"Cheating, Gamesmanship, and the Concept of a Practice"

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In 1980, the Virginia Senate had to decide whether to ratify the Equal Rights Amendment. In order for ratification to succeed, an absolute majority of the Senate (21 of 40) was required to support the amendment. Leading up to the vote, support for ratification was evenly split, with twenty senators in favor and twenty opposed. If a tie occurred on the official vote, Senate rules provided that the Senate's presiding officer, Lieutenant Governor Charles Robb, would be granted a vote to break the tie. On this issue, Robb was projected to support ratification. Thus, the anticipated result was that the amendment would be ratified, 21-20.

In practice, however, ratification of the E.R.A. failed despite no one changing his or her mind on the merits of ratification. Paradoxically, the amendment was defeated because Senator John Chichester, an E.R.A. opponent, decided not to vote against the bill, choosing instead to abstain. By abstaining, his vote counted neither for nor against the amendment, making the final vote 20-19, with one abstention. Since Chichester's abstention meant there was no tie, and thus no need for the lieutenant governor to cast a tiebreaking vote, the amendment failed to meet the twenty-one vote threshold required for ratification. After the amendment's defeat, Lieutenant Governor Robb observed that Chichester's decision was one the senator would "have to wrestle over with his own conscience," implying Chichester's voting trick was ethically dubious despite being consistent with the existing rules.[1]

This incident, recounted in William Riker's classic *The Art of Political Manipulation*, is a paradigmatic example of *gamesmanship*. Gamesmanship is a notion that originated in sports, where it refers to advantage-seeking strategies players use that violate good sportsmanship but nonetheless are permitted by the rules and thus not "actually cheating."[2] The concept has broad applicability across rule-governed activities ("practices").[3] One can "game" the tax code, a moral code, computer code, or—as in the case describe above—a legal code. Moral intuitions regarding gamesmanship vary, both across individuals and across cases. To some observers gamesmanship looks indistinguishable from cheating. Something like this seems to have been the position of Lieutenant Governor Robb regarding Chichester's abstention ploy. To

[1] William H. Riker, *The Art of Political Manipulation* (New Haven: Yale University Press, 1986), 103–5.
[2] Stephen Potter, *The Theory and Practice of Gamesmanship or the Art of Winning Games Without Actually Cheating* (BN Publishing, 2008).
[3] Following Rawls, a practice is "any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure." Examples of practices include "games and rituals, trials and parliaments." John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (January 1955): 3.

others, gamesmanship looks like admirably creative use of the rules. (This happens to have been Riker's assessment of the E.R.A. case.)

This paper addresses the question of whether gamesmanship is moral. Gamesmanship is supposed to be morally superior to cheating since it does not involve rule-breaking. Upon inspection, however, gamesmanship reveals itself to be little different from cheating. Many alleged instances of gamesmanship are more accurately characterized as pseudo-gamesmanship since they possess only superficial conformity with the rules. Pseudo-gamesmanship is just cheating by another name. Real gamesmanship does exist, but even it is wrong in essentially the same ways as cheating. Real gamesmen use the rules of practices to pursue targets that would be unthinkable from the perspective of someone who really internalized the value of the practice. Allowing the rules to be used in this way risks transforming the practice into a sham. As a consequence, gamesmanship is reasonably rejected by other participants in the practice. Those who pursue it anyway avoid none of the wrongs of cheating.

§1. Cheating

In his account of cheating, Stuart Green gives voice to the widespread intuition that to say *X* has cheated requires her to have violated a rule. "Merely playing things close to the line may earn *X* a reputation as dodgy or wily or unsportsmanlike, but, unless *X* actually crosses the line, she has not cheated."[4] Green does not defend his assertion that rule breaking is conceptually necessary for cheating, but let us take it as a given since it tracks conventional usage. Observe that in the process of making rule-breaking necessary to cheating, Green cannot help acknowledging that there are many actions that resemble cheating despite not violating the rules. These are the "dodgy or wily or unsportsmanlike" forms of rule-consistent strategies that I call gamesmanship. Because gamesmanship is a concept whose defining characteristic is that it is "not cheating," a clear conception of what cheating is and why it is wrong will aid our evaluation of the morality of gamesmanship.

1.1. Cheating Is Unfair

Conceptual analyses of cheating have been produced by philosophers of sport, but their arguments, while insightful, are predictably restricted in scope.[5] Stuart Green is one of the few moral philosophers to

[4] Stuart P. Green, "Cheating," in *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, Oxford Monographs on Criminal Law and Justice (Oxford, UK: Oxford University Press, 2007), 58.

[5] For example, see Warren P. Fraleigh, "Intentional Rules Violations—One More Time," *Journal of the Philosophy of Sport* 30, no. 2 (October 2003): 166–76; Oliver Leaman, "Cheating and Fair Play in Sport," in *Ethics in Sport*, ed. William J. Morgan, Klaus V. Meier, and Angela J. Schneider (Champaign, IL: Human Kinetics, 2001), 91–99; J.S. Russell, "Is There a Normatively Distinctive Concept of Cheating in Sport (or Anywhere Else)?," *Journal of the Philosophy of Sport* 41, no. 3 (September 2, 2014): 303–23; Hugh Upton, "Can There Be a Moral Duty to Cheat in Sport?," *Sport, Ethics and Philosophy* 5, no. 2 (May 2011): 161–74.

offer a general conception of cheating and its place in moral practice. According to Green, cheating occurs when someone

(1) [violates] a fair and fairly enforced rule,

(2) with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship.[6]

Assuming this conception as our starting point, it is not hard to explain why cheating is wrong. As common sense would have it, cheating is objectionable because it is unfair. There are two senses in which this is true, each corresponding to one of the elements in Green's definition. First, violating a fair and fairly enforced rule while continuing to benefit from the cooperative behavior of others engaged in the practice is a clear failure of reciprocity, a violation of the Hart-Rawls *fair play principle*. In H.L.A. Hart's famous formulation:

> "...when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to similar submission from those who have benefited by their submission."[7]

That is to say, rule-breaking is a form of wrongful free-riding. It is a failure to bear one's share of the burden of supporting a mutually beneficial practice. The wronged party is composed of those who have sacrificed their liberty by following the rules, thereby maintaining the practice from which the cheater benefits.

Violating the fair play principle is wrong regardless of whether the cheater's rule-breaking is effective. Successful cheating, however, is unfair in a second respect as well. Namely, successful cheating results in the cheater securing an unjust advantage over those who played by the rules. This is a comparative, distributive injustice. Think of a practice's rules as a procedure for distributing the benefits of the practice.[8] For example, in a competitive practice like electoral politics, the benefit being distributed is *likelihood of winning*. Cheating, by definition, involves trying to secure a greater likelihood of winning than is procedurally fair. Because other benefits often accompany winning, such as the perquisites of power that accompany holding a public office, these too may be unjustly distributed as a consequence of someone's decision to cheat.

1.2. Substantively Justified Cheating

By grounding cheating's wrongness partially in its distributive consequences, one may be tempted to think cheating can be justified in cases where procedural justice undermines substantive justice. I do not

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[6] Green, "Lying, Cheating, and Stealing," 57.

[7] H. L. A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64, no. 2 (April 1955): 185. See also John Rawls, "Legal Obligation and the Duty of Fair Play," in Collected Papers, ed. Samuel Richard Freeman (Cambridge, Mass: Harvard University Press, 1999), 117–29.

[8] They are more than *just* a distributive procedure, however. See the next section for more on this point.

wish to downplay this possibility, but a few words of caution are in order. First, breaking a fair and fairly enforced rule in pursuit of substantive justice is still a violation of the fair play principle. Second, there are many cases in which it is unlikely or even impossible to achieve substantive justice by cheating. The possibilities depend on what type of procedure one is considering violating.

John Rawls identifies three forms of procedural justice: *perfect*, *imperfect*, and *pure*. Perfect procedural justice obtains when "there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it."[9] Rawls cites the "I cut, you choose" method of dividing a cake as an example of such a procedure but acknowledges that meaningful instances of perfect procedural justice are rare. There is never a good reason to cheat at a practice whose rules are perfectly procedurally just because by definition following the rules will result in a substantively just outcome. It is logically *possible* that one can violate such a procedure and still achieve substantive justice, but the certainty the procedure provides will have been sacrificed.

Imperfect procedural justice is far more common. As with perfect procedural justice, there is an independent standard for deciding which outcome is just, but this time "there is no feasible procedure which is sure to lead to it."[10] Rawls's example of imperfect procedural justice is a criminal trial. When someone is charged with a crime there is a procedure-independent "right answer" at which the trial aims—namely, that the defendant should be convicted if she is guilty and acquitted if she is innocent. The procedures that make up the trial exist to maximize the likelihood that this is what will happen. However, it always remains a possibility that the trial will "get it wrong" and convict the innocent or acquit the guilty. In such cases an (imperfect) procedurally just process has generated a substantive injustice. The relative weight we should accord to substantive justice versus procedural justice is contested and almost certainly context dependent, but in cases like this cheating might be justifiable.

Pure procedural justice is the third possibility. It is distinguished from perfect and imperfect procedural justice by the fact that there is no independent standard of what constitutes a just outcome. The justice of the outcome depends solely on the fairness of the procedure itself. As an example, consider gambling. Any distribution of winnings at the end of the night is just as long as the odds were fair, no one cheated, etc. Cheating always results in a substantive injustice in a case of pure procedural justice.

Rawls's analysis reveals that cheating to secure substantive justice is only a potentially justifiable strategy in cases of imperfect procedural justice. This is an important insight, especially for political liberals, because the fact of reasonable pluralism means that large areas of political disagreement are properly treated as cases of pure procedural justice. That is to say, in a matter on which reasonable people

[9] John Rawls, *A Theory of Justice*, Revised ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 74.
[10] Rawls, 75.

can disagree, the only substantively just political outcome is the outcome generated by a fair decision procedure; cheating in pursuit of substantive justice becomes self-defeating.

1.3. Cheating and Constitutive Failure

Thus far we have established that cheating is wrong because it violates the fair play principle and, when successful, it is a distributive injustice. Cheating is also wrong for reasons that extend beyond its unfairness. Specifically, cheating can result in a *constitutive failure*. When cheating results in a constitutive failure it opens up the possibility of new forms of second-order wrongdoing.

The idea of a constitutive failure originates in Rawls's seminal article "Two Concepts of Rules." In this piece, Rawls defines a practice as "any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure."[11] Essential to this conception is that practices are not merely regulated by their rules—they are also constituted by them. This means that actions falling under a practice cannot be described as that sort of action without the existence of the practice. The rules provide the "stage-setting" necessary for the actions.[12] The same physical moves might be enacted without the practice, but they would have to be described in some other way. Consider the practice of baseball. The rules of baseball define the office of umpire and the roles of pitcher and catcher, batter and outfielder. They define what actions count as a "balk" and what the penalty is for committing the infraction. Because the rules of baseball constitute the practice, one can throw or hit a ball without playing baseball, but one cannot throw a "strike" or hit a "home run" without playing baseball.

The possibility of a constitutive failure follows from this conception of practice rules. A constitutive failure occurs whenever someone claims to be engaged in a practice-defined activity but that description fails to apply because she is not following the rules that themselves constitute that form of activity. Cheating, because it involves violating the rules of a practice, results in constitutive failure. For example, baseball is a practice constituted by its rules. The only way to play the game is to follow the rules. Therefore, if someone breaks the rules (i.e. cheats), they are no longer really playing baseball at all. If they cheat in secret, they are merely pretending to play baseball. If they cheat in the open, they are playing some game that closely resembles baseball, but does not actually constitute it. From this it follows that a ball hit out of the park by a cheater—someone using a corked bat, for instance—is not a home run because a "home run" is a practice-dependent action. Only someone playing baseball can hit a home run. In a political context, a politician who fabricates votes does not really win her election, because "winning an election" is a practice-dependent activity constituted by following the rules of electoral politics.

[11] Rawls, "Two Concepts of Rules," 3.
[12] Rawls, 25.

1.4. Objections to the Constitutive Account

According to the constitutive account of practices, compliance with the procedure established by a practice constitutes participation in the practice. Conversely, the only way to engage in a practice-defined action is to actually follow the rules. As they stand, however, both formulations fail to account for common cases of engagement in practices.

First, it is possible to imagine situations where an individual acts in conformity with the rules of a practice without actually engaging in it. There are at least two ways this might happen. One involves cases where an agent follows the rules "incidentally," so to speak. For example, we can imagine a skilled mimic who knows none of the rules of chess and yet "plays" chess, without violating any of the rules, by simply copying previously seen moves. (One might argue this is how computers "play" chess.) Despite conforming to the procedures that constitute chess, it seems wrong to say the mimic "plays chess." Another set of cases involves rule-following that fails constitute a practice because the necessary background conditions for the practice do not exist, as is the case when a practice has become a *sham*. A practice becomes a sham when "the noncompliance of one party, at least beyond a certain threshold, [makes] it the case that the other is not even participating in the activity defined by the practice rules, despite the fact that the latter party is following the letter of the law."[13] For instance, it may be impossible to engage in the practice of "negotiation" with someone if they refuse to engage in good faith, no matter how one behaves oneself.[14]

Second, examples abound of people actually engaging in practices despite breaking some of the rules.[15] For instance, when a basketball player commits a foul (i.e. breaks a rule), it seems inaccurate to claim she is no longer playing basketball because she is not following the rules. Similarly, it is no more accurate to say that a basketball game is not "real basketball" because the referees overlook countless minor fouls that the rules technically prohibit.

We can rescue the constitutive conception of practices from both objections by adding a few further conditions to Rawls's account. First, the objection illustrated by the example of the mimic can be met by drawing attention to what H.L.A. Hart calls the "internal aspect" of rules.[16] According to Hart, those who are truly engaged in a practice not only conform to the rules as a matter of descriptive fact, but they also see their conformity as justified by the rules. In other words, they see themselves acting within the rules *because of* the rules, not simply observing them from the outside. Accordingly, the rules are more than descriptive regularities; they provide reasons for action. This also means that those truly engaged in a

[13] Tamar Schapiro, "Compliance, Complicity, and the Nature of Nonideal Conditions," *Journal of Philosophy* 100, no. 7 (2003): 338.
[14] Schapiro, 337.
[15] Michael Sean Quinn, "Practice-Defining Rules," *Ethics* 86, no. 1 (October 1975): 76–86; Susan Wolf, "Two Concepts of Rule Utilitarianism," in *Oxford Studies in Normative Ethics*, ed. