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Inconsistent, Vague, and . . . Just? An Analysis of the National Football League's 2021 COVID-19 Policy

Steven Gimbel ^{1,*} and Joseph Radzevick ²¹ Department of Philosophy, Gettysburg College, Gettysburg, PA 17325, USA² Department of Management, Gettysburg College, Gettysburg, PA 17325, USA; jradzevi@gettysburg.edu

* Correspondence: sgimbel@gettysburg.edu

Abstract: The National Football League, the premier professional organization for American football, developed a policy concerning the protocol in cases where players contract COVID-19. This policy includes elements such as collective punishment that appear, at first glance, to be morally problematic. To the contrary, the policy is indeed morally acceptable as we should not think of organizations such as the NFL in the same way we think of governments in stable nations, but rather in the same way that we think of hybrid justice systems in countries where because of histories of colonialism, the identity of citizens is divided, with tribal identities being more important than national citizenship.

Keywords: COVID-19; National Football League; collective punishment; justice



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1. Introduction

Perhaps the most straightforward principle when considering questions of retributive justice is that one ought not punish the innocent. Only those who violate the rules ought to be liable to sanction. Equally straightforward is the expectation that any set of rules posited as a system of justice ought to do its best to avoid ambiguity. Maximal clarity should be sought in terms of exactly what acts are expected from those agents bound by the rules, which acts are disallowed under the rules, how the determination of whether an act corresponds to or violates the rule is made, and what sanctions will be imposed. If a process is constructed in order to include elements of procedural justice [1], then the nature of justice itself seems to require that it be made as clear as possible what acts do and what acts do not follow the rules and how the penalties will be meted out before the system is put into effect. To be seen as applying the rules in an ad hoc fashion is to reasonably undermine belief in the system being just. This can prove especially problematic given the important role that justice perceptions have for identification [2] and commitment [3] to organizations.

Before the 2021–2022 season, the National Football League (NFL), the organization overseeing the highest level of professional American football in the United States, formulated a policy governing league play during the 2021–2022 season which violates both of these seemingly obvious requirements of a just contractual basis for governance. The rules reasonably seek to keep players safe during the COVID-19 pandemic. As a contact sport, playing the game creates exposure between players that could result in spreading the contagious virus among them.

Players, coaches, and other team personnel also spend significant amounts of time in close contact during the season for practice, film sessions, travel, etc. The NFL's rules are designed to diminish the likelihood of a spike in cases among players by encouraging, without requiring, vaccination. However, the sanctions in the code include provisions that would not only punish the unvaccinated, but entire teams. Further, the rules as formulated contain a notable degree of looseness, that is, discretion given to the league in their applicability. This immediately gives rise to concern that the league will apply rules unevenly so that favoritism could override equal treatment when real cases emerge.

Despite, indeed because of, these two seeming failures of the NFL COVID-19 policy, we contend that the rules as set out by the league are, in fact, just. The contextual complexities of the situation are sufficiently peculiar that the violation of two standard expectations of a system of justice actually serve to make the system more just in this particular case. The two principles, no collective punishment and maximum clarity, are legitimate principles *ceteris paribus* and especially ought to be followed in the case of systems of justice in social-political contexts. However, this case is less like that of a system of law in a developed nation. A better model for this situation, we will argue, is to be found in developing nations wherein we find hybrid models of justice that include loose patchworks of national, regional, and tribal systems of justice which intersect, contradict, and yet must coexist. In some cases, for example the Bedouin tribes of Jordan and Afghanistan, tribal systems include elements such as the justification of revenge killings that we seemingly ought to abhor as inherently unjust. However, the loose integration of the different justice systems make it so that the systems that contain these seemingly unjust elements, in fact, are more just. It is in this way, we contend, that the NFL's COVID-19 policy succeeds from the perspective of philosophical justice.

2. Two Principles of Justice

Let us consider two principles of justice in turn: (1) To be innocent is to be undeserving of punishment, (2) systems of justice ought to avoid ambiguity as far as possible. While these are certainly not the only principles to consider when assessing a system of rules to be just or unjust, they are the two that are germane to this discussion.

There is, perhaps, no more obvious principle of retributive justice than punishment ought only be meted out to the guilty. As Feinberg clearly states, "To be legally responsible for a harm is to be liable to official punishment [4] (p. 30)", where a punishment is a sanction, i.e., a harm, that is officially applied to a member of a community under a social contract for violating that contract.

We further follow Feinberg in distinguishing between two senses of the ambiguous notion of harm. There is what Feinberg terms "the non-normative" sense of harm, what we may call natural consequences. In this sense, a harm is "the thwarting, setting back, or defeating of an interest" [5] (p. 32). Students have interests in getting good marks. If a student opts not to study for an exam and receives a poor mark, this is a natural consequence of the lack of study, but is not a punishment, even if the mark was given by an authority, because the grade was earned not given as a sanction.

On the other hand, is the "normative" sense of harm. To harm is to wrong another, where Feinberg defines wrong as "One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful in the sense already explained" [5] (p. 34). If the student who has not studied proceeds to try to get a good mark by copying off of a neighbor's exam, now the student has committed the sort of act that warrants punishment and that punishment will itself be a harm to the student, say, a grade of 0 on the assignment. This is a sanction, not a natural consequence, and thereby a punishment because it is imposed upon the student by the authority on the basis of the violation of rule and in accord with the power granted the authority under the system.

This recognizable principle of only punishing the guilty is what undergirds the prohibition of collective punishment in international law that we find, for example, in the Fourth Geneva Convention: "No protected person may be punished for any offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited [6]". Collective punishment is morally problematic because it takes those who did nothing wrong and subjects them to sanctions because of the actions of those who did. We are responsible for our own actions, not in general those of others, if those others are autonomous agents. Any system of justice which knowingly subjects the innocent to punishment for acts they did not commit ought to be seen as problematic [7] (p. 192).

The second principle is that a system of justice based upon rules that encourage or prohibit behaviors ought to be maximally clear when it comes to the criteria for distinguishing acceptable from unacceptable acts, the process by which acts are judged, and the punishment for violations. This principle derives from an even more basic requirement, that society treats all members equally under the law, a notion that can be traced back to classical Greece and stated explicitly by Pericles: “If we look to the laws, they afford equal justice to all in their private differences” [8] (p. 14). The requirement of equal standing is under threat when ambiguity allows those with power leeway to treat different people differently. The point of procedural justice is to build fairness—in this case impartiality—into the structure of the justice system itself [9]. To maximize the fairness, then, we ought to seek to minimize the ambiguity of the system and thereby limit as far as possible the need to interpret the rules as it is at these junctures that differential treatment under the rules threatens to appear. Therefore, it should be uncontroversial that any system of rules seeking justice should incorporate the straightforward principles of non-punishment of the innocent and maximum clarity.

3. The NFL COVID-19 Policy and Its Violation of the Two Principles of Justice

The official NFL website includes the following documentation outlining the “Competitive Principles” of its COVID-19 policy for the 2021–2022 season:

- The league will make every reasonable effort, consistent with underlying health and safety principles, to complete the full 272-game regular season within the current 18 weeks and all postseason games as scheduled, in a safe and responsible way. This is grounded in a commitment to players, coaches, fans, and business partners. We do not anticipate adding a “19th week” to accommodate games that cannot be rescheduled within the current 18 weeks of the regular season.
- Every club is obligated under the Constitution and Bylaws to have its team ready to play at the scheduled time and place. A failure to do so is deemed conduct detrimental. There is no right to postpone a game. Postponements will only occur if required by government authorities, medical experts, or at the Commissioner’s discretion.
- In light of the substantial roster flexibility in place for the 2021 season, absent medical considerations or government directives, games will not be postponed or rescheduled simply to avoid roster issues caused by injury or illness affecting multiple players, even within a position group.
- If a game is cancelled/postponed because a club cannot play due to a Covid spike among or resulting from its non-vaccinated players/staff, then the burden of the cancellation or delay will fall on the club experiencing the Covid infection. We will seek to minimize the burden on the opposing club or clubs. If a club cannot play due to a Covid spike in vaccinated individuals, we will attempt to minimize the competitive and economic burden on both participating teams.
- Whether to reschedule a postponed game will be dependent on health and safety reasons at the recommendation of medical experts as well as considerations of stadium availability, schedule integrity, fan convenience, and other appropriate matters.
- If a game cannot be rescheduled within the current 18-week schedule and is cancelled due to a Covid outbreak among non-vaccinated players on one of the competing teams, the club with the outbreak will forfeit the contest and will be deemed to have played 16 games for purposes of draft, waiver priority, etc. For the purposes of playoff seeding, the forfeiting team will be credited with a loss and the other team will be credited with a win [10].

What is important to the current project are two elements of this code. First, it explicitly includes collective punishment. If there is an outbreak among its unvaccinated players, the team may have to forfeit games. The forfeiture may have natural consequences; for example, it may lead to a team not making the playoffs, a milestone for which players receive direct compensation for playing in post-season games and possible future benefits in the form of more lucrative future contracts and enhanced historical legacies. Additionally,

lost games could impact players negatively whose contracts include clauses awarding bonuses for reaching particular individual or team goals.

However, while the forfeiture may have negative natural consequences, because it is a harm sanctioned by the rules, it must be understood as a punishment with direct penalties on both the team (an automatic loss recorded in the standings) and players (foregone game earnings) rather than a natural consequence. If the same scenario in terms of a COVID-19 outbreak were to occur on a team among vaccinated players, the NFL would treat the scenario differently, being more flexible in terms of rescheduling the game without forcing the forfeiture. As such, it is clear that the intent of the rule is to threaten teams and players with a punishment if they choose not to vaccinate.

Consider two different cases to help illustrate this distinction further. In the first case, two teams are fully vaccinated and one team has an outbreak that requires postponing or canceling a game. In this case, there are negative natural consequences in that the teams will not be allowed to compete, but the rule will not be triggered that would cause the infected team to forfeit. These teams will play a delayed game or have a sixteen-game season instead of a seventeen-game season like the rest of the teams, and using win-percentage, the teams with unequal numbers of games played will be appropriately ranked within their division to determine who moves to the playoffs.

In the second case, the quarterback of one team is unvaccinated and that sparks an outbreak among several of his unvaccinated teammates that causes a game to be postponed until the league decides the rule must be enacted. At this point, unlike in the first case, both teams are considered to have played the unplayed game and the unvaccinated quarterback's team is considered to have lost that unplayed game. The unvaccinated quarterback's team suffers additional negative consequences beyond the natural consequences as a result of the imposed rules. This must be seen as a punishment, and since the win-loss record is a collectively owned property of the team as a whole, the punishment is thereby also collective.

There are cases in which punishments are player-specific. Consider cases such as an act of egregious unsportsmanlike conduct during play (e.g., a blatant, severe hit on a defenseless player). In these contexts, the league may fine a specific player. However, the potential COVID-19 outbreak sanction applies to the team as a whole. Game forfeiture harms all of the players rather than only those who caused the outbreak through their choice to remain unvaccinated. Thus, punishing the team for the choices of its individuals is textbook collective punishment, the sort that we discussed above as problematic.

Secondly, the policy also violates the other principle because of its explicit vagueness in crucial sections. Consider these lines: "The league will make every reasonable effort, consistent with underlying health and safety principles". "Postponements will only occur if required by government authorities, medical experts, or at the Commissioner's discretion". "We will seek to minimize the burden". "Whether to reschedule a postponed game will be dependent on health and safety reasons at the recommendation of medical experts and considerations of stadium availability, schedule integrity, fan convenience, and other appropriate matters". Throughout the entire policy, the chosen language is littered with slippery phrases that will require judgement calls of individuals that could differ depending upon the context and those involved. The process as outlined seems rife with the sort of ambiguity that the second principle urges one to avoid.

Thus, the NFL COVID-19 policy violates both of the justice principles that are so straightforward that they need very little argumentation to justify. On these grounds, it seems *prima facie* that we should deem the policy as morally problematic, as unjust. Instead, we will argue to the contrary: that these violations are, in actuality, morally acceptable.

4. Is This a Trivial Case of Corporate Responsibility?

One obvious objection to the collective punishment principle is the case of corporate responsibility. NFL teams and the league itself, after all, are first and foremost businesses, and such organizations can be loci of moral responsibility. Consider, for example, a tobacco

company that, while knowing its product to be carcinogenic, used its resources to maximize the addictiveness of its product and further used additional resources to lie to the public about its actions and the addictiveness of its product. It seems easily justifiable to demand justice not only from those in positions of authority (e.g., top management) who hatched and carried out the scheme but also to seek recompense from the corporation itself. That justice would be the result of governmental sanction. If it can be established that in this situation, teams are corporations and the NFL is the quasi-government, then we have a straightforward model through which to make sense of the policy and the collective punishment it mandates.

Peter French [11] argues that the basis of this claim of corporate collective responsibility derives from the fact that the corporation should be thought of as an artificial human. Corporations possess the two properties that a human requires to be morally culpable: the ability to make decisions and the ability to carry them out in the world. Corporations may be different from the very humans that constitute them, but the “mind” and “body” of a corporation are not identical to that of any individual, and therefore should be considered to be their own entities.

What differentiates an organization such as a corporation from a mere aggregate, such as a mob, is that the organization, by virtue of being organized, possesses an internal process for determining actions, what French refers to as a “Corporate Internal Decision” (or CID) procedure. Corporations make decisions according to a process that involves human cognition and volition, but is not identical to it. Boards, for example, may make sets of decisions that do not coincide with the preferences of any single member of the board. In some cases, the CID procedure will grant decision making power to a single individual, allowing for cases in which the individual and the corporation can be jointly responsible, but what is important here is that the corporation itself can be held liable for damages.

