powerful no one could get in the way of it. I don't think the president at the time or the athletic director at the time would have fired that coach with nine wins, but the culture and society around it demanded that, and anyone who said "no" would have been sacrificed in the process with the head coach. The cagey president or institutional leaders faced a real dilemma there. In my experience, most presidents know what they ought to do, but if they do it, they will no longer be the president, so the question then becomes "what can I best do to get toward what I ought to do." Oftentimes that is very little or nothing as this turned out to be.<sup>91</sup>

This graphically illustrates the danger faced by collegiate executives when athletic programs, especially the multi-million dollar generating football ones, become fiefdoms unto themselves essentially renting space on their campuses to conduct their profiteering. How strong a force is it on some campuses?

Michael Stern, the chairman of Auburn's economics department and a former member of the faculty senate, said athletics is so powerful at Auburn that it operates like a "second university." Whenever athletic interests intersect with an academic matter, he

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

said, “it’s a different kind of process.”<sup>92</sup> “What does this look like at Auburn? In August 2012, according to documents, the political science faculty voted 13-0 to remove public administration as an active major. The following March, Auburn’s academic program review committee, the final faculty body to review such proposals, voted 10-1 to place the major on “inactive status” for five years.”<sup>93</sup> In fall semester 2013, 51% of the 111 students pursuing public administration as a major were athletes. Among them was Auburn’s football quarterback, running back, its leading wide receiver, and the three defensive players who led the team in interceptions, tackles, and sacks.<sup>94</sup> In 2014, 26 football players comprised 32% of the public administration majors.<sup>95</sup> Despite the academic faculty decision to discontinue the major, the athletic department had begun a campaign to reverse it.<sup>96</sup> But the Southern Association of Colleges and Schools Commission on Colleges, which accredits Auburn, requires that “primary responsibility for the content, quality and effectiveness of the curriculum with its faculty” and decisions about majors must be made by people who are qualified in the field.<sup>97</sup> When pitting the “second university” against the academic first one, who prevails? In September 2014 “when Patricia Duffy, the chairwoman of Auburn’s curriculum committee, asked the provost’s office for an update, she received an email that said: ‘The Provost and the Dean have agreed to keep the Public Administration program open.’”<sup>98</sup> The Wall Street Journal poignantly notes that “This season, Auburn is ranked No. 6 in college football’s preseason polls and is the early favorite to win the SEC title. Public Administration is still the team’s most popular major.”<sup>99</sup>

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<sup>92</sup> Ben Cohen, *At Auburn, Athletics and Academics Collide*, WALL ST. J., Aug. 27, 2015, at D6.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Ben Cohen, *At Auburn, Athletics and Academics Collide*, WALL ST. J., Aug. 27, 2015, at D6.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

While football success begets monetary gain in the form of increased gifts, tickets, concession, TV rights, and athletic apparel sales, to name only a few external goals, the rise of the football *king-skin*, illustrated by the sordid Penn State case, puts the institution not only in legal and reputational jeopardy, but eviscerates the intrinsic values of sport. P4 agreed with this saying:

That it is not enough to simply pass the information on and to pretend as if you have done your duty. That's not enough. You have to bring to the fore-front the issue that you discovered, Period. And if one person won't listen, then you need to go higher and keep on going, otherwise you're gullible. Another thing the collegiate academic culture can be is a very tone deaf culture, and in that case it certainly was. It was all about protecting the institution, not what was better for the institution or best for the institution, certainly not what's best for the child.<sup>100</sup>

P5 viewed the Penn State scandal as a flat out integrity failure.

Integrity is a very important thing. If you lose your integrity, you don't have much value. And the people involved in the Penn State scandal lost their integrity. They weren't very solid in their thinking, in what their responsibilities were. The bad news is that the outcome was scandalous. The good news is eventually the perpetrator was exposed and everyone involved became identified. And I haven't seen things recently about the AD [athletic director], and Spanier, whether or not they're still being prosecuted . . . but I'd expect they are. Integrity is the rock of all people and of the organizations, and the people who are supposed to be overseeing.<sup>101</sup>

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<sup>100</sup> P4 interview, *supra* note 14.

<sup>101</sup> P5 interview, *supra* note 15.

P6 analyzed the Penn State episode from two perspectives—hiring and personal responsibility.

I learned two things. One is, and I've spoken with our board [of trustees] about this one, is that it is imperative that the president is in every area of the institution focused upon hiring people who are honest and nurturing in the environment of communication and that particularly, when it comes to athletics, that the president cannot be hands off. Because it's the one area of the university unique to all other areas of the university that has the largest amount of money involved with it as a single entity, and it's irresponsible of a president to be anything but hands on.<sup>102</sup>

None of the other leaders interviewed saw this lesson as one of personal responsibility where, in true British fashion, the leader should be expendable and needs to take personal responsibility for the institution's failure resulting in termination.

This was before Penn State, but one of the first decisions I made as president was to have athletics report directly to me and it had previously never reported to the president; it always reported to an ancillary of the institution. The second thing I learned out of that experience, and then I expressed again, is sometimes even if everybody believes at the leadership level that they have done everything that they could, that they've done everything they believe is right, the president is expendable. Sometimes the board [of trustees] needs to exorcise itself of the president in an act of self-defense, and it doesn't matter if the president knew and disclosed and worked very hard behind the scenes and under-

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<sup>102</sup> P6 interview, *supra* note 16.

neath to try to address and protect people and so on, so forth. The role of the president is a symbolic political role and as the leader of the organization sometimes the president has to be sacrificed. And so what I have said to the board here is I want you to know that I know that, and therefore it is incumbent of me to be very upfront with you about what I know because even though you know that, I know I have to be expendable to you, that's just part of the work.<sup>103</sup>

P7 viewed the Penn State experience as an obvious leadership failure observing, "I learned nothing that I didn't know before: we are all responsible for reporting any activity that indicates unwanted or illegal sexual activity or other acts of violence. Every campus needs clear policies and protocols and a culture that does not tolerate acts of violence."<sup>104</sup> Easily said, but this seems to contradict the campus realities addressed by P3 above. How do you reconcile virtue and reality in the context of multi-billion-dollar collegiate football? The conflict is palpable and real. As already attested, most presidents may not possess the power or tenacity to ethically choose the harder right over the easier wrong.

P8 had an insider's seat of this sport program's catastrophe relating observations derived from first-hand experience:

Well, you have the good fortune, I guess, for your study to be talking to somebody who was in Pennsylvania when all of that went down. So I spent seven years with president of [deleted], University in Pennsylvania... Up-close, personal, emotional, governor, legislators. Still to this day "oh that's not fair", "you can't fine us 60 million dollars blah blah blah." What have I learned?

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<sup>103</sup> *Id.*

<sup>104</sup> P7 interview, *supra* note 17.

We have to continue to educate faculty, staff, students, the community about what's right, what's wrong in what we are doing... You can follow the scenario in the Sandusky deal. The red headed kid was the assistant football coach, goes into the locker room sees something he thinks is fishy... I'm sure he was full of emotion. He didn't know what the hell to do. What does he do? Goes home and talks to dad... Then dad says "oh, we will go see Joe [Paterno] because Joe is in charge and Joe will make it right."... And I think there was an underlying assumption that once I did that I'm good. I think there's a fear in our society for reporting what we think might look like crime, and we are going through a real interesting phase now with the police about what you do and how you do it, with all the videos and everything about questions...<sup>105</sup>

But the story continues with deeply troubling revelations.

For who's in trouble — the red headed kid gets fired. He gets let go. This is me at the institutions I've been at... You check the history and apparently back in the late 90's, early 2000's there was some knowledge that there was something goofy going on. I'll throw in some variables. One of the stories on the street was Graham Spanier is a brand new president at Penn State University, finds something out in 1998, the system is so strong he was fearful of crossing Joe Paterno so he didn't say anything...<sup>106</sup>

So what is to be learned from this powerful intersection of football and money from a campus chief executive who has seen the ethical conflict at all too close range?

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<sup>105</sup> P8 interview, *supra* note 18.

<sup>106</sup> *Id.*

I'll circle back what I've learned and I would hope I would come through on this. You have to draw it out of other sand, back to your first question. What's the right thing to do? And if the right thing to do is something fishy is going on and I've got the most powerful football coach in the country, I say something. I don't care how pleasant or unpleasant or goofy it is, I say something. Now when you get into the other variable of that place the question has to become how powerful is the sport of football at Penn State University? Obviously it was pretty powerful.<sup>107</sup>

Relating the Penn State experience to yet another similar institution facing similar ethical dilemmas, this president continued:

There's an interview with a lieutenant from the Notre Dame Police department who claims that sport was so powerful on the Notre Dame campus that he was specifically instructed as a police officer that if a complaint ever came through him about any student athlete, it immediately went over to the athletic department. So one of the things I have learned is that it just makes good sense that you don't treat anybody, any student organization, any campus, any differently than anybody else. If something happens, it happens.

...The other thing I find about the whole Penn State thing if you look closely at it, in my opinion, there's one significant missing piece and that is little or no police reports...<sup>108</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*



As strange as it sounds, why might that be, do you suppose?

But the Penn State governance system is incestuous in the state of Pennsylvania... At Penn State University there was a 32 member board of trustees, only three of whom are appointed by the governor.<sup>109</sup>

This is different from all other Pennsylvania state universities which have a system of checks and balances represented on each campus by a 20-member board of governors, an 11 member council of trustees, and a strong chancellor. But not so at Penn State:

Ergo the incestuous nature, ergo if you're an outsider you are an enemy, you don't understand Penn State, you don't understand football. You don't understand what we do, you don't understand Joe Paterno, you know... And it's interesting, fast forward Penn State University just hired the former president of Florida State who was making 400,000 dollars a year at Florida State. He's now on a 5-year 6 million-dollar contract at Penn State — a million dollars a year and another million dollars if he stays for 5 years... To sum all that conversation up, I learned a lot, but I learned a lot about its preventive medicine. You keep doing the right things on a regular basis you keep doing.<sup>110</sup>

Does money matter in football and higher education today? P8 testifies it is the elephant in the room and he does know how to throw his weight around. With the national play-off games, involving only four teams established in 2015, ESPN purchased broadcast rights for \$7.3 billion over 12 years. This works out to be about \$600 million annually.<sup>111</sup> For the schools involved, and

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<sup>109</sup> P8 interview, *supra* note 18.

<sup>110</sup> *Id.*

<sup>111</sup> GILBERT M. GAUL, BILLION DOLLAR BALL 20 (2015) [hereinafter GAUL].

those who aspire to be, does this type of money affect ethical judgment?

P9 summed up the argument well saying:

Well I think the take-home message there is that you cannot sit on issues that have criminal overtones, ethical overtones, and social acceptability overtones. There are certain things that you just cannot tolerate in the world of sport no matter how badly you want to win. No matter how much you have invested in your teams and in your athletic department. There are moral and ethical values that should precede all that and I think that's where a president has to be very careful in acting upon his or her values and his or her moral and ethical principles. You just can't subjugate those sort of pressures of an athletic game or the pressures of wanting to win by whoever is pushing you whether that be the alumni or the students or yourself. You just have to recognize that you have to stay on a higher moral ground.<sup>112</sup>

Some would argue "easy for him to say" perhaps being at a school that is not in one of the power five conferences with endless mouths to feed. Yet, does he see or value something greater than money ball?

P10 focused on presidential leadership and the need to know what is really going on in the institution's athletic program. What is the Achilles heel of all campus executives?

Well the one thing that sure came out is University presidents are responsible for the character of their programs and their coaches... The president is the

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<sup>112</sup> P9 interview, *supra* note 19.

primary moral agent of that school... So the idea though is presidents should make it their business to know and to try to find out or have a report that they trust and can find out. And secondly, if something is egregious, they have to take care of this. They basically have to go to the board [of trustees], say what's going on, and tell the board what the ethical issue is, and get support of the board to get the problem redressed, particularly if there's an unwillingness to do so on the part of the coaching administration. I think that's what we can all learn from the Penn State scandal. I have a lot of feeling about Penn State, Coach Paterno is obviously a tremendous person, but again there are Achilles heels and the president has to make sure that those Achilles heels are not going to become his or her Achilles heel, and just ruin the school because of egregious conduct.<sup>113</sup>

University of Texas football coach Mack Brown viewed the situation differently observing, "When you hear presidents and athletic directors talk about character and academics, none of that really matters. The truth is, nobody has ever been fired for those things. They get fired for losing."<sup>114</sup> While on the subject of losing, are there significant costs when coaching staff are fired that adds fuel to the fire for more revenue, however it can be obtained. "In a decade, the total annual amount spent on severance by athletic departments at 48 public universities in the 'Power Five' conferences increased from \$12.9 million combined in 2004, adjusted for inflation, to \$28.5 million in 2014."<sup>115</sup> When viewed as one athlet-

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<sup>113</sup> P10 interview, *supra* note 20.

<sup>114</sup> Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), [http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-football-more-like-the-pros-73-billion-for-a-start.html?\\_r=0](http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-football-more-like-the-pros-73-billion-for-a-start.html?_r=0).

<sup>115</sup> Will Hobson and Steven Rich, *College Sports' Fastest-Rising Expense: Paying Coaches Not to Work*, WASH. POST (Dec. 11, 2015), <https://www.washingtonpost.com/sports/colleges/college-sports-fastest-rising->

ic program, “That 120 percent jump *outpaced* rises on larger athletic budget items such as facilities spending (89 percent), coaches pay (85 percent) and administrative staff pay (69 percent).” (Emphasis added).<sup>116</sup> Numbers matter, especially financial numbers of this magnitude that impact scholar-athletes. The need for insatiable revenue drives decision-making, and erodes intrinsic values in favor of extrinsic ones. Where does this leave ethics, and schools that do not generate the Big Five football conference revenues?

If numbers tell stories, a “Huffington Post/Chronicle analysis found that subsidization rates tend to be highest at colleges where ticket sales and other revenue is the lowest — meaning that students who have the least interest in their college’s sports teams are often required to pay the most to support them.”<sup>117</sup> Does it sound ethical that “Many colleges that heavily subsidize their athletic departments also serve poorer populations than colleges that can depend more on outside revenue for sports. The 50 institutions with the highest athletic subsidies averaged 44 percent more Pell Grant recipients than the 50 institutions with the lowest subsidies during 2012-13, the most recent year available.”<sup>118</sup> How does the pressure build to create a football program’s insatiable need for more revenue?

## VI. MONEY, MONEY, SHOW ME THE MONEY!

Given the conflict between intrinsic and extrinsic values, the insatiable sports appetite for revenue presents an endless arms race for intercollegiate sports and their institutions. It has been observed that “. . . [M]oney was the new metric for success in college

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[expense-paying-coaches-not-to-work/2015/12/10/ec856b42-9d33-11e5-bce4-708fe33e3288\\_story.html](http://projects.huffingtonpost.com/ncaa/sports-at-any-cost).

<sup>116</sup> *Id.*

<sup>117</sup> See Brad Wolverton, Ben Hallman, Shane Shifflett & Sandhya Kambhampati, *Sports at Any Cost - How College Students Are Bankrolling the Athletics Arms Race*, HUFFINGTON POST (Nov. 15, 2015),

<http://projects.huffingtonpost.com/ncaa/sports-at-any-cost>.

<sup>118</sup> *Id.*

sports.”<sup>119</sup> Is that true? “At Texas, football accounts for nearly two thirds of the athletic budget. At Auburn, it accounts for almost three quarters. At Georgia, Penn State, and LSU, eight of every ten dollars the athletic department generates come from football.”<sup>120</sup> Does a pattern begin to emerge and does this affect ethical judgment?

Looking back at past ethical sport scandals addressed in *Is It Ethical to Sell a Lower Tier College Sports Team to Play Another Team of Far Greater Competitive Skill?*,<sup>121</sup> and now looking forward, campus chief executives were asked “**With the trajectory of athletics’ costs accelerating, like football, where do you see the destiny of this intercollegiate program?**” If money is the extrinsic value that is overwhelming intrinsic ones with increasing frequency, the status quo of the increasing need for sports revenue generation is not going to stall. P1 responded, “Fragmented into the haves and have much less. It is hard to imagine a future where institutions remain aligned around a national sports governance structure to any significant degree. The big five conference (i.e., big football) schools have already made it clear they will chart their own path separate and apart from all others.”<sup>122</sup> “The NCAA itself reported \$872 million in revenue in the 2011-2012 school year. TV rights for the NCAA men’s basketball tournament and football bowls are worth nearly \$18 billion.”<sup>123</sup> P2 viewed his school as being perhaps in a different tier and insulated to some extent in the athletic arms race. He appeared to have a firm expectation on what cost and revenue level his program needed to be at, observing:

Well, I would say first of all we are at exactly the right level of play for this university. The FCS level

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<sup>119</sup> GAUL, *supra* note 111, at 24.

<sup>120</sup> *Id.*

<sup>121</sup> Huckabee, *Is It Ethical*, *supra* note 3.

<sup>122</sup> P1 interview, *supra* note 11.

<sup>123</sup> Ray Henry, *Legal Showdown Looms Over NCAA’s Ban on Paying Athletes*, ARGUS LEADER, Aug. 23, 2015, at 3D.

of play is consistent with our goals for athletics and consistent with the identity that this campus has and consistent with the identity that this community, and by community I don't just mean [deleted], but the state of [deleted] and our fan base and so on. So we are not, at least by the moment, driven by a financial reason to do something else. I mean we are at a point where we have a program, it's a financially responsible program, it's a program we can afford, it's a program we can compete in and do very well in an ongoing way. And so it is a level of activity, a level of play that works really well for this university. Going up to the FBS level wouldn't work well for this university, so I wouldn't have any intention to do that. We had that opportunity to do that right when I came in as president and we declined. So we are at the right level of play. Now the financial picture of athletics is consistently changing and probably as dynamic right now as it has been in my career in higher education with what's happening with the top five conferences and that kind of stuff. So I will say we are keeping a very close eye on all of that, including the financial aspect of it, to make sure that the financial picture or the other aspects of the landscape don't change around us without us knowing about it and making intentional decisions about it.<sup>124</sup>

How realistic is this view?

Gilbert Gaul has made a detailed study of football revenue generation. At the richest schools they have doubled and tripled in the last decade.<sup>125</sup> “Back in 1999, when I had started collecting data, the ten largest football programs had reported \$229 million in revenue. By 2012 revenues for those same ten schools had swelled

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<sup>124</sup> P2 interview, *supra* note 12.

<sup>125</sup> GAUL, *supra* note 111, at 25.

to \$762 million. Meanwhile, profit margins had ballooned to hedge-fund margins."<sup>126</sup> P3 recognized the dilemma, but did not want to take the bait as to destination other than to predict a cliff was out there somewhere:

Two answers to that. One is that I think we tend to cast out on all collegiate athletics as being what FBS football has become, and at some levels Division I men's basketball...I am profoundly troubled, and I think most presidents including FBS presidents if you got them to speak in candid or in confidence they would say they are extremely troubled about every step we are taking towards professionalization of college sports. That was never its intention, that's not its history and it will change in an uncomplimentary way at least what FBS football means... Where is the end point—where you've gone too far? ...What point will it become from some definition of too expensive? Will it be too expensive for universities to even host sports, or at least FBS sports? . . . It's where is the turning point where that goes from good to bad?<sup>127</sup>

P4 agreed with his peers that there is a significant spending difference between FBS and FCS level schools. A perceptible financial tier difference exists:

I think you have to separate the big boys from the regulars. I mean our budget has increased probably from six to seven million to ten to eleven million in the last sixteen or seventeen years, but I think the percentage of our total budget is about the same. It's a little like coaches' salary. The public kind of paints it with a broad brush for instance. For at least the FCS, I think that the salaries are not inap-

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<sup>126</sup> *Id.*

<sup>127</sup> P3 interview, *supra* note 13.

appropriate, in fact they might even be a little low, ours are a little low. So I don't think that the statement that the costs are accelerating, it implies that they are accelerating inappropriately. I'm not sure that is correct at least for FCS schools. I can't talk about them all. It seems the teams of the Missouri Valley football conference and the teams in the Summit League are reasonable in terms of what their costs are. That's my sense of it. But I think that's a whole different ballgame when you're talking about the top five conferences. It's basically going to be professional athletics, whether they think so or not, because it's all tied to television revenues....<sup>128</sup>

P5 took a different tack arguing, "Well, football will spend all the money they have. A function of revenue, not a function of expenditures, so whatever revenue they have will get spent... whatever that is."<sup>129</sup> A professor in charge of Penn State's Honors College corroborated this observation relating "Football pays for itself... They get to spend as much as they want... Football operates according to its own rules, and the rest of us go along for the ride."<sup>130</sup> DeLoss Dodds, longtime athletic director at bigtime football University of Texas asserted, "Football is the train that drives everything and pays for everything. It just is. Everything begins and ends with football."<sup>131</sup> The University of Texas philosophy of spending on athletics is "We eat what we kill."<sup>132</sup> Gilbert Gaul in his searching investigation of football financing concludes:

Less visibly, the new financial model had inspired a radical shift in the economics of football, with the largest and richest programs pocketing about \$2.5

<sup>128</sup> P4 interview, *supra* note 14.

<sup>129</sup> P5 interview, *supra* note 15.

<sup>130</sup> GAUL, *supra* note 111, at x.

<sup>131</sup> *Id.* at xii.

<sup>132</sup> *Id.* at 1.



billion from television broadcasts, luxury suite rentals, seat donations, and corporate advertising while all the others scrapped over what few leftovers remained. In effect, the game had devolved into a zero-sum experience, with clear financial winners and then everyone else, mirroring what seemed to be occurring in the larger economy.<sup>133</sup>

How does this become a self-fulfilling prophecy of the ever increasing need for more football revenue?

While Alabama is said to be a poor state with a median household income of \$43,253, some \$10,000 less than the national average, public funding for higher education in the state was reduced by \$556 million, a 28% reduction from 2008 to 2013.<sup>134</sup> Yet Alabama appears to value football more than higher education itself. Last year Alabama football coach Nick Saban earned \$7.2 million, 11 times the university's president. While the athletic department made \$153million in 2013-14, Alabama football produced \$95 million of that, giving \$9 million to the university.<sup>135</sup> While the players earn no salary, Mr. Saban and his staff do earn a nice sum.

Now that the five top tier D1 football schools can offer cash payments to players for cost of attendance beyond tuition, fees, room, board, and books, FCS schools are joining the arms race. "North Dakota State will pay its full-scholarship athletes \$3,400 per year...All scholarship athletes in all sports, male and female, will receive the same stipend...."<sup>136</sup> South Dakota State's football coach John Stiegelmeier said about this new player compensation issue: "It's just another budget item. We're going to

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<sup>133</sup> *Id.* at xiii.

<sup>134</sup> Monte Burke, *College Coaches Deserve Their Pay*, WALL ST. J., Aug. 31, 2015, at A13.

<sup>135</sup> *Id.*

<sup>136</sup> Matt Zimmer, *Stipends in College Athletics – Jacks, Coyotes Could Follow NDSU's Lead*, ARGUS LEADER, Aug. 28, 2015, at 1A.

have to figure out a way to do it, not to keep up with NDSU, but to treat our players as well as we can within the rules.”<sup>137</sup>

But is this not providing college athletes cash compensation never before provided, inching them closer to semi-pro status? Notre Dame’s president Rev. John I. Jenkins argues “Our relationship to these young people is to educate them, to help them grow,” he says. “Not to be their agent for financial gain.”<sup>138</sup> Yet, are other scholarship students being provided cash compensation, in addition to their scholarship, to cover the difference between their scholarship and actual cost of education for being cheerleaders, working on the school newspaper or yearbook, or other student activities? One suspects not. Why is that?

Is the trajectory of football expenditures reaching a zenith or point of no return for many schools at both levels? “Perhaps institutions will make decisions about where they want to go – a semipro model or a different, more educational model – and I welcome that,” Fr. Jenkins says. “I wouldn’t consider that a bad outcome, and I think there would be schools that would do that.” Furthermore, he puts Notre Dame in that latter group: “And if that somehow comes to pass, he says, Notre Dame will leave the profitable industrial complex that is elite college football, boosters be damned, and explore the creation of a conference with like-minded universities.”<sup>139</sup>

P6 presciently foresaw an increasing cleavage between the “haves and have-nots” suggesting the demise of football at institutions that could not afford to compete in the burgeoning financial arms race.

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<sup>137</sup> *Id.* at 1A, 4A.

<sup>138</sup> Dan Barry, *Notre Dame President Stands Firm Amid Shifts in College Athletics*, N.Y. TIMES (Sep. 11, 2015), <http://www.nytimes.com/2015/09/11/sports/ncaafotball/notre-dame-president-stands-firm-amid-shifts-in-college-athletics.html>.

<sup>139</sup> *Id.*

I see a significant number of institutions pulling out of it. The higher education landscape of the 20th century was a landscape that was significantly and very, very positively supported by federal dollars. That in mind, this is not the future of higher education. The development of football is something that has been made possible by a combination of two major factors. One is the fundamental subsidization of higher education by government, which is clearly on the downward trend, which itself is going to obligate institutions to really begin rethinking how the cost structure of institutions allow them to survive in view of greater dependence upon student and family dollars. And alternatively, the second force has been media. And what gets media dollars are programs that are successful and people want to watch. And I think what's going to end up happening is, and not similar to the consolidation that we're seeing in the NCAA, is it represents both the "haves" and a whole bunch of the "have-nots," and I think a whole bunch of institutions, starting with the small ones, in our conference the [omitted], which is the last vestige institution, [omitted] the one before it that has football, is just going to say we can't do this anymore....<sup>140</sup>

Recent decisions by large NCAA institutions involving football support this observation. It has been said that the most unpopular man in Birmingham, Alabama is Dr. Ray Watts, the president of the University of Alabama-Birmingham ("UAB"). Recently Watts announced that the school was going to eliminate its football team.<sup>141</sup> "Our athletic budget is \$30 million. Of that amount, \$20 million comes directly from the school — either

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<sup>140</sup> P6 interview, *supra* note 16.

<sup>141</sup> Joe Nocera, *When Football Gets the Ax*, N.Y. TIMES, Dec. 16, 2014, at Editorial Page.

through student fees or direct subsidies from the overall university budget. A consultant Watts hired concluded that it would cost an additional \$49 million over the next five years to keep the football team competitive with the other schools in Conference USA.”<sup>142</sup> President Watts argued he made the right decision observing “We could not justify subsidizing football if it meant taking away from other priorities,” he said. Then he added, “This is driven significantly by the changing landscape of intercollegiate athletics.”<sup>143</sup> What was the response to his decision? Mark Emmert, the president of the N.C.A.A., described Watts’s decision as “unfortunate.” When comparing the intrinsic and extrinsic factors of sport, which side did Mr. Emmert favor?

A group of important donors wrote a letter to the chancellor of the Alabama university system, calling for an investigation into Watts’ decision. Another big supporter, a Birmingham restaurateur, canceled his \$45,000 sponsorship of a television network that aired UAB games and ended the use of his restaurant as the locale for the basketball coach’s weekly radio show. “This is so tragic,” he told a reporter. “It’s like a death.”<sup>144</sup> But that was not the end of the story.

“After making what was described by UAB president Ray Watts as an agonizing decision to terminate the football program in December (2014), he and the university reversed field and announced Monday that they would reinstate the program, along with bowling and rifle.”<sup>145</sup> Watts originally disbanded football and two other athletic programs based largely on a reported lack of financial solvency. Miraculously Watts announced there were recent changes in private support through individuals and the business community that made the reinstatement possible. The UAB presi-

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See Alex Scarborough, *UAB Reinstates Football for 2016*, ESPN (Jun. 2, 2015), [http://espn.go.com/college-football/story/\\_/id/12991674/uab-blazers-football-return](http://espn.go.com/college-football/story/_/id/12991674/uab-blazers-football-return).

dent reported “an estimated \$27 million has been raised through the UAB Football Foundation, the city of Birmingham and the UAB Undergraduate Student Government Association.”<sup>146</sup> From death to resurrection, even football has an afterlife.

Is this what football pressure and its extrinsic money factor mandate? New York Times columnist Nocera presciently observes:

But what I always thought would happen when this day came — when the financial difference between the power schools and everybody else became overwhelming — is that the smaller schools in Division 1 would be forced to rethink their priorities, just as U.A.B. has. Maybe not get out of football altogether, but de-emphasize it so that the tail finally stops wagging the dog. But so far, at least, that is not turning out to be the case. At a college sports conference last week in New York, nobody gave U.A.B. any credit for pulling out of football. On the contrary: most of the athletic directors in the room were adamant that they would pay whatever they had to pay to keep pace with the big boys. “Our board is totally committed to athletics and competing at the highest level,” said Chris May, the athletic director at Saint Louis University. “We are going to be very aggressive.” “There is no pressure to drop football,” said Mike O’Brien of the University of Toledo. “It is too important to our university.”<sup>147</sup>

Is it really? At least some campus chief executives are not only seeing the ethical and financial tensions, they are taking action to address it, despite the rancor. Is this a trend or a prudent decision by a few?

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

But the prevailing mentality among the smaller leagues is that they must follow whatever changes the so-called Big 5 institute during the N.C.A.A. convention in January. Even with bleak financial outlooks for many of these athletic departments, a certain consensus seems to have been reached. “We’re going to fight speed with speed,” Sean Frazier, the athletic director at Northern Illinois, said. The cost will be steep, particularly for teams in the American Athletic, Mid-American, Mountain West and Sun Belt Conferences and Conference USA — the five football leagues not among the Big 5 in the Football Bowl Subdivision, Division I’s top tier. Many of their athletic departments require student fees to support their teams, and some people worry students will be squeezed even harder.<sup>148</sup>

Reflecting on all this, P8 offered:

The quick answer is I have no clue. I worry because we are talking now about full cost of attendance. What does that mean? . . . We do not have the resources. We do not have the facilities. We don’t have the money. We are going to play football at the second level of football as long as we can, as long as it exists. Do I worry that a kid will get recruited away by another school because they have more money? . . . So I worry about it, but I guess I don’t have enough money or resources or time to spend a lot of time worrying about it. I’m going to make our voice known at the NCAA level. . . .<sup>149</sup>

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<sup>148</sup> Ben Strauss & Zach Schonbrun, *It’s a Game of Spiraling Costs, so a College Tosses Out Football*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/03/sports/ncaafotball/uab-cancels-football-program-citing-fiscal-realities.html>.

<sup>149</sup> P8 interview, *supra* note 18.

Gazing over the football horizon, P9 sang a similar football tune predicting an increasingly problematic sport for the NCAA to manage. This may sound more like an National Football League (“NFL”) farm club league than a collegiate sport.

. . . I’m not sure I see much change coming from FBS. I think they’re going to move far more aggressively into the more elite football leagues. And I think the challenge is going to be for the FCS Division I teams that are in the next tier down outside of those elite power leagues, how do we pay for the game [that we lose]? Because we frankly don’t have the financial revenues to even begin to compete with the upper power five in the FBS. Even though I think we may get to a point where we’ll be like some teams that can have pure dominance in the FCS for a few years, I think with the waxing and waning and the amount that it’s going to take to recruit against the elite teams in the FBS, I just don’t see much change; I see the FBS stronger. I see the power five getting even more influential in the NCAA, and I see the FCS teams in division I struggling to try to compete, and I don’t think in many ways they should even try to compete. We have got to find a different resolution to the power five versus the rest of the division I teams.<sup>150</sup>

Our P10 ethicist offered an even more apocalyptic view arguing we have reached a tipping point, predicting an inability to police the insatiable thirst for money, trading collegiate amateurism for professionalism.

Well, I still see it’s going to keep moving ahead on this level. It’s kind of interesting — can we police it in the same way the NCAA has wanted to do so in

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<sup>150</sup> P9 interview, *supra* note 19.

the past, in other words calling it amateur sports? Boy, I'll tell you there's so much demand with the amount of money being spent, the amount of people being entertained, the amount of reputation being gleaned from it. There's a tremendous pressure on players to win, to spend most of their time in athletics rather than on academics. When you have that much money being put into it, that many people being entertained by it, it's going to get harder and harder to police it in the way that the NCAA has tried to do it. There may have to be some kind of caps and intrinsic limits. How much more can you go? Maybe we have already exceeded any decent intrinsic limit. Maybe we have to back away from things because without those kinds of intrinsic limits, we may turn big time football into not amateur, but professional sports.<sup>151</sup>

While the first postseason football bowl game occurred in 1902 with Michigan and Stanford making hardly any money, there are more than 40 bowl games today with ESPN creating almost a dozen to provide its own cable network with programming.<sup>152</sup> "These contests generate more than \$250 million for the schools, with teams in the Rose Bowl receiving about \$15 million each."<sup>153</sup> What should this tell us about the trajectory and commercialism of this sport?

Fr. Spitzer confronts the out of control spending and revenue generation observing from first-hand experience "Just call it what it is. It's like professional collegiate entertainment with the idea of having an amateur network...anyway at some point the NCAA sits down with its presidents and just says how much is too much? How much money is too much money?"<sup>154</sup> He suggests that

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<sup>151</sup> P10 interview, *supra* note 20.

<sup>152</sup> GAUL, *supra* note 111, at 16.

<sup>153</sup> *Id.* at 17.

<sup>154</sup> *Id.*



the time has come for placing intrinsic caps on sport spending. Is this realistic? Has the train already left the station with campus executives having already lost control over what have become independent self-supporting financial enterprises renting space on college campuses? The NCAA today, albeit an alleged non-profit organization and watchdog over college sports, has annual revenue of \$700 million separate from its member schools' take.<sup>155</sup> Is there a palpable conflict of interest when this much money is in play?

The television revenues alone are simply extraordinary. We may have to rethink how we do things, but I do think putting intrinsic limits and caps on is going to be important. I do think the players have to be protected from the amount of pressure that's being put on them to perform in these big things, in these big programs because, honestly, I just don't know what they can get academically and in their social lives, even their ethical lives—the pressure to win is so immense even with the stakes being what they are.

I just think we have to really rethink this, and we really have to have some good presidents, some good ethicists, some people really sitting down trying to think how do we take the pressure off some of these kids and take the pressure off some of these programs which are sub units of professional sports almost. How do we want to do that so that it can be really intercollegiate, even more at least it can be a collegiate sporting activity which is still an amateur activity...how do you protect ethics in programs that are that big and have that much pressure? We have to rethink that.<sup>156</sup>

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<sup>155</sup> GAUL, *supra* note 111, at 17.

<sup>156</sup> *Id.*

## VII. ACADEMIC VS. SCHOLAR ATHLETE SPENDING

Especially at the FBS level, when you factor in the cost of the football program for scholar-athletes versus non-athletes, the budgets are a little different — another worst kept secret. Yet, and this is illustrated here, some campus chief executives deny the difference in cost. They were asked **“How do you justify in your own mind the trajectory of spending more on student-athletes (when factoring in the entire athletic budget) than spent on academic students?”** P1 says there is value in the difference.

When done correctly, there is great value in a university athletic program. Student-athletes acquire enhanced skills in teamwork, followership, leadership, mental stamina, resilience, and time management. Fans have a wonderful time cheering on the student-athletes and celebrating their success on and off the playing field or court. Universities have a means to showcase their programs and activities, and to inspire others to become connected to their institutions (new students, new community partners, new donors, etc.).<sup>157</sup>

While conceding the economic difference, P2 also sees value in the brand identification, loyalty base, and community benefit as appropriate justification.

Well, I think because what you're spending on and it's probably true on a per student basis — if you look at what gets spent in the athletic program on a per student basis compared to what gets spent on the school of business or the college of fine arts on a per student basis. One, I'm not convinced that the expenditure — what we think of as our general fund budget is that much different. I mean I would

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<sup>157</sup> P1 interview, *supra* note 11.

have to look at that. Certainly the total expenditure, when you take that into account, ticket revenue and all the other sources of funding for our program for the roughly 400 student athletes at this university, if you add that whole budget up on a per student basis, it probably does exceed any other group of students. But, I think you have to keep in mind you are spending that money on more than those student athletes. You are spending that money on the campus community, you're spending that money on the fan base that attends those sports, you're spending that money on really a connection to a university that spreads out over a lot more than the 300 or 400 student-athletes that are involved. So I guess that's how you justify it in my mind. Having a positive impact on far more than just those 300 to 400 hundred students.<sup>158</sup>

P3 dispels the notion that most football coaches are extravagantly compensated arguing:

Well, and again I think this is where we cast the FBS light on everything else. No argument the coaches' salaries are absolutely out of control in FBS football. I can see that agreement in the sense that that's what the market will bear, and until the market doesn't bear it, as an economist I would say all is fair. And also point out...that with a few rare exceptions most highly paid FBS football coaches, and frankly head coaches and even head basketball coaches, don't have a real long life span, so it's real easy to then take the coach who's making a couple million dollars a year and project that on everyone. But first, most coaches don't make a couple million dollars a year and certainly the associate and assis-

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<sup>158</sup> P2 interview, *supra* note 12.

tant coaches even at the BCS levels aren't bringing down those types of salaries...Our coaches make salaries very similar to our faculty members. So it's misleading to suggest that they are dramatically overpaid and that's in a revenue sport such as football and basketball...When you look at the compensation of faculty, at least at research universities that's not necessarily at all or even most FCS schools, but many coaches are pretty comparable if not less compensated than people in equivalent higher positions within the faculty.<sup>159</sup>

P5 takes a similar position observing from experience that there are pronounced tiers in college football, yet recognizes uneven spending exists:

I don't think you can put all of intercollegiate athletics in the same bucket. I think you have to take the equity 5—the 65 universities that are in the big five conferences and then you can also take and separate from them the next five, which are FBS conferences that are kind of wanna-be conferences than the Division I conferences that have no football. Then there are the Division I programs like [deleted] and [deleted] that have FCS football, and then there's the Division II and then the Division III, so you can't treat all of them the same.

If you look at our level Division I athletics with FCS football, the expenditures on student athletes are quite different than the other conferences. And the expenditures on athletics per student isn't much different between the Division II uppers and us with football, so then the question becomes whether revenues support expenditures. And the second tier of

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<sup>159</sup> P3 interview, *supra* note 13.

FBS Schools like the MAC and Sunbelt, the investment into those students will sometimes be called into question. If you look at some of those budgets, 70% of those budgets come from student athletes. That's not sustainable. It would be interesting to watch that. I'm pretty comfortable where we are with the level of investment from the student side, but more importantly how we are able to try to balance and complement that with gate receipts and very generous donor and corporate support to create the type of intercollegiate program that we can be proud of.<sup>160</sup>

P6 concedes the budget expenditure difference, but sees value from an institutional marketing perspective. Institutional marketing often costs significant sums. Utilizing athletes as a form of marketing or brand recognition, makes institutional sense, he suggests.

[t]hat is a very good question. I think different institutions will have a different perspective on this based on what they actually do. Now, at [deleted] we actually have a significant number of students who really are on full scholarship and they have nothing to do with athletics. So, it is without question the case that a high value for institutions like [deleted] is to have and to be competitive in attracting students in a space where there is a lot of competition for their talent and what I would say is two things. One is, on its own merit, I actually do see our student-athletes effectively performing the equivalent of what most people would consider to be "work." They work hard in their sport, in the spaces where no one watches them. They spend many hours working out, working on strategy, working together in practice, and that, in my view,

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<sup>160</sup> P5 interview, *supra* note 15.

is in part why institutions feel that it is fair to recognize that extraordinary effort relative to the non-student-athlete. It is worthy of recognition.

As a collaborative, there is no question that athletics can be in its own way, athletics and athletic success, a really powerful tool for marketing. Institutions become known in part based upon the success of their teams and based upon the kind of environments they create for their student-athletes and their spectators. So, I think that institutions often consider these both on the individual level to be fair and equitable recognition, and on a collective level to be kind of a marketing investment.<sup>161</sup>

P8 concedes there is concern with so much money sloshing around one sport running the numbers for one big time school: “[...]yeah, I always worry. I always use the Penn State example. Penn State Beaver Stadium holds 110,000. The average ticket price is 75 bucks, that’s \$7.5 million every Saturday. Concessions are about \$3.5 million, that’s \$11 million, a million in radio, a million in TV, a million in others, so they’re making \$14, \$15 million a Saturday. It costs them a million dollars to operate that Saturday. Net seven home games times \$14 million used to be \$100 million dollars.”<sup>162</sup> Might this become addictive?

Conceding the trajectory, P9 predicted the “have nots” (FCS teams) are not going to be able to keep up with the FBS financial powerhouses. In desperation to keep fans, alumni, and brand polishers happy, where can campus executives turn for more dollars with which to compete? P9 saw a clear demarcation of justification between supporting good academic athletes and those at academic risk.

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<sup>161</sup> P6 interview, *supra* note 16.

<sup>162</sup> P8 interview, *supra* note 18

At the moment we have a pretty good balance here at the University of [deleted], but I think it's going to be harder and harder to pull dollars away from the academic programs. We have more pressure for the preparation of professional students, engineering students, even students from the liberal arts, performing arts, and sciences. I think it's going to get harder and harder to justify 'pay to play' kinds of arrangements with our athletic programs. I do think this is going to be a bigger challenge as times go on for most schools in Division I, but are in that FCS football category... I say that with a small justification that many of our better students are athletes... But the moment we start crossing into the majority of our athletes being an academic risk, and I think in my case it's going to be harder and harder to justify those expenses to keep those teams going.<sup>163</sup>

An ethicist with an undergraduate accounting degree, P10 views the picture quite differently. He sees economic value in such spending — dividend returns on athletic player and program investment. He argues:

Well here's how I justify it, student athletes are already doing a tremendous service for the school and anybody who says they are not is out of their minds; they are not looking at reality. So the first thing is we have to acknowledge what the student is already doing and what kind of reputation they are bringing, what kinds of student recruitment they are doing, and frankly, I know this sounds crazy, but it's absolutely true that when you have a good sporting team maybe a doctor who graduated from your school is more likely to give money to the new science building, not to the athletic program, but to the science

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<sup>163</sup> P9 interview, *supra* note 19.

building — because they are pleased with the sporting team. I've seen it many times where your benefaction rate goes up because there's that pride of place that comes with a good division one athletic team being in that whole ethos of people of the school, and there's so much pride and so forth in the school.<sup>164</sup>

The ugly financial truth at many universities is that the two revenue sports — football and basketball — pay the bills for the other nonrevenue sports whose existence is required by the NCAA and athletic conferences in order to be eligible for post-season play of all sports. Fr. Spitzer argues:

Athletics do a lot for fundraising for the university. So I would say it is justifiable and the idea of trying to make comparisons, I don't know how you can possibly make a comparison because the athletic program is basically doing good for the other program, and by the way, big time athletics pay for all the other sports programs that don't make any money on campuses as well. I mean a lot of times you look at it and ask how many of your programs make money and most colleges will say two, division one football and division one basketball. Your division one baseball team doesn't make you any money? Nope, doesn't make me any money. Tennis? No. Golf? No. Soccer? Maybe in one or two cases yes, but by and large the two big programs or the one big program in cases of schools that have division one basketball that don't have football, that program is basically paying for everything else, so I think it can easily be justified, easily.<sup>165</sup>

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<sup>164</sup> P10 interview, *supra* note 20.

<sup>165</sup> *Id.*



But what about the intersection of money — enormous amounts of money, ethics, and football scheduling in particular? Is there a conflict of interest that often leads to corruption?

### VIII. MONEY, ETHICS, AND FOOTBALL SCHEDULING

“Schools in college football’s top division turned a \$1.4 billion profit on \$3.4 billion in revenue in the fiscal year ended June 2014, according to data schools submit to the U.S. Department of Education.”<sup>166</sup> Is there serious money to be made in DI football by scheduling FBS teams to play lower tier FCS schools? “...FBS schools have won more than 90 percent of such matchups every year since 2007....”<sup>167</sup> Why would a coach or athletic director schedule a game with an opponent where statistics reveal your team has at best only a 10% chance of prevailing? The NCAA concedes that football is the most injurious NCAA sport.<sup>168</sup> If the NCAA is to be believed, why would an FCS school schedule a game against an FBS team that is stronger, bigger, faster, more talented, presenting a greater risk of injury? With FBS teams having 85 scholarships to 63 for FCS schools, does this have consequences? A study by Faure and Cranor provides evidence “FBS players are traditionally bigger and stronger. Typically, FCS schools cannot attract the best football players in the country, so the FCS school goes in as the “decided underdog.”<sup>169</sup>

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<sup>166</sup> See Mason Levinson, *Northwestern Football Players Cannot Form Union, NLRB Rules*, BLOOMBERG BUSINESS (Aug. 17, 2015), <http://www.bloomberg.com/news/articles/2015-08-17/northwestern-football-players-cannot-form-a-union-nlr-rules>.

<sup>167</sup> See Tom Oates, *Hopefully for UW Fans, FCS Opponents Are On Way Out*, MADISON (Sept. 7, 2013), [http://host.madison.com/sports/college/football/tom-oates-hopefully-for-uw-fans-fcs-opponents-are-on/article\\_a147fa0c-c6cb-519b-be30-d2f119d51341.html](http://host.madison.com/sports/college/football/tom-oates-hopefully-for-uw-fans-fcs-opponents-are-on/article_a147fa0c-c6cb-519b-be30-d2f119d51341.html).

<sup>168</sup> Randall Dick, et al., *Descriptive Epidemiology of Collegiate Men’s Football Injuries: National Collegiate Athletic Association Injury Surveillance System, 1988-1989 Through 2003-2004*, 42 J. OF ATHLETIC TRAINING 221 (2007) [hereinafter Dick et al.].

<sup>169</sup> Caroline E. Faure & Cody Cranor, *Pay for Slay*, 3 J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 201-202 (2010) [hereinafter Faure].

This leads us to ask an intriguing ethical question. Why is it ethical for an FCS football team to play an FBS team for a big payday when it knows statistically it will face a 90% chance of defeat frequently involving significant physical injuries, but in another sport of boxing it would be unethical to schedule a boxer to fight a vastly superior opponent for money when facing a 90% chance of loss plus physical injury? This is the conundrum faced by FCS institution chief executives. Our interviewees were asked **“Do you believe it is ethical for an FCS (formerly Div I-AA) school to schedule a game with a FBS (formerly Div I-A) school when it knows, or should know based on data, that it is not competitive?”**

P1 attempted to discredit the competitiveness issue saying, “I don’t worry too much about the competitive issue. Although the vast majority of these contests are won by the FBS schools, surprising and exciting upsets do occur (e.g., Appalachian State Mountaineers 34, Michigan Wolverines 32, Sept. 1, 2007). I worry much more about smaller, slower, less physically prepared student-athletes being exposed to greater risk of injury.”<sup>170</sup> This is precisely the danger identified above. Is the competitiveness issue devalued by the money factor?

P2 conceded the preeminence of the money issue — that it is the controlling factor in scheduling a FBS team. Perhaps this is part rationalization, but there is some truth in the observation FCS football players seek the opportunity to competitively “play up” against opponents who will pummel them, but the chance to play a big name school is memorable. The one distinguishing difference between them and their boxing counterpart is they do not get a share of the money.

Probably true, you know there are definitely money games, but that doesn’t mean the teams can’t learn from those games and improve themselves as a re-

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<sup>170</sup> P1 interview, *supra* note 11.

sult from those games. If you took the money away from them, would we have played [named school]? Probably not, but that doesn't mean that the rest of it wasn't without value, I think a team can learn and improve themselves in that kind of game. And again it's sort of like the satisfaction of going up against a tougher opponent. You know intellectually that this is probably not going to result in a win, but there's that chance. You just want to do it. That's just like you getting the opportunity to play golf with Rory [McIlroy] or any of those guys. Do you think you're going to win? No, but it's a great challenge and it's exciting and it gets you motivated, so I think there are other values to it besides the money.<sup>171</sup>

P3 accentuated the student-athlete desire to “play up,” but seemed to minimize the role of money in the scheduling decision. Again, rationalization may play a role when analyzing this ethical question. FBS-FCS games are scheduled primarily for money. To argue other factors supersede this objective conflicts with the evidence.<sup>172</sup>

No, I don't find that unethical at all. Again, unethical in my mind would be if one of those is being duped by the other in those relationships—no one is being duped by anyone. And in the most extreme example where a team is unlikely to even be competitive, I don't think if you asked a player on that team whether they want to play the game or not, they'd say no. We get to play the University of Alabama or we get to name your institution [pick an institution to play], it will be the thrill of their lifetime. And they will again learn something from it...

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<sup>171</sup> P2 interview, *supra* note 12.

<sup>172</sup> Huckabee, *Is It Ethical*, *supra* note 3, 20-35.

I may be looking at my own institution a little too much when I'm answering that but I don't buy the premise. Again I think if they can find a way to play that team, in our case we are proximal to teams that you can argue fit that description, so it would be affordable for us to get to their venue and play them. We would play them with or without the money, I don't kid myself that the money is important. But again I think our players would say the opportunity to play even what they perceive to be a vastly superior team, to a real athlete that is an incredibly exciting challenge.<sup>173</sup>

P3 makes a legitimate point about football athletes wanting to “play up” against a big name school. But the athletes do not make football schedules, coaches and athletic directors do. They never ask their teams “who would you like to play next season?” Scheduling just does not work that way, which brings us back to the true motive for FCS teams wanting to play FBS teams and vice versa, and its corrupting influence. Why would a team like New Mexico State want to play bigtime University of Texas? If you responded with “it's the money”, your powers of perspicacity are alive and well. “Texas paid the Aggies \$900,000 to fly down from Las Cruces and take a whooping [56-7]. Indeed, New Mexico State was so bad at football it had to pay its own students to come to the games. And even then they rarely came.”<sup>174</sup> Why is that, do you suppose? “In 2012 the Aggies had a record of 1-11, and most of the scores were so lopsided that it was easy to mistake them for basketball results.”<sup>175</sup> How did 2013 go? 2-10; 2014 fared no better with 2-10 that included a 63-7 trip to Louisiana State University (“LSU”) for an undisclosed amount. Despite a legion of similar examples, P4 seemed to play down the monetary motive as well asserting:

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<sup>173</sup> P3 interview, *supra* note 13.

<sup>174</sup> GAUL, *supra* note 111, at 4.

<sup>175</sup> *Id.*

Well I think we would play them [for no money]. I think we might play them, but the custom is not to. We played the University of Nebraska for years without money. I suspect if they would play us today we would still do it even though we preferred to get paid because it helps us balance our budget. And the way the ranking rules are you have to have certain Division I schools, FBS schools, you'd have a certain number of guaranteed wins, so that's why they are scheduled that way. I don't know if that makes it unethical.<sup>176</sup>

Custom or not, present day football schedules are designed to augment athletic budgets, not to provide players the opportunity to “play up” for the fun of it.<sup>177</sup> “In 2012 football generated a remarkable \$103 million for the Texas athletic department, with \$78 million falling to the bottom line. Note that I didn't say that this windfall went to the university itself. As at many other elite football powers, the Texas athletic department was nominally part of the university but in reality functioned as an autonomous business, free to raise and spend as much as it wanted.”<sup>178</sup>

Reflecting on the campus chief executive's earlier observation that the athletic budget is by far one of the largest, if not the largest, part of an institution's budget, at Texas “Football was by far the largest, richest department on campus — the department of College Football, if you like. It was overseen by a CEO/coach, Mack Brown, who received millions more than the university president. His nine full-time assistant coaches averaged \$555,000, or about four times what a full professor earned.”<sup>179</sup>

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<sup>176</sup> P4 interview, *supra* note 14.

<sup>177</sup> John Feinstein, *College Football: FBS vs. FCS Games Need to be Limited*, WASH. POST (Sep. 22, 2013), [https://www.washingtonpost.com/sports/colleges/college-football-fbs-vs-fcs-games-need-to-be-limited/2013/09/22/c93b1c5e-23c3-11e3-ad0d-b7c8d2a594b9\\_story.html](https://www.washingtonpost.com/sports/colleges/college-football-fbs-vs-fcs-games-need-to-be-limited/2013/09/22/c93b1c5e-23c3-11e3-ad0d-b7c8d2a594b9_story.html) [hereinafter Feinstein].

<sup>178</sup> GAUL, *supra* note 111, at 6.

<sup>179</sup> *Id.*

If profit margins mean anything, and in business they certainly do, Texas' nontaxable football business is a model. "The program's profit margin wildly exceeded those of Apple and Exxon/Mobil, two of the nation's richest, best-known companies. And Texas football didn't do it for just one year; it did it *every* year, consistently. Moreover, the size of its take was growing — up sevenfold in a decade. Even by Texans' gaudy standards it was an absurd amount of money."<sup>180</sup>

P5 deprecated the money issue preferring to focus on the student-athlete experience. Is this disingenuous or possibly rationalization for an ethically questionable decision? Would these schools really "play up or down" for no money?

I think it is a great opportunity for the student athletes who are playing at our level to experience a game that is larger than you, and occurs in more than just football. It occurs in basketball, men's and women's basketball, probably those are the only sports where you have to buy-in competition, but it goes the other way too. Institutions at our level, because of schedule challenges, often have to. We played the University of [deleted] in football this year. Last year we played [omitted] which is a non-scholarship football program. In the future we will be playing [omitted] which is a non-scholarship Division I football school, because of the experience that gives their students and we recover some of the costs; the likelihood of them doing that are pretty slim. In fact, the experience that students have is usually a positive one. And we come to look too much into the budget issue instead of a student experience issue and they both go hand-in-hand now because they both have become integrated. Those schools that have more of a dependence on gate re-

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<sup>180</sup> *Id.* at 7.

ceipts will often play two games up; that's their choice.<sup>181</sup>

P9 concurred in the athletic value of an FCS team playing up against a FBS opponent, but did perceive the presence of an ethical dilemma where others discounted it. Can the ethical boundary routinely be seductively camouflaged in the “playing up-team improvement argument”?

I think to put a FCS team up against a FBS team there is a risk you're going up against a faster, stronger, more powerful team. But if you want your own team to improve, I think that might be about the best way to do it to compete against a faster, stronger, more powerful team. If you're doing it for money, you may have crossed that ethical boundary. If you're doing it to improve your team's experience and to give the young men on your football team a chance to really test themselves and to compete against stronger faster teams, I think you are still in an ethical boundary.<sup>182</sup>

Even the Wall Street Journal is piling on noting a culture problem: “We're grown accustomed to the dollars and obsessiveness surrounding these games — the ridiculous coach-as celebrity worship, the lucrative sponsorship arrangements, the spectacle of grown adults on TV shouting at each other all day over the successes and mistakes of young men still learning on the job.”<sup>183</sup> While this is admittedly true, what is the catalyst that produces such behavior? “The polite illusion of amateurism has long been shattered; the spectacle has literally become a multibillion dollar industry.”<sup>184</sup> True or false?

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<sup>181</sup> P5 interview, *supra* note 15.

<sup>182</sup> P9 interview, *supra* note 19.

<sup>183</sup> Jason Gay, *The Power Shift in College Sports*, WALL ST. J., Nov. 10, 2015, at D6.

<sup>184</sup> *Id.*

What does the University of Texas (“UT”) do with the \$170 million generated by football each year? A neutral observer would surmise that UT must have a robust intercollegiate athletic program. In fact, UT sponsors 20 intercollegiate teams with 549 athletes, including their 88+ footballers with an enrollment of 38,437.<sup>185</sup> Princeton, however, with an athletic budget of \$20 million sponsors 36 teams with 962 athletes while Harvard has 42 teams with 1,016 athletes.<sup>186</sup> Much smaller Haverford College with 1,205 undergraduate enrollment, sponsors more teams than UT with an athletic budget that pales in comparison to UT’s.<sup>187</sup> Where do you suppose Goliath UT’s money goes? Does that matter and is it ethical? At least 75 college football coaches make over \$1 million per year, with 34 receiving \$2 million or more, 15 collecting between \$3 and 5 million, and 5 topping \$5 million annually.<sup>188</sup> Does a rising tide carry all football boats in trajectory terms and does this ethically matter? The University of Alabama football program and its celebrated Coach Nick Saban have generated not only \$209 million since 2007, but general revenues have increased 43 percent.<sup>189</sup> What is important to note, however, is that the football program’s profit margin has decreased during Saban’s tenure from 72 percent to 54 percent.<sup>190</sup> This means Saban and company are increasing spending at a higher rate than revenue generation. What does this portend regarding trajectory?

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<sup>185</sup> GAUL, *supra* note 111, at 32, 36.

<sup>186</sup> *Id.* at 32 and 36.

<sup>187</sup> *Id.* at 32-33. *See also id.* at 37 for more in depth comparison.

<sup>188</sup> *Id.* at 87.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 88.



## IX. THE ALLURE OF GOLD<sup>191</sup>

The succeeding research question focuses specifically on the money seduction issue. Each respondent was asked **“Why is it ethical for an FCS school to schedule a game with a much larger FBS school primarily for money, when they would not play the game without the large payday?”** P1’s response connected the ethical question not with the competitiveness issue, but rather with the increased risk of injury factor (i.e., David playing Goliath is more likely to be injured when playing up against FBS teams than playing down or teams of their caliber).

The payout for participating in the game is simply a reality of the revenue stream that is generated by the public’s willingness to support the contest. Both teams should be appropriately rewarded for contributing to producing that revenue stream. Having said this, the big issue is not that the FCS team is highly likely to lose and is guaranteed to make a lot of money doing so, the troubling issue is exposing the FCS players to, what I believe are, greater risks of injury than they would have experienced if they stayed at their competitive level.<sup>192</sup>

P3 focuses on a somewhat different approach, but seems to imply the “playing for free straight-up” proposition would be doable.

I can assure you our institution regardless would be very excited to measure up against arguably the best

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<sup>191</sup> "Commerce has set the mark of selfishness, The signet of its all-enslaving power, Upon a shining ore, and called it gold; Before whose image bow the vulgar great, The vainly rich, the miserable proud, The mob of peasants, nobles, priests, and kings, And with blind feelings reverence the power That grinds them to the dust of misery. But in the temple of their hireling hearts Gold is a living god, and rules in scorn All earthly things but virtue." PERCY BYSSHE SHELLEY, *QUEEN MAB* (1813).

<sup>192</sup> P1 interview, *supra* note 11

in the nation. I'm not trying to avoid the economic incentives for both teams to make those arrangements, but at the same time at the end of the day in financial practicality they could happen. I think in many cases they would still happen. And we see that in interstate rivalries around the nation between different teams, even when they are in the same supposed tier, they are oftentimes vulgar mismatches. Texas and a Texas A&M, Michigan and a Michigan State, you know any given season one of them might have no business being in the game — they're not going to be competitive. But you still play the game and you're able to play the game affordably. I'm using an analogy that's even more extreme and upsets happen even when against those mismatches.<sup>193</sup>

P4 took issue with the ethical proposition arguing that it did not present an ethical problem.

I don't think one is obligated to prove that everything is ethical. It seems to me one has to prove the opposite. I don't understand why playing for a guaranteed game is de-facto unethical. That seems to be your conclusion... If you define competition as having a significant chance to win then that's one thing, but I necessarily don't define it that way exactly. It seems to me we have a couple games each year in which we do, and one of them seems to be clearly beyond our grasp, although once in a while as in [deleted] which our student-athletes will remember for a hundred of years, we do win. I don't think the only value of competitive athletics is winning. I think our students learn a little something every time they play one of those games.<sup>194</sup>

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<sup>193</sup> P3 interview, *supra* note 13.

<sup>194</sup> P4 interview, *supra* note 14.

P5 disagrees that money is an important factor in game scheduling. He stresses the point that the student-athletes are the ones that want to “play up” and that would appear to be the driving force in game scheduling. That does strain comprehension as the overwhelming evidence previously cited reveals the primary factor in FBS-FCS football scheduling is money, if athletic directors and football coaches are to be believed.

I would take issue that it is an important factor, but I think student-athletes enjoy the opportunity. What I said before as one of the important dimensions of intercollegiate sports is giving the students the opportunity to perform well athletically as well as academically. And going to an upscale venue and having to compete with the University of Nebraska, I don't think you'd have any of the student-athletes from our football team who have had that opportunity and say that it wasn't a marvelous experience, even if you didn't get any money, they would have chosen to do so.<sup>195</sup>

P6 directly confronted the question with a candid answer connecting the ethical question of scheduling for money with that of student-athlete safety, as P1 did as well.

I'm not sure it is. To me, there is an issue of potential harm that is inherent in this and some of the other questions. If you have reason to believe the consequential effects of having that contest are going to be significant injuries to players, if the circumstances are such that there is just a single minded focus on trying to generate money, I'm not sure I would consider that to be an ethical decision at all.<sup>196</sup>

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<sup>195</sup> P5 interview, *supra* note 15.

<sup>196</sup> P6 interview, *supra* note 16.

P7 preemptively attempted to diminish the injury risk between FCS and FBS teams. Does size, weight, speed, strength, talent, experience matter in football? Recruiting coaches seem to think so. Are David football teams more likely than not to suffer injuries from Goliath teams? P7 argues:

Whenever a team plays a higher ranked team, there is an opportunity for the student-athletes on both sides to hone their skills outside traditional conference competitions. Besides, the outcome isn't certain. [FCS school] beat Oregon State in football and almost beat the University of Washington in fall 2014. [deleted school] men's basketball team beat Indiana this year. If there were clearly disproportionate numbers of injuries in such games, I might argue that such match-ups are potentially problematic. However, I am not aware of any data along those lines. These games don't seem any less appropriate than regular conference games.<sup>197</sup>

Potentially problematic, does this reflect a lack of interest or consideration of the prospect that injuries may be more likely than not between FBS Goliath and FCS David teams? On one Saturday alone, Sep. 21, 2013, 4 FBS teams outscored 4 FCS team matchups 281 to 7.<sup>198</sup> Is it probable overmatched players who are publicly humiliated and beaten up against opponents who are much bigger, stronger and faster at every position might be subject to greater injury? Take for example Savannah State who in 2013 lost to the Miami Hurricanes 77 to 7, lost to Oklahoma State 84 to 0, and lost to Florida State 55 to 0 (but the game was stopped due to rain in third quarter with nine minutes left), for a combined total of 146 to 0. Is it probable, foreseeable, more likely than not that Savannah State's players would be exposed to greater injury in this physical and talent matchup than their FBS opponents? "The excuse given by athletic officials at places like Savannah State is that

<sup>197</sup> P7 interview, *supra* note 17.

<sup>198</sup> Feinstein, *supra* note 177.

the payout for allowing their “student-athletes” to get pummeled this way helps sustain the athletic department financially.”<sup>199</sup> Why is this ethical?

P8 corroborates this view to a certain extent: “Not that I necessarily support it or not, but it’s the cost of doing business. Go back to my original definition, doing the right thing when no one is looking. The culture around doing it causes the athletic program to be at plus dollars. And the question becomes do you do that on a regular basis? We do it because we would play Iowa and Iowa State even if it wasn’t for the money. I’m fairly confident.”<sup>200</sup>

While some chief campus executives deny the existence of, or deprecate, an ethical dimension to FBS-FCS game scheduling primarily for money, P9 concedes it is an ethical challenge. It is fascinating these experienced education executives recognize the existence of the same issues, but when it comes to money, arrive at different ethical destinations. University of Illinois law professor John D. Columbo authored a law review article on tax breaks for college sports. His study concludes “The idea that college football evokes a Greek ideal of well-rounded athletes — that’s just nuts... The Greek ideal, if there is one, is intramural sports. Big time college football is nothing more than the minor leagues for the pros and everyone knows it.”<sup>201</sup>

At least P9 confronts the ethical dilemma squarely. If confession is good for the soul, this is what one looks like:

Well I think that’s an ethical challenge. Again you get down into the reality, just the practical reality of having to pay the bills in your own athletic program. We had an experience a few years ago where we scheduled a game against Texas Tech. We came home with the team and we left one player behind

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<sup>199</sup> *Id.*

<sup>200</sup> P8 interview, *supra* note 18

<sup>201</sup> GAUL, *supra* note 111, at 59.

in the hospital. That has bothered me from an ethical and professional level ever since. I'm not sure I can justify that and that's something I will have to live with because I think we did that possibly for experience, but possibly more for the guarantee on the game. My athletic director and I have had many conversations about the ethics of that. It's a difficult challenge I will admit. I sometimes come away from these games with a bit of an awkward feeling.<sup>202</sup>

P10 took a surprising turn in a different direction.

