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Brain-injured footballers, voluntary choice, and social goods. A reply to Corlett.

Abstract: This essay responds to Angelo Corlett’s criticism of our paper “Ethics, Brain Injuries, and Sports: Prohibition, Reform, and Prudence.” To do so, first, we revisit certain assumptions and arguments Corlett makes concerning intercollegiate football and brain injuries in his 2014 paper “Should intercollegiate football be eliminated?”. Secondly, we identify and criticize two key elements in his response regarding (a) “luck egalitarianism,” and (b) “public goods.” We conclude by reaffirming our critical reading of Corlett’s original 2014 paper and by identifying further elements (i) luck and the nature of individual responsibility; and (ii) the nature of sports as public rather than merely private goods, that he would have to address for his latter 2018 position to hold true. **Keywords:** concussions, ethics, responsibility, public goods, football.

1. Introduction

In this paper, we respond to Angelo Corlett’s criticism of our paper “Ethics, Brain Injuries, and Sports: Prohibition, Reform, and Prudence.” We are grateful to him for his extensive response and his efforts to develop his position with respect to the support of a sporting practice, closely associated with head injuries, and for which the relevant practice communities themselves cannot, or will not, assume economic responsibility. In this paper, we defend our earlier position and propose yet further problems for Corlett if he is to sustain both his original and modified positions. First, we revisit his assumptions and arguments concerning intercollegiate football and brain injuries in his 2014 paper “Should intercollegiate football be eliminated?”, highlighting *inter alia* the connection between the two types of analyses that Corlett provides, namely, the descriptive and normative¹. Secondly, we identify and criticize two key elements in his response regarding (a)

¹ Using these terms as a heuristic device, we do not hereby commit ourselves to any metaphysical position on the fact value dichotomy.

“luck egalitarianism,” and (b) “public goods.” We conclude by reaffirming our grasp of Corlett’s original 2014 paper and by identifying further elements of weakness in his account namely (i) luck and the nature of individual responsibility; and (ii) the nature of sports as public rather than merely private goods. We conclude that these issues must be addressed if his 2018 revision is to be decisive.

2. Corlett’s critique of our interpretation of his analysis of the arguments for and against inter-collegiate football

Corlett claims that we have partly misinterpreted his analysis of the arguments for and against the elimination of inter-collegiate football (Corlett, 2018, 6). In order to challenge this claim, we are obliged to quote him extensively in this response. According to him, he neither argues for the elimination of inter-collegiate football programs, nor does he hold a paternalist position. Instead, as we point out in our paper, he presents five arguments: (a) argument from exploitation; (b) economic argument; (c) academic argument; (d) argument from fraud; and (e) health care and medical costs to others argument. Then, he takes the ‘health care and medical costs to others argument’ to be “the only argument that serves its purpose and stands critical analysis not only in the context of college sports but it also in professional football” (Lopez Frias & McNamee, 2017, 265).

Corlett concedes that we understood part of the central argument of his 2014 paper but failed to comprehend some other important aspects of it: “Lopez Frias and McNamee seem to appreciate part of the core of Corlett’s health care and medical costs to others argument as an ethical one of justice and fairness” (Corlett, 2018, 3). According to Corlett, one of the aspects that

we failed to understand is the conditional character of his argument; while the other is the role that scientific evidence plays in the argument. In his words:

it is at least misleading to suggest that Corlett (2014) proposes ‘to prohibit the activity *en masse* on the basis of the journalistic presentation of two respected neuroscientists (among many) in what is a deeply contested scientific field’” (Corlett, 2018, 6).

In failing to acknowledge his argument as “a conditional one” (Corlett, 2018, 6), Corlett claims that we not only misconceive his medical costs argument, but that we also seem not to “sufficiently appreciate [...] that inter-collegiate football programs might be eliminated whether or not CTE is scientifically proven to be the result of normal football play” (Corlett, 2018, 3). In what follows, we respond specifically to Corlett’s rejoinder by showing that his arguments are not as conditional as he claims. This endorses our original argument that in effect he “justif[ies] prohibition [based on the] economic and social costs that [inter-collegiate football programs] would entail” (Lopez Frias and McNamee 2017, 276).

2. The conditional character of Corlett’s argument

Corlett’s position on the issue of brain injuries and intercollegiate football draws on the distinction between two aspects of his argument, namely: descriptive and normative. Normative aspects relate to whether inter-collegiate football should be eliminated. Descriptive aspects have to do with whether football will be eliminated¹. Corlett emphasizes this distinction in the title of his 2018 paper, “Should and will Inter-collegiate Football Programs be eliminated?” In this paper, he summarizes his position thus:

If there is a scientifically established solid link between CTE and normal football play, then given how costly CTE is to treat medically and given that inter-collegiate football programs

are not public goods in the relevant sense and given that it is unjust because unfair to foist on those not associated with the sport its costs (including those associated with CTE), then inter-collegiate football programs ought to be eliminated insofar as they cannot bear their own costs in full (Corlett 2018, 6).

According to Corlett, three conditions must be met for this argument to apply: (a) the connection between the regular practice of football and CTE would have to be scientifically proven; (b) this would in turn lead to an increase in the costs of football programs; and (c) football programs would be unable to cover such costs, which would end up falling on the public purse. There are many situations where the three conditions would not be met at the same time. For instance, the National Football League (NFL) might cover for the medical and health insurance costs incurred by college and professional football players; new equipment might reduce the harmful consequences of playing football; more restrictive rules regarding collisions or head contacts might newly be formulated and applied; further policies might be developed that mandated earlier and more comprehensive diagnosis or testing; or the cost of maintaining football programs might not increase.

As Corlett claims in his response paper (2018, 6), he had discussed some of these possibilities in his original essay. Nevertheless, it is important to note a move that he makes. His empirical analysis of inter-collegiate and professional football shows how the current situation of football in the United States is one where the conditions of his argument are either increasingly being met or will be met in the near future. Thus, we contend that Corlett's normative argument when augmented by the suggested empirical prediction has the effect of removing the conditional character of the former². In his empirical analysis in the original paper, Corlett explores

the question of how likely it is that competitive football more generally will in fact be eliminated because pre-collegiate, inter-collegiate, and professional football supporting institutions and organizations will simply not be able to afford likely and increasing litigation concerning various cases of CTE [chronic traumatic encephalopathy] whether or not they continue to be substantiated by sound medical science (Corlett, 2014, 128).

Corlett seems to assume that “the Pandora’s box of CTE [...] has already been opened and the scientific evidence that is still under investigation is forthcoming may well be sufficient to spell the demise of [football]” (Corlett, 2014, 130). For Corlett, some of the potential consequences are that: “the cost of health insurance premiums for football players is likely to skyrocket” (Corlett, 2014, 124); “[more high school] districts will be unable to afford medical and legal liability insurance to cover such risks” (Corlett, 2014, 128; see Corlett, 2014, footnote 23); and that “lawsuit[s] filed by [football] players who allege that the NFL knew the risks of CTE to its players” will increase (Corlett, 2014, 129). All these “evils” would present a “fiscal threat to [...] football that threatens the very viability of competitive football at all levels” (Corlett, 2014, 127). Moreover, according to Corlett, if the scientific findings on the connection between playing football and CTE “continue to provide a plausible empirical link between the playing of competitive football and CTE, [then] the health care and medical costs to others argument [will become] most powerful as an empirically based moral consideration concerning the need to eliminate inter-collegiate football in particular and football in general as an organized and competitive sport” (Corlett, 2014, 128).

In sum, what Corlett now argues is that the current evidence on the connection between the regular practice of football and CTE has started a process that will likely increase the medical and health insurance costs related to football programs. This, he goes on to propose, will eventually

lead to the dismantling of high school and inter-collegiate football programs. With regard to high school football, Corlett claims:

it is reasonable to predict what a likely, though perhaps gradual, outcome will be in the coming years: the elimination of high school football. Of course, if high school football is eliminated, from what league or level will inter-collegiate football programs recruit their future athletes? (Corlett, 2014, 129).

It should be noted that the elimination of high school football would impact college football significantly (and, it is reasonable to infer: the NFL successively). For instance, inter-collegiate football (then NFL) programs would have a significantly reduced pool of football players from which to recruit. Moreover, such players would be of lesser quality than today's inter-collegiate players: "After all, they would lack the pre-training and discipline of a sport that requires a great deal of teamwork and timing between players, multiple tasks, memorization of a multitude of complex plays, etc." (Corlett, 2014, 129). Corlett suggests that one potential solution to this problem would be that "the NFL fund[ed] its own 'minor' league from which [to] recruit players" (Corlett, 2014, 129). Having realized the possibility however, he challenges it:

it seems reasonable to think that the NFL might find it difficult, if not impossible, to cover these mentioned costs and remain economically viable. Until now, the NFL seems to have survived without paying its fair share of what its own sport seems to have caused in terms of medical risks (Corlett, 2014, 130-131).