In the same sort of way, the corporation has the ability to act. It has a “body” that is not only comprised of its workforce, but also of assets which belong to the corporation itself rather than any given individual, shareholder, executive, or worker. Corporations are therefore able to act in ways an individual can, and as such can be responsible, as individuals, for their actions.

In this way, French argues, there is an important moral difference between a corporation and a mob. Both may act collectively, but in the case of harm caused by the mob, it is the members of the mob and the members alone who are responsible and thereby liable to sanction. One cannot harm the interests of the mob itself, since the mob is only the collection of individuals who comprise it. Each member of the mob may face justice, but the mob itself does not. Corporations, on the other hand, because of the CID structure, are themselves liable to official sanction. The CEO of the tobacco company may go to prison, but the company itself may also have to pay a fine, that is, there are two different punishments corresponding to the two different loci of responsibility, one a human and one a quasi-human organization.

Should we thus deem the NFL policy, which penalizes the team for the outbreak caused by unvaccinated players, an allowable application of collective punishment because it is the franchise qua corporation that is being held responsible?

For this to be the case, the individual teams would be treated as corporations and the league, the NFL, as a quasi-governmental structure capable of constructing and enforcing rules upon the teams that fall under its governance structure. That set of rules would then be subject to the regular expectations of any system of justice.

5. Why This Is Not a Trivial Case of Corporate Responsibility

There are two problems with applying this sort of model to the case under consideration. First, it takes the NFL to function like a governmental regulatory agency with independent oversight powers. Second, it takes the teams to be corporate entities. Neither of these are true.

The NFL is certainly spoken of in government-type terms. It has a Commissioner who appears to have chief executive-type functions and power. One hears claims such as, “The League is reviewing concerns about the new onside kick rule”, or, “The Commissioner’s Office handed down a fine to a given player for inappropriate on-field conduct”. These certainly seem to be governmental functions of regulation and legislation, and these created rules are enforced upon the “citizens” of the league, viz., the players.

This *prima facie* governmental structure, however, is belied by the actual organizational structure and power within the league. The NFL does not exist as an artificial individual of the sort needed. The NFL is not an organization, but a confederation. The Commissioner is selected by, and serves at the pleasure of, the owners of the franchises. As such, the Commissioner is not an independent authority, but rather a mouthpiece of management, i.e., for the owners of the teams. To consider the NFL to be a governmental structure would be the equivalent of taking the United Nations to be the locus of authority of the One-World Government, which it is not.

It is true that in times of labor disputes, the league will “lock-out” the players, that is, declare that the sport will not proceed as usual. However, in these cases, it is the individual owners acting in concert, not the league as an independent entity, who have made the decision. To use French’s notions, the league is more like an aggregate, like a mob, and less an artificial entity capable of independent decision-making capabilities like a corporation.

The confederation does act as an artificial entity in some cases. The players’ union, the NFLPA, negotiates with the confederation as if it were an entity, that is, it enters into contractual discussions with the league as if it were an individual and accepts proposals from the league and comes to agreement with the league as if it were a proper governmental structure. However, the contents of these agreements concern exactly the ways in which the NFLPA allows and constrains the ability of the Commissioner and the owners to act as if they were the sort of independent legislative and regulatory entity that would be considered a government. Since the NFLPA agrees to allow the NFL to act as if it were a governmental structure only in certain cases, the league should not be thought of as a governmental structure, but rather as a quasi-governmental structure in which there is shared power among distinct political entities. The players are “citizens” of both, with complete loyalty to neither. The players are partners with the confederation that is the league, not subservient to it and ruled by it.

Even if the NFL could be thought of as a quasi-government with the players as citizens, the second problem with considering this to be a simple case of corporate responsibility is that NFL teams, although they are associated with corporate entities, are not themselves corporations in the requisite fashion.

First of all, we must distinguish between the team and the franchise. The franchise, which is a corporation, builds the team, but it is the team that plays the game. The franchise transcends the season, but the team exists only within the temporal confines of the season. The Pittsburgh Steelers qua franchise have won six Super Bowl titles. The 1975 Pittsburgh Steelers qua team were the Super Bowl X champions.

Central to the discussion here is that both a franchise and a team may be the locus of punishment. In 2016, for example, both the Atlanta Falcons and New England Patriots forfeited selections in that year’s player draft as a result of rule violations. That punishment surely had natural consequences for the teams as they would be constructed in the following seasons, but the punishments were targeted at the franchises. Similarly, in the case under consideration, the forfeiture of a game is a punishment for the team, although it will have natural consequences for the franchise.

To consider whether this case can be understood as a simple case of corporate responsibility, then, we must ask whether the team, and not the franchise that constructs the team, is itself a corporation.

Gimbel, Stern, and Rasmussen [12] argue that there is an ontological difference between corporations and teams. Both may be made up of individuals with a collective goal, but they possess fundamental differences because teams have a “Distributed Internal

Decision" (or DID) structure rather than the CID structure that categorizes corporations. Though the corporate structure determines decision-making and binds members of the corporation, a greater degree of autonomy defines teams. To be a team member is to share a collective goal, but to be independent in crucial ways when making decisions about how to carry out actions on behalf of the team. In American football, the coach may call a fade route to the corner of the end zone, but it is the wide receiver's duty to figure out on his own how to gain distance from the defensive back, and the quarterback's duty on his own to buy enough time in the pocket and to determine whether the receiver is sufficiently open to warrant the throw that the play calls for or if he ought to take some other option, such as scrambling or throwing a check-down pass. There is not a centralized decision-making structure, but rather one that distributes the cognitive load among individuals while still operating as a collective whole.

It is certainly true that portions of corporations are structured as teams, consider for example "sales teams", and that parts of teams may be organized as corporations, such as a head coach having centralized authority over roster cuts. However, these distinctions do not preclude a centralized or distributed decision-making procedure from dominating in particular organized groups. We are able to distinguish organizationally between teams and corporations in how they function. To hold otherwise would surely be to commit the fallacy of the continuum.

Further, Gimbel, et al. [12] argue that what makes a team into a sports team is that the team possesses a "ludic telos". A telos is ludic if and only if it is victory oriented. One may have a variety of teloi in approaching play—enjoyment, education, or exercise—but what differentiates a sports team from a team merely engaged in a sporting activity is the collective goal of achieving victory. It may be the case that not all players possess this. Perhaps, one cares only for one's own statistics, not whether the team as a whole wins or loses, but that simply demonstrates that again in this case, the team is not a mere aggregate, but an artificial individual distinct in identity from its parts.

Further, this ludic telos establishes the collective interest that is thereby subject to harm in an official sanction. Since the team has victory as its collective goal, the forfeiture is thereby a team punishment.

As the whole does not make the decisions, the difference in organization prevents this from being a simple case of corporate responsibility. Penalizing individual players for a decision made autonomously by other players as opposed to a centralized decision-making procedure undermines the necessary conditions for corporate responsibility and puts us back in our original conundrum.

One still might raise the objection that we hold entire teams responsible and penalize them accordingly for in-game penalties committed by individual players. For example, if the left guard commits a holding penalty, the entire team is moved back ten yards. Could league issued punishments for COVID-19 outbreaks be a similar sort of case?

The answer is again, no. In the case of the in-game holding penalty, the player who committed the foul was an agent explicitly acting on behalf of the team. The left guard was executing his role in the play—that is, he erred while being a player playing the game.

In the case of a player's decision to vaccinate or not, that decision is not undertaken in a ludic context as an agent of the team. The player's decision is not made as a player qua player, but qua patient, that is, as an autonomous individual making medical decisions for himself away from "the office". There is no doubt, as has been seen during the season, that such decisions have natural consequences for the team, as many medical decisions would. However, that the act has natural consequences for the team does not make it an act undertaken in-play as an agent of the team.

Secondly, the left guard's illegal hold is a violation of the rules because it grants an unfair advantage to the team. Since the player was acting (1) as an agent of the team (2) in a way that the team collectively stood to undeservedly benefit, i.e., derive positive natural consequences, from the illegality of the act, the collective can be penalized for the action of one of its autonomous parts.

In the case of the unvaccinated players causing a COVID spike, on the other hand, (1) the decision not to vaccinate is not made by a player qua player—that is, it was not made in a ludic context, and (2) it is not an act made by the player to help the team in an unfair fashion. Quite the opposite. The decision in no way helps the team, and in this case, serves to harm the team. The player has harmed, not benefitted the team by more likely exposing his teammates to the virus, making it more likely that they will fall ill and that the team will lose the services of at least some players for upcoming games. The act has possible negative natural consequences, not predictably unfair positive natural consequences.

For straightforward corporate responsibility, the harmful act would have to be committed by a part of the corporation acting on behalf of the corporation in order to wrongfully acquire a benefit for the corporation and there would have to be a governmental structure in place to regulate and sanction the corporation for such violations. In this case, the player is not acting in a ludic context as an agent of the team, the team is not structured like a corporation, the act does not wrongly benefit the team, and the NFL is not a governmental structure of the sort needed to police corporate entities. Thus, if this is not an example of corporate responsibility or team responsibility, either of which would justify the collective punishment of the forfeiture rule, is the policy otherwise justifiable?

6. The Case against the Policy

Perhaps, then, the policy is simply unjust. There certainly is an argument to be made. As discussed above, the policy does hold the potential for punishing the innocent. If it were fully invoked, vaccinated players would suffer for actions that were not their own.

This is exacerbated by the fact that such collective sanctions are not necessary. While it is true that teams get penalized for rule violations during play, in egregious cases the league will issue fines to individual players days after the game. This shows that, with respect to doling out punishment, the league is clearly capable of painting with a fine brush and not merely a roller. Further, given the policy's clear enunciation of a willingness to reschedule games wherein a spike results from breakthrough cases among vaccinated players, it demonstrates the non-necessity of the overly harsh punishment of a forfeiture. Thus, since there is a way to avoid punishing the innocent by rescheduling and there is a means of exacting a focused punishment that only reaches the guilty, the forfeiture punishment seems unjust.

7. Hybrid Justice Systems and Draconian Punishments

We concede that at first glance the COVID-19 policy of the NFL seems problematic from a moral perspective, but a deeper understanding of the context and of unexpectedly related systems of justice will show that the two apparent ethical weaknesses of the system are, in fact, strengths that allow us to laud the system.

What makes the system unusual and in need of a comparative model concerns the point made earlier about these teams being incapable of being thought of as corporations. A corporation is an autonomous artificial individual as French describes, that is, a self-contained entity that makes decisions and acts in its own self-interest. In a corporation, there is a hierarchy and founding documents that divide tasks and authority among the members of the corporation. People have delineated roles according to the internal structure of the corporation and it is from this definition that the "mind" of the corporation emerges.

The NFL, on the other hand, is a much more complicated beast. There is a league comprised of the teams, each of which has an owner. The league also possesses a Commissioner, who in one sense presides over the teams by using his authority to make certain decisions but in another sense serves the teams by carrying out the collective will of the owners. The individual teams themselves are complex in that they are comprised of management that is hired by and that serves the team owner and by players who are hired by the team, but who belong to a union that cuts across teams throughout the league. There is certainly not the sort of clean pre-established structure needed to consider the NFL or its teams as corporations despite the fact that they exist as collectives with a profit motive.

If, then, we cannot look to corporate ethics as a source of intuitions by which to judge the NFL COVID-19 policy, where ought we look? This peculiar context requires us to move outside of the economic and into the political realm. The situation here more resembles a political hybrid justice system.

Many nations, especially those in the developed world, have strong central governments in which the citizenry have a strong sense of national identity. These nations possess an organized structure, perhaps constitutionally-based, that creates a central legislature that makes the laws, a police force that enforces them, and a judiciary that interprets the laws, judges, and levies punishments. The citizenry sees the government as legitimate, the judiciary as generally fair, and therefore justice as enforced within the system is likewise deemed legitimate.

However, there are other nations in which this is not true, where the central government is weak, where there is no trust by the citizens in the fairness of the national justice system, or where tribal or clan identity is stronger than national identity. In these cases, what emerges is not a centralized justice system, but a hybrid system.

In a hybrid system, there will be a combination of national, local, and tribal justice systems that may contradict each other's requirements and yet are forced to work together. "Hybrid mechanisms operate through informal and formal networks to deliver 'justice' and secure the community from further escalation of violence arising from retribution. While most hybrids are local innovations and assured by the predominance of, or coalition of, local power holders, local-national innovation has also emerged in responding to local demands for speed, flexibility, and adequacies of remedies and outcomes" [13] (p. 218).

In cases where there are divided loyalties among those governed, it is important to construct systems of justice that meet local needs. Deinla [13], for example, considers the Autonomous Region of Muslim Mindanao (ARMM) within the Philippines. The citizens of Mindanao have a long history of conflict and grievances with the central government. There is a stronger connection to the local than to the national, indeed, there is widespread mistrust due to historical and ongoing conflicts. Authority is found in the state, the sultan, and the datu (the village chief), and these overlapping claims require hybridization through "cooperation, negotiation, or co-optation" [13] (p. 226).

The threat of lawlessness is overcome by allowing the interplay of the conflicting systems without a clear and strict hierarchy or structure. The specifics of the situation are allowed to determine the basis of negotiation of authority and punishment in different contexts. When, for example, there was a spate of thefts of baby formula following a spike in violence in a specific area, the usual means of trying cases of theft from stores was shifted from the governmental to the village level because the crimes exposed threats to the well-beings of families [13] (p. 229). The flexibility in the lack of an impartial system is seen as the key to justice. "Bringing the parties to agree to settle the dispute is a complex process that requires the justice provider to trace common lineages or relationship between the disputing clans. Security, speed, flexibility, and participations of the parties are identified as essential in the process of justice delivery in ARMM and are synonymous with justice itself" [13] (p. 231). In the usual sorts of context we consider, impartiality is a virtue; but in cases requiring hybrid systems, Deinla argues, justice requires flexibility.