It's ethical because in a way even though you are entering into basically a loss ... the lower ranked team gets three advantages from it which are probably good advantages: first, they are going to get people looking at their team who would have never of looked at it, so reputationally it will help the school and the team even if it is a blowout; second, obviously there is the money part of it they will be compensated handsomely much more than they would ordinarily have been compensated; and thirdly, if they make it a close game the dividend for the smaller school is enormous....<sup>203</sup>

Does this argument sound convincing, or does it sound like a means to an end justification for a school needing to pay athletic bills? Take even a new FBS school like the University of Massachusetts at Amherst ("UMass") that elected to move up from FCS status in 2012. After four years playing in an independent nonconference status like Notre Dame and Army, they sport an 8-40 record.<sup>204</sup> Assuming this is not what success looks like, UMass has

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<sup>202</sup> P9 interview, *supra* note 19

<sup>203</sup> P10 interview, *supra* note 20

<sup>204</sup> Bob Hohler, *UMass Has Little to Show After Leaping into Big-Time Football*, THE BOSTON GLOBE (Dec. 24, 2015),

fixated on the big-time FBS revenue selling its team to play games they cannot athletically compete in. But does that ethically matter? Next year, UMass will receive \$1.5 million to play at the University of South Carolina, \$1.25 million to travel to the University of Florida, \$400,000 to fly all the way to the University of Hawaii, and \$250,000 to play Brigham Young in Utah.<sup>205</sup> Do these matchups sound competitive for UMass' scholar-athletes? UMass' chief executives even sought a larger stadium to play home games in located in Foxborough, two hours from campus. Even with a capacity of 66,829, nine of ten seats remained vacant on Nov. 7, 2015 when they played the University of Akron.<sup>206</sup> The average attendance of three games in Foxborough is 9,717 in a 66,829 capacity stadium.<sup>207</sup> The expectation that students, faculty, and alumni will travel two hours from campus to watch a home game, with an 8-40 record, says something about the judgment and ethics of these UMass leaders. Yet they were lured by the prospect of moving up and capturing the seductive allure of television and sponsorship revenues. Do the scholar-athletes matter and if so, is this ethical decision-making when it comes to football scheduling?

## X. ETHICS AND INJURY

Do stronger and bigger opponents present a greater risk of injury? With FBS teams having 85 scholarships to 63 for FCS schools, does this have consequences? As confirmed in several of the interviews above, some presidents and chancellors recognize the risk, but not to the point they consider it an ethical question. They were asked to consider the related question **“In view that football is the most injurious sport in the NCAA, concussions in the NFL resulted in an initial proposed \$760 million settlement, how do injuries ethically affect the primary consideration of money when scheduling games, especially when there is**

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<https://www.bostonglobe.com/sports/2015/12/24/umass-football-stalled-and-seeking-solutions/WQ07Rwz1ZfXnlGZMVBSTI/story.html>

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

over a 90% competitive advantage by FBS teams?” P1 answered the question directly stating:

Significantly. See my responses to questions 12 & 13 above. [He said earlier “... I worry much more about smaller, slower, less physically prepared student-athletes being exposed to greater risk of injury... The payout for participating in the game is simply a reality of the revenue stream that is generated by the public’s willingness to support the contest. Both teams should be appropriately rewarded for contributing to producing that revenue stream. Having said this, the big issue is not that the FCS team is highly likely to lose and is guaranteed to make a lot of money doing so, *the troubling issue is exposing the FCS players to, what I believe are, greater risks of injury than they would have experienced if they stayed at their competitive level.*] (Emphasis added).<sup>208</sup>

Corroborating this observation, athletic directors interviewed for the Faure and Cranor study (cited earlier) conceded “Because of the physical differences among the players, several FCS athletic directors acknowledged having *significant* fear of their players getting hurt while playing FBS teams... [Other interviewed AD’s] also felt the threat of injury to their players was significant.”<sup>209</sup> Does this ethically matter?

P2 sincerely questioned whether there was evidence of greater exposure to injury for FCS teams attempting to compete with FBS juggernauts:

Do we know that the injury rate is higher in those games?... I guess I’m not ready to accept the premise that there are more injuries in those kind of matchups than there are in regular games. Maybe

<sup>208</sup> P1 interview, *supra* note 11.

<sup>209</sup> Faure, *supra* note 169, at 203.



there are, but I haven't seen any data to that effect, maybe you have... I think injuries can happen and I don't know that they have, I don't know that there's evidence that you're more likely to have serious injuries playing up than you are playing in league or playing down. Maybe there is data of that, I just haven't seen it. There is some sort of an intuitive feel to that I agree. It's one thing to sort of get beat up, but in terms of serious injuries, are there more in those games than other games? I don't know the answer to that. Well, I think it's a bit of a David and Goliath in terms of competition, I don't know that it's a David and Goliath in terms of serious injuries. I mean I just don't know that. And I guess I'm not quite willing to speculate we should make decisions about playing up or down based on the notion that injuries might occur because that frankly isn't the antidotal experience; maybe it is, but you'd have to have pretty large data set to look at that.<sup>210</sup>

It is interesting to note that this campus chief executive seized upon the David and Goliath metaphor. While David was the victor in his slingshot contest with Goliath, there are no slingshots in football — physical contests are decided based on size, weight, strength, talent, speed, experience, and other physical characteristics that, when combined together, cause the Goliath to dominate the David in contact force. “During one fifteen-year stretch, more than three hundred players died from injuries suffered in college games, foreshadowing by more than a century today's concerns about concussions and brain trauma.”<sup>211</sup> The recent 2015 release of the movie *Concussion* is a biographical sports medical film based on the 2009 GQ exposé *Game Brain* by Jeanne Marie Laskas that documents the NFL's efforts to suppress brain damage suffered by NFL players. Virtually all NFL players are former college players. Yet despite this evidence, college presidents fail to

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<sup>210</sup> P2 interview, *supra* note 12.

<sup>211</sup> GAUL, *supra* note 111, at 17.

recognize or appreciate the true injury risk of the sport they sponsor. To what extent does the money involved affect and conflict their ethical judgment? Nevertheless, P3 agreed with P2 wanting to see evidence of the increase in injury rate deflecting the ethical question pending receipt of such data:

I would want to see evidence that I have never seen suggesting those games are more injurious between FBS and FCS schools. In my experience that's just not the case. A game against a supposed pure institution is just as likely to involve injuries as a supposed superior school, perhaps more so because they seem to be at a league competitive level the future dynamics are more at stake, but I'm extending my answer too far. I don't know of any evidence suggesting that that mismatch results in any more or less injury than a typical game. I would question the premise and I would want to see evidence of that, and in my experience that just hasn't been the case.<sup>212</sup>

While the Faure and Cranor study provides significant data proving the injurious nature of football among all NCAA sports, it is curious that the two-decade NCAA study did not compare injury rates in games between FBS and FCS teams, or between Division I, II, and III teams. They have the data already. Why no analytical comparison might you suppose? Could the extrinsic money factor again play a role?

P4 thought the question interesting, but could not equate it to anything he had experienced:

That seems like a logical conclusion, maybe the absence of injuries on our part, maybe when you're not taking it seriously as you'd like to be, maybe it

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<sup>212</sup> P3 interview, *supra* note 13.

isn't as competitive in those instances. Maybe the killer instinct doesn't come to the forefront when you're playing a team that you're pretty sure you're going to beat. I don't know, that's a really good question I think. But I asked [our Athletic Director] if he could remember an injury in the years he's been here, that if there was a significant injury during a guarantee game, and he could only think of one, and I could only think of one... Of course I think part of the problem is I don't think we know what the injuries are, we won't know for thirty years, that's the problem. If I thought we were getting beat up, it would be a whole different story. But so far I haven't seen that. I guess I think it was constantly this 62 to 14 without trying very hard. So I don't know maybe the coach tells them don't annihilate the team because we will never get anyone to play us. I have no idea, but that's been our experience, but clearly if you were playing that way all the time, you'd have a problem.<sup>213</sup>

P5 did not question the proposition, but wondered whether the game of football itself could be altered to avoid the injury outcome and potential risk.

Well I think our athletes can compete very well. It's usually the competitive advantage comes from the depths because they have 85 scholarships and we have 63. It's a game by game matter. Some programs go into a place and don't have the right approach and they never show up and don't play very well. The bigger issue is can you change the game of football to avoid the long term injuries. And it's not the injury perhaps that emerges after an

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<sup>213</sup> P4 interview, *supra* note 14.

intercollegiate athletics experience of a football player.<sup>214</sup>

P5 agreed with the proposition that 22 scholarships make a difference in team and player performance. What about in risk of injury? P7 joined several of the above campus leaders questioning the premise of the inquiry:

. . . I don't know of any relationship between injuries and games scheduled for money. Student athletes get injured in practice and in regular conference games. The games played for money don't seem any less appropriate than the regular athletic enterprise. There are plenty of teams that lose an inordinate percentage of conference games, but that doesn't make it less problematic for more successful teams to play them.<sup>215</sup>

P8 seemed to agree, arguing:

Now I will be the professor that I am. I'm not sure the data supports that question because I think you have to look at equal-ness of injury across division. The presumption of that question suggests that you're more likely to get injured with an FBS-FCS competition. I'm not sure that's true. I would want to look at concussions across the board. I would want to look at other injuries across the board. I would suggest that some of the more severe injuries is paralyzed players, death of players has either come in practice or FBS-FBS, FCS-FCS, D2-D2, D3-D3 competition. . . So yeah the NCAA like any other organization has much room for improvement, and I think the challenge is about some of the scheduling that you're looking at in terms of FCS

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<sup>214</sup> P5 interview, *supra* note 15.

<sup>215</sup> P7 interview, *supra* note 17

schools versus FBS schools. We are probably a good model and we are one of the competitive ones so (A) We don't do it a lot; (B) we do it inside [state]; (C) we would do it for an advantage; (D) we would play [omitted] [University of State], and [omitted] State regardless. The money's nice, but we would still play them because they are 5 busloads down the road an hour and a half, and the citizens of [State] [omitted] would love us, regardless.<sup>216</sup>

If the norm is for better football athletes to seek scholarships at FBS as opposed to FCS schools, and those superior teams have 22 additional scholarships than inferior FCS schools, what implication is there for increased risk of injury? Athletic Directors ("AD") and coaches argue their FCS players accept the risk of increased injury by "playing up", or being outscored on TV by a zillion points. "Most top programs preyed on lesser competition (see Oklahoma 84, Savannah State 0).<sup>217</sup> "They crave the opportunity to play the Goliaths," say the Davids.<sup>218</sup>

Contradicting his colleagues, P9 recognized not only the increased risk in FBS-FCS games, he also conceded the ethical implications:

So now if you're asking the question if you enhance the risk by going up against a more powerful team... I suppose you could argue that maybe the answer is yes. So I think the ethics are in terms of sport competition versus revenue. If you're risking injury for revenue, I think you have to step back and assess your ethical boundaries. If you're running

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<sup>216</sup> P8 interview, *supra* note 18

<sup>217</sup> See Andy Staples, *Cupcake Wars*, SPORTS ILLUSTRATED, Sep. 10, 2012, at 117, available at <http://sportsillustrated.cnn.com/vault/cover/featured/11834/index.htm>.

<sup>218</sup> Faure, *supra* note 169, 199-200.

the risk of injury in competition for personal best or team best, I think maybe you're within the ethical boundaries.<sup>219</sup>

P10 recognized the same ethical dilemma.

I'm not sure, has it been true that FCS teams have more injuries than an FBS team in those kinds of games? Because I'm not sure about that. If that's the case, then that would be a definite ethical agreement against playing FBS versus FCS if they do have more injuries . . . If that actually is the case and the intuition is certainly there . . . then that's an ethical problem. Then in that case you should not jeopardize the health of your players especially if there's a possibility of truly an increase of severe concussions and so forth. You cannot ethically justify an increase in injury rate to your players especially if one is predictable.<sup>220</sup>

While injuries are common and a risk in all sports, there are norms of coaching and athletic behavior. Player safety should be first and foremost the primary ethical duty of everyone connected with intercollegiate sport. But as time and the expense of football at the Division I level have proven, commercialism and its economic benefits may have corrupted this duty.

Reasonable minds should agree in a highly injurious sport like football that the NCAA should assume some degree of responsibility for its play and regulation. In its 16-year football injury study (1988-1989 through 2003-2004 seasons), the NCAA reviewed injury surveillance data for men's football to identify potential areas for injury prevention initiatives. Approximately 16% of the schools in NCAA Division I, II, and III sponsoring football participated in the study, so the data are relevant and material.

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<sup>219</sup> P9 interview, *supra* note 19.

<sup>220</sup> P10 interview, *supra* note 20.

There was no comparison, however, involving FBS (“1A”) and FCS (“1AA”) teams in games with each other or between schools in DI, II, or III. That is a curious omission.

What is fascinating about this NCAA study is that the results show little variation in the injury rates over time.<sup>221</sup> While fall game, fall practice, and spring football practice injury rates were reviewed, the NCAA’s confidence intervals are 95%.<sup>222</sup> Not unsurprisingly, injury in football games was 9 times higher than the practice injury rate (35.90 versus 3.80 injuries per 1000 athlete-exposures).<sup>223</sup> The study revealed that player contact was, not unsurprisingly, the primary source of player injury (game 78%, fall practice 57%, and spring practice 69%). “Knee and ankle injuries accounted for the most frequent type, while concussions represented 3% in both fall and spring practice, but 4% in games.”<sup>224</sup>

The NCAA study revealed data not found in any other NCAA sport.<sup>225</sup> “The study concludes, based on its statistical

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<sup>221</sup> Dick et al., *supra* note 168, at 221.

<sup>222</sup> *Id.* at 222.

<sup>223</sup> *Id.* at 223-224. “The body parts most frequently injured playing football involved knee internal derangements, ankle ligament sprains, and concussions. So what is the nature of assumed risk of battle wounds on the playing field? In fall games, knee internal derangements accounted for 17.8%, ankle ligament sprains 15.6%, and concussions were 6.8%. In fall practices injuries were less with knee internal derangements being 12.0%, ankle ligament sprains were 11.8%, and concussions totaled 5.5%. Spring practice numbers were higher coming in at 16.4%, 13.9%, and 5.6% respectively. In the game itself when compared to fall practice, a player was 18 times more likely to sustain upper leg contusion (1.27 per 1000 athlete-exposures (A-E)), 14 times as likely to sustain an acromioclavicular joint sprain (.98 per 1000 A-E), 13 times as likely to sustain knee internal derangement (6.17 per 1000 A-E), 12 times more likely to sustain an ankle ligament sprain (5.39 per 1000 A-E), and 11 times as likely to sustain a concussion (2.34 per 1000 A-E).” *Id.*

<sup>224</sup> *Id.* at 224.

<sup>225</sup> *Id.* at 227. “The NCAA football injury study also found that approximately 85% of the knee internal derangements were classified as new injuries. In particular, the research disclosed there were three major types of knee injuries experienced during games and practices: ACL, posterior cruciate ligament (PCL), and menisci. These injuries occurred more frequently in games than practices.

analysis, that not only is football a high-impact collision sport, but players' characteristics (e.g., age, height, weight) vary widely, both within a team and among NCAA divisions." This should not be surprising to anyone familiar with this sport. The study also reveals that "[T]he intensity level and speed are generally considered higher in games than in practices, increasing the magnitude of collisions and thus, increasing the risk of injury."<sup>226</sup> Again, this is not surprising.

There is research that has been done taking a closer look at those FCS schools that typically play 1 to 2 guarantee (are paid to play) games each season. Athletic trainers are the key football staff that treat and monitor player injuries. Daniel Ballou of the University of New Mexico undertook a study involving collection of data from eight FCS athletic trainers consistently involved in guarantee games. He found that since athletic trainers work to prevent injuries, the opportunity to interview them provided insight for this study. In summary, "[t]he majority of FCS athletic trainers (67%) said their student-athletes suffer from increased soreness and are banged up following games against FBS schools. The majority also said that playing multiple FBS opponents in the same season is detrimental to the health of their student-athletes. The athletic trainers who reported that their school had played FBS opponents in consecutive weeks saw an increase in injuries."<sup>227</sup> Why is that you do you suppose? ". . . the general underlying premise was that fatigue and lack of depth from the FCS schools increased

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Are such injuries serious? Using the 10 days of time loss criterion, less than 45% of knee derangements resulted in such loss. But for those with more than 10 days of loss, in the case of ACL injuries 78% were operative; 39% of PCL injuries underwent surgical procedure." *Id.*

<sup>226</sup> *Id.* at 232.

<sup>227</sup> See Daniel Ballou, To What Extent is the Safety of College Football-Athletes Compromised by Playing Guarantee Games Against Superior Opponents? (May 2015) (unpublished Ph.D. dissertation, University of New Mexico) (on file with University Libraries MSC05 3020), available at <http://hdl.handle.net/1928/27760>.



the potential for all types of injuries.”<sup>228</sup> This would seem to support the David and Goliath characterization.

Logic and personal experience testify that the reason football coaches recruit faster, heavier, bigger, stronger, more agile players is so they can play the game at a higher level of intensity and force. As already mentioned, tackling or hitting in a collision prone game logically produces more injuries as reflected in the testimony of FCS trainers. This violence naturally produces cause and effect results. Is this revelation really that surprising, or does it reflect a lack of consideration of what might be considered intuitively obvious?

Ballou’s study also revealed, “None of the trainers reported that FBS games resulted in an increase of season-ending injuries, career-ending injuries, or catastrophic injuries.”<sup>229</sup> Bearing in mind this data comes from only eight trainers, a wider sample of trainers more likely than not, using a preponderance of the evidence standard, would provide evidence of more serious injuries inflicted by Goliath FBS players on smaller, slower, weaker, less talented and agile FCS players. Yet, most of those campus executives interviewed failed to consider or appreciate this, while some more astute ones did. Why is that?

Football fans, parents of athletes, and campus chief executives should be asking “What impact have improvements in football equipment had on safety of the game?” The answer is stunning. Research reveals “Despite changes in equipment (e.g., helmets, increased padding, mouth guards), there was little variation in injury rates for games, or fall and spring practices over the 16-year [NCAA] study. The study observes that these results are most likely because the basic characteristics of the game have not changed drastically over the years.”<sup>230</sup> Surprisingly, safety of the game has not changed in 16 years.

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Dick et al., *supra* note 168, at 228.

Have improvements in strength and conditioning programs had an impact on injuries? Unfortunately, for the worse. A poignant fact known to most football coaches is that “stronger, faster athletes increase the speed and collision forces, causing more injuries.”<sup>231</sup> Between FBS and FCS teams does size, weight, height, strength, talent, speed, and experience matter among football players engaged in a sport where speed and collision cause increased injuries? Again, why do football recruiters seek athletes with these characteristics? It is interesting to note that several campus chief executives picked up on this increased danger risk while others sought empirical evidence that these characteristics possessed by FBS over FCS teams created any risk.

Returning to the boxing analogy, would these same executives agree that a more experienced, faster, stronger, talented, heavyweight pugilist might pose a greater physical injury risk to a 165-pound middleweight boxer? While football is a team sport and boxing an individual one, football frequently has multiple players hitting, blocking, knocking down one player while boxing is a one-on-one physical contest. Which circumstance poses a greater risk of physical injury?

Concussions are an increasing concern in both amateur and professional football. The NCAA study also reports “Games tend to reduce the influence of the coaches over the quantity and nature of body contact, as the game is played at high speed and high intensity and players expect to be involved in contacts.”<sup>232</sup> The NCAA report has been corroborated by other researchers such as K.M. Guskiewicz, M. McCrea, and S.W. Marshall that have reached similar data driven conclusions.<sup>233</sup>

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<sup>231</sup> *Id.* at 232.

<sup>232</sup> *Id.* at 229.

<sup>233</sup> Kevin Guskiewicz, Michael McGrea, Stephen Marshall, & Robert Cantu, et. al., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 J. OF THE AM. MED. ASS’N. 2549-2555 (2003).

## XI. CONCLUSION

Football is admittedly the most popular intercollegiate sport. Fan and student based popularity can affect rational analysis of the ethical implications of football scheduling and the influence of extrinsic monetary factors. Time and cultural shifts influence public opinion. Whereas boxing was probably a sport more popular than football in the 1930's and 1940's with famous athletes such as Joe Lewis, Jack Dempsey, Rocky Marciano being nationally recognized champions, football heroes of similar stature had yet to emerge.

If broadcast and related revenues in the 21<sup>st</sup> century tell us anything, it is that intercollegiate football now is the most popular college sport. As such, we view it through a lens that is more clouded with emotion than consideration of physical injury. This certainly was the case during boxing's golden era when athletes would take brutal beatings as long as they could stand on their feet. Spectators and participants themselves did not view the sport as prohibitively injurious. Is this not the same phenomenon we see today in college football? Collegiate presidents and chancellors reflect the culture of their campuses and the national preoccupation with a fast moving hard hitting sport. While some recognize the physical danger presented to their athletes, the culture is such that the importance of the safety of the game, like boxing in its day, is lost in the emotional appeal and entertainment provided by the sport.

Scheduling noncompetitive football games between Goliath FBS and David FCS teams primarily for money presents an ethical question few of us, let alone campus presidents and chancellors, want to consider. Like Penn State, other schools such as Baylor are being accused of choosing economics over sexual assault victims. "It's hard for schools to do the right thing...because that reputation (in athletics) is valuable to the school in an economic sense," observed Erin Buzuvis, a law professor at Western New

England University and co-founder of the *Title IX Blog*.<sup>234</sup> It is suggested, like the Civil Rights movement, that we have an ethical culture problem.

Due to space limitations, this qualitative study involving interview of 10 campus chief executives could not include all questions or their responses. The most poignant ones were provided. Pointing out this dichotomy between the ethics of sport to include its safety, and the cancerous infection of the money factor, football scheduling between David and Goliath teams threatens both the athlete and the sport itself. Like the many cited sports commentators, this is a call to action. Our scholar-athletes deserve more consideration of these issues from our collegiate presidents and chancellors than they perhaps are giving us. As previously noted, the pressure “to win” and generate revenue to sustain the “*king-skin*” is enormous. Make no mistake, this is a tough ethical challenge and an even more difficult conversation in need of participants.

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<sup>234</sup> Nancy Armour, *Baylor Case Must Be Turning Point*, ARGUS LEADER, at 6D (May 27, 2016).