To this, Corlett adds that, in order to fund its "farm" league, the NFL would need to "substantially increase[e] the costs of tickets to its games, perhaps well out of reach for most everyone except the relatively wealthy" (Corlett, 2014, 129). This would not be viable, for, according to Corlett, "[i]t is difficult to imagine a traditionally blue collar sport like football appealing to mostly white

collar types, especially in cities such as Cleveland, Detroit, Green Bay, Oakland, and Pittsburgh, among some others” (Corlett, 2014, 129).

Even if the strategy mentioned above worked, Corlett raises an additional problem. For football to survive, the NFL would have to fund its “farm” league. Yet, Corlett takes this possibility to be implausible:

even though the NFL might be able to adequately cover the costs of health care and medical expenses for the time being if it chose to do so, it is unlikely that it will be able to do so in the future if taxpayers, who currently demand less waste, fraud, and corruption in government, decide to target the NFL’s lucrative tax advantage (Corlett 2014, Footnote 18).

The NFL could only afford the costs associated with fully funding its own “farm” league if it maintained “its coveted non-profit status with the US Internal Revenue Service” (Corlett, 2014, 129). For, how, he continues:

can NFL football be expected to cover such costs when taxpayers read about lucrative tax advantages the NFL has enjoyed since its historic merger with the AFL decades ago and begin to demand that the NFL be treated by the IRS as the profit-making business that it most certainly is? (Corlett, 2014, footnote 18).

If all the events above took place, then, as we argued in our 2017 paper, “the only way to cover these programs, in the context of ever-increasing premiums, [would be] through public taxation or higher health care premiums’ (Lopez Frias and McNamee 2017, 265). This would saddle the public with the costs of funding football programs, which, according to Corlett, would be unfair and therefore morally unjustifiable.

Our interpretation is strengthened by Corlett's claim that the beginning of the chain of events leading to the elimination of football could be made by the mere perception that practicing football regularly leads to CTE. In this vein, Corlett says: "even if the relevant medical and brain sciences prove that CTE is not linked to normal football play, inter-collegiate football programs might nevertheless be eliminated insofar as health care insurance companies decide to, say, even in the face of such scientific evidence, target football players/teams with significantly increased health care premiums and medical costs (for CTE care) because of the public *perception* that normal football play is linked to CTE" (Corlett 2018, 3).

What have we established so far? By connecting the descriptive and normative analyses of both of Corlett's essays, our interpretation of Corlett's main thesis in his 2014 paper - that the public will inevitably underwrite head injury treatment - is, we maintain, justified.

3. A critique of two main concepts of Corlett's argument: "voluntary responsibility" and "primary goods"

Corlett's argument is built on the assumption that increasing concussion-related medical costs would 'coercively' pass to the public purse. This situation, according to him, would be unfair for two reasons. First, "the vital medical care required results from an activity which is voluntary, intentional, and yet unnecessary and regarding which the patient nowadays understands the medical risks" (Corlett 2018, 2). Secondly, within a liberal individualist society, only costs related to primary goods can be imposed on others because primary goods are to everyone's advantage. Given that football, even with its vast supporter base, fails to qualify as a primary good for Corlett, it would be unethical to force the fund football programs and associated costs on the public purse. In what follows, we will explore the two key concepts of "voluntary responsibility" and "primary

goods” underlying Corlett’s argument in order to submit to criticism some of the main tenets of his argument.

3.1. Two types of costs and the principle of voluntary responsibility

A fundamental assumption in Corlett’s argument is that “no one has a right to coerce the general public to subsidize one’s engaging in an especially medically expensive and physically dangerous activity” (Corlett 2018, 9). Regarding this coercion, he provides the following example:

I do not have an ethical right to eat unhealthy foods on a regular basis, not workout regularly, become obese, and then expect others (the general public) to cover the medical costs associated with my obesity. For it is unreasonable to think that there is a correlative ethical duty of others to cover such costs. Nor do I have an ethical right to engage in abnormally dangerous activities wherein I cannot afford adequate health care and medical insurance coverage for myself (and others in terms of liability insurance) as it is unreasonable to think that there is a correlative ethical duty of others to cover such costs for me (Corlett 2018, 10).

Corlett takes the practice of football to be abnormally dangerous. Thus, individuals who choose to play football must themselves cover for the costs associated with it. Corlett’s position is a version of “luck egalitarianism” (Dworkin 1981), drawing as it does on the distinction between two types of inequalities: (i) those resulting from brute luck; and (ii) those arising from option luck (Segall 2010, 10). Brute luck is beyond the individuals’ control, whereas option luck is controllable through voluntary choice (omission or commission). For luck egalitarians, “the norm of equality [...] should apply to that over which the individual lacks control (a person’s brute luck)” (Wikler 2002, 49). Society is thus only obliged to compensate for the inequalities resulting from factors

beyond the individuals' control. In contrast, individuals must be responsible for those actions that fall within the realm of option luck. This distinction is key to maintaining Corlett's position. Since football players choose to engage in football voluntarily, then they, and the parties that contract them to do so, ought to be held responsible for the harms arising and the means of their remediation. Therefore, football players themselves must correct any inequality or social cost resulting from their regular practice of football.