Furr and Al-Serhan [14] make a similar case with respect to the Bedouins of Jordan and Afghanistan. Bedouin tribes had been nomadic herders in central Asia and the Middle East for centuries. After World War I, when empires decolonized and countries were created, national borders cut across traditional grazing routes. Clans who had followed those routes for generations could no longer do so. They were now citizens of countries they had never heard of and to which they had no connection. For them, their tribe and their clan were foremost in their identity. These groups had their own cultural mores, rules, tribunals, and rituals connected with the dispensing of justice.

Additionally, the states of Jordan and Afghanistan have gone through periods of weakness. As a result, we have tribes who feel disconnected from central governments that demonstrate shaky authority. When a member of the tribe feels aggrieved as a victim

of a crime, that person will seek traditional tribal means for redress if there is no faith in the strength, honesty, or legitimacy of the governmental justice systems. As a result, the Bedouin in these countries have developed hybrid systems that combine elements of the tribe with that of the state.

One result of this is that aspects of traditional systems not seen as acceptable in modern state-based systems remain. Consider, for example, the traditional Bedouin response to murder. “When a murder takes place in a village, the male members of the victim’s family have the right under Bedouin law, to murder a male member of the perpetrator’s family. The victim’s family need not choose to kill the perpetrator” [14] (p. 24).

Often, Furr and Al-Serhan point out, the members of the victim’s family will intentionally choose not to kill the murderer but rather a relative because causing the death of someone else within the clan will lead to further shame for the murderer within his own group. There is a rule, however, for who may be the legitimate victim of such a revenge killing. It must be someone with a common ancestor within five generations (although governmental representatives have gotten most tribes to agree to limit it to three generations).

This acceptance of the punishment of someone who is innocent violates the first of the principles discussed above. Yet, the hybrid system permits it. Indeed, if there is a murder, the state justice system springs into action and its police locate the family of the murderer and escort them to a distant, undisclosed location. “This evacuation process (J’lwa) is carried out by and under the supervision of the policemen in the village to ensure the safety of the evacuees” [14] (p. 24). The state does not seek legal remedies to prevent revenge killings, but accepts that this is the way of the Bedouin, and instead acts to prevent them while still allowing them.

This evacuation begins a period termed *Atwa*, a security truce which lasts an indeterminate period of time. When sufficient time has passed—it “may be weeks, months, or years” [14] (p. 25)—the families are brought together for a *Ja’ha*, a tribal mediation session overseen by a prominent and respected Sheik. Here, the parties conduct specific rituals including a negotiation of damages (blood money), after which everyone drinks coffee together and the matter is deemed concluded.

The two important elements of this system for the current consideration are (1) that the hybrid systems again possess a looseness that allows for contextualized partiality, and (2) that it includes the possibility of extremely severe punishment of the innocent for crimes of the guilty, innocents who are connected to the perpetrator. The idea of revenge killing ought to strike us as deeply problematic. Why should one have the right to kill an innocent person under a system of justice when that seems to make the system inherently unjust?

However, such a system has an important by-product. If any member of an extended family is the legitimate target of reprisal, then it provides strong incentive for the entire extended family to police itself. In situations of weak governments, where the central authority cannot be trusted or does not have the power to enforce the rules, it becomes crucial that the smaller non-governmental institutions—in this case the clans and tribes—take up that role. The threat of death for anyone in the group, if some other member acts inappropriately, will cause the groups to police themselves.

While this is clearly a moral silver lining, surely it does not legitimize the brutal punishing of the innocent. However, this is where the hybridization is important. In this case, the government, by permitting this problematic means of justice, also does what it can to make sure it is never actually exacted. The use of the state-sanctioned police to protect the potential victims in the case of a murder in a village allows the threat of the punishment, incentivizing self-policing, while minimizing the likelihood that such a draconian sanction will ever occur.