Corlett's employment of the voluntary responsibility principle raises the following problems. First, the onus is upon him to clarify the extent to which football players' decision to play football is characterized as voluntary. To hold individuals responsible for their actions, the latter must "properly" be theirs. That is to say, individuals must be the sole authors of their actions. Although the criteria actions must meet to be fully voluntary are highly contested, most theorists agree that voluntary actions are informed, voluntary, unforced, and deliberated over (Wikler 2002, 50). These concepts are familiar within medical ethics under the umbrella of informed consent. From this perspective, it is at least questionable that football players strongly choose their lifestyle voluntarily in the strong sense that Corlett requires. For instance, players are introduced to the practice by others (often parents or friends) very early in their lives, developing habits and social relationships and an athletic identity that strongly influence their choices as adults, without their deliberate consent.

Secondly, an exclusive emphasis on personal responsibility might be detrimental to the healthcare practice. Corlett identifies two types of CTE-related costs.³ One relates to medical coverage, that is, to the increase in health insurance premiums. The other has to do with medical care and, in particular, with the long-term medical care of CTE patients. Yet it is worth noting that much medical practice is grounded in the idea that help must be provided to those who need it. In

general, medical practitioners' care (though their sympathy might be an altogether different matter) ought not be diminished in virtue of the self-inflicted nature of any harms. As Daniel Wikler argues, "All of us gain if and when doctors think of patients as patients (a point that tells also against financial screening of patients at the hospital door)" (Wikler 2002, 51). By contrast, Corlett seems to imply that individuals can engage in any behavior only insofar as they can be held responsible – including financially responsible - for the consequences of their actions.

Thirdly, the employment of the principle of voluntary responsibility in the health care setting is inconsistent. True, some reckless actions might be seen as morally questionable. However, not all voluntary actions that lead to disease, illness or some condition that requires medical care are regarded as actions whose costs must be shouldered by those individuals. As Wikler argues, the concept is often applied to behaviors that people merely disapprove of. For instance, he posits, "the decision to have children (now that this involves an actual decision for many people) risks the health of the mother. A decision to postpone childbearing until advanced education has been completed markedly increases the risks for cervical and breast cancer." (Wikler 2002, 52).

The conclusion that public health services ought not to be expected to make good on poor choices is not a self-evident truth. Just as norms of care and justice in healthcare depend on how we conceive public goods, so too our norms of responsibility for foreseeable harms like head injuries in football, depend whether we conceive of sports as social or public goods. We turn now to this notion.

3.2. Corlett's controversial and underdeveloped notion of "public goods"

The concept of “public goods” plays a central role in both Corlett’s papers. Whereas in his original paper, he borrows the concept from Mancur Olson’s *The logic of collective action*, in his response paper, he draws on Rawls’ notion of the public good. In the former, Corlett argues that football fails to qualify as a public good because “it is only a good for those who voluntarily participate in the sport as players, coaches, fans, etc.” (Corlett 2014, 124). In his latter paper, Corlett he reframes football as a public good only in “a weak sense” (Corlett 2018, 5). For a practice like football to be referred to as a public good in the strong (Rawlsian) sense of the term it must be one that “benefits, on balance, a vast majority of the public” (Corlett 2018, 5). In an earlier paragraph, Corlett cites Rawls to provide a different definition of public goods as those that are “to everyone’s advantage in a society” (Rawls 1971, 267 cited in Corlett 2018, 2).

Despite being widely accepted among liberal philosophers, Rawls’ account of “primary goods” is controversial. As McNamee argues, sports must be regarded “as *inherently* social [...] as forms of public ceremonies and all forms of sports as partly both *play* and *display*” (McNamee, 2008, 130, our emphasis). From the standpoint of play, sports must be more broadly regarded as leisure activities, and it must be noted that leisure and play are often regarded as public goods, even from a Rawlsian standpoint. In particular, Blain Neufeld (2018) claims that leisure should be regarded as a primary good in Rawls’ sense because it is necessary for the promotion or realization of one’s conception of the good, especially during childhood:

Within the childhood stages of persons’ lives, leisure time will involve (at least for most persons) the realization of many childhood goods, such as creative play, athletic and artistic activities, friendships, and the like. So certain childhood goods can be realizable adequately for all citizens via the just distribution of the primary good of leisure time over citizens’ complete lives (Neufeld 2018, 1068).⁴

In alignment with Neufield's approach, Brennan, Gheaus, and Macleod argue that "childhood goods" require further consideration, and that Rawls has largely overlooked them. A broader interpretation of the notion of primary goods would allow for considering football as a public good. Because football allows individuals to promote and realize their conception of the good, as well as to achieve other goods and develop their abilities, football may be regarded as a common good.

A further consideration is noteworthy regarding our understanding of the basic goods of a human life. Nussbaum, for example, takes play to be one of the substantial freedoms, which she calls "capabilities," required for having a life worthy of dignity (Nussbaum, 2013; Bloodworth, McNamee, and Bailey, 2012). Indeed, many international organizations such as the European Union (EU), the United Nations (UN), and the International Olympic Committee (IOC) regard leisure as a public good and some take the access to it to be a basic right (Lopez Frias, 2014).

With regard to the understanding of sport as display, two features must be noted. First, football engages vast numbers of people whose lives are enhanced by their participation in the practice. For instance, the 2018 Super Bowl drew 111.3 million viewers, and thirty-three of the top 50 television programs were NFL games (Pallotta, 2018). Moreover, a Gallup poll released in January 2018 revealed that football is the favorite sport of 37% of Americans (Norman, 2018). Secondly, as Morgan argues, sports, especially in the United States, have "narrative prowess," for they play a key role in the way Americans learn "to speak [their] national language" (Morgan, 1999, 51). Morgan's conception of sport coheres closely with Taylor's notion of "irreducibly social goods." According to him, such goods provide background understandings that make the experience of other goods intelligible (Taylor, 1997). As the issue of whether or not football is a public good goes beyond the scope of this paper, it suffices to say that there are other views of the

public good that Corlett could have considered in the development of his argument. He seems to accept Rawls' view of public good too quickly.⁵

4. Conclusion

Over both articles Corlett has offered an argument to the effect that that head injuries are sufficiently prevalent in Collegiate Football that it may be predicted that their costs could not be met by those associated with such injuries and therefore would unjustly and unjustifiably fall on the public purse. This drives his negative stance towards Collegiate Football's future continuation. We have argued his claims to have offered a merely contingent, hypothetical argument, is undermined by his substantively negative predictions regarding the scale and costs of consequent healthcare, along with the inability of football to look after its own excesses, are flawed. We have also challenged his assumption that Collegiate Football is not a social or public good. None of this makes us apologists for American Football nor the harms that may be associated with it. We are simply in favor of good arguments about sports and their place in modern society.

Notes

¹ Despite agreeing with Corlett that the two types of aspects must be addressed separately, we argue that he underplays the potential connection between the two of them. If the normative and descriptive aspects of Corlett's analysis are connected, then his analysis loses part of its conditional character. We do not endorse an absolute position on the distinction between description and normativity. Rather like the tired fact : value dichotomy, it may nevertheless be a useful heuristic (see Putnam, 2002).

² Indeed, the combination of both types of aspects aligns with Corlett's intent of "focus[ing] on more serious concerns within the confines of the real world in which we find ourselves" (Corlett, 2014, 117). A philosophical analysis that applies to the real world must, according to him, avoid drawing a clear-cut distinction between normative and empirical analyses. We concur with this.

³ To the extent that medical and brain sciences discover a solid link between CTE and normal football play and given the current health care system in the US which requires medical providers to provide medical assistance to those in need of vital medical care, the subsidizing of inter-collegiate football programs forces economic costs onto others (the general public) in order to support it (say, in the forms of substantially increased health care premiums and medical costs due to football-caused CTE-related injuries) (Corlett 2018, 8).

⁴ To further explore the issue of value of leisure, see Parry (1989), McNamee (1994), and Telfer (1987).

⁵ As one of the anonymous reviewers of the journal points out, further distinctions are needed here. For instance, we would need to clarify what kind of public good sport is and differentiate it from other types of publicly shared goods such as common goods, the common good, social goods, and basic goods. However, we will leave this task for a different work, for all we want to point out here is that Corlett assumes Rawls' concept of "primary good" without providing a solid justification for it. For an analysis of the concept of "public goods," see Buchanan (1967), Kallhoff (2011), Inge (2003) and Cornes and Sandler (1994). Also, for an interpretation of the relationship between Rawls' notion of "primary goods" and sport different from Corlett's, see Murray and Murray (2011) and Murray (2018).

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