This is where these models are appropriate for understanding the COVID-19 policy of the National Football League. In the cases of the Philippines, Jordan, and Afghanistan, we have societies without functioning hierarchical structures undergirding their justice systems because of historical animosity from those living in isolated localities, local identities that

trump national identity, or a simply non-functional state. While the NFL is none of these, it finds itself in a similar situation because of the complex social architecture of the league: the league administration is controlled by owners, there are individual teams with their own cultures, and there is a players' union that cuts horizontally across the structure. There is no locus of authority, certainly not one strong enough to require players to get vaccinated. Yet, unvaccinated players risk both the health of the other players and the financial viability of the league. No one benefits from unvaccinated players and everyone is at risk from them. It is therefore imperative to maximize the vaccination rate within the league. The question is "how?"

The NFL policy can be seen as falling in line with the hybrid systems, especially that which accommodates the Bedouin. As with the Jordanian acceptance of revenge killings, which potentially punishes the innocent for the crime of someone else, the NFL has a form of collective punishment in mandating the forfeiture of a game by the entire team for the decision of one or a subset of players. Again, all else being equal, such collective punishment is morally unacceptable. However, in the case of the Jordanian Bedouin, it is ethically permissible for two reasons: (1) it creates an incentive for otherwise ungoverned subpopulations to police themselves, thereby creating a more stable society for all, and (2) there are safeguards overseen by the state to make sure that the generally unacceptable punishment rarely, if ever, occurs. The consequences of honor killings, both to individuals and to the stability of the society, are so severe that they threaten the structure itself. This unusual and dire situation creates a utilitarian justification for overriding the normal dictates of justice, which are held to apply *ceteris paribus*. However, it is also essential that the override be constructed in a fashion that meliorates the potential risks of violating the principles of justice.

We see precisely the same set of circumstances in the case of the NFL during a global pandemic. The virus is so contagious and the results of the associated illness sufficiently dire for individuals (in both the short and long term) that the effects of multiple players simultaneously occupying the COVID list have significant deleterious effects on the individual games and the league as a whole. Given that it too is unusual and dire, the utilitarian justification also applies to this case as well.

Further, there are structural similarities between the two cases examined and the NFL/COVID context. Professional American football is a contact sport in which injuries, some career-ending, occur with regularity. Lasting health effects from concussions, for example, are sadly common. The expectation of each player is the willingness to sacrifice for the whole. Players often use metaphors such as "going to war together" to describe playing on the same team, and often refer to their teammates in familial terms, such as "brothers". As such, there is a commitment to team that is not unlike the commitment to clan and tribe seen among the Bedouin.

Furthermore, the two entities share similar desires to bring glory and not shame to the group. Offensive, defensive, and special units all execute plays where each relies on the other to do their job properly. Coordination is combined with maximal personal effort in order for the whole to function properly. As a result, there is a deep sense of connectedness in a locker room, often extending to coaches and other team personnel.

This means that the threat of collective punishment will likely give rise to successful self-policing within the team. While there is no authority within the league (e.g., the Commissioner, the owner, etc.) that could require players to get vaccinated, the threat of collective punishment and the intrinsic culture of the locker room should exert pressure on individual players to get vaccinated who otherwise would not feel the need to do so.

However, again, utilitarian justification for unreasonable punishment is insufficient. In addition, there needs to be credible reason to believe that the morally unacceptable punishment is highly unlikely to ever take place. In the case of the Bedouins, it is the state that oversees the conditions that make it unlikely.

Similarly, built into its COVID-19 policy, we see the NFL doing everything reasonable to make sure the ultimate sanction is never needed. This is where the ambiguity of the

policy turns from a moral detriment into a moral virtue. Procedural justice generally requires the elimination of looseness to ensure impartiality. However, in the case of the NFL COVID-19 policy, the wiggle-room built in for the Commissioner is designed to give the authority maximal opportunity to head off the circumstance that would require the otherwise problematic punishment. The village police in Jordan do not try to intervene with those who have the right to kill for revenge under local, but not national law, while also doing whatever they can to prevent the actual revenge killing by evacuating the potential victims. The NFL Commissioner does not interfere in the decision to get or not get the shot, but does whatever is possible to obviate the need for a team to forfeit. Again, it is a general truth that equivocal or inexact language ought to be avoided in systems that seek to be just. However, such looseness is allowable in this case because it is part of hybrid justice system wherein the authorities of the highest level are leaving policing to the groups themselves under threat of otherwise problematic retribution.

It is then true *ceteris paribus* that punishing the innocent is wrong and that just systems should be as exact as possible to eliminate partiality. However, in cases where there is not or cannot be a strong centralized authority overseeing a justice system, hybrid systems may be the best options. In such cases, the otherwise intuitively true requirements may need to be set aside. In the case of the NFL COVID-19 policy, the situation may not first appear to be one like we see in Afghanistan or Mindanao, but when we look close enough, it is. As such, under further review, the policy stands; that is, the seeming flaws of the NFL policy turn out not to be flaws at all.

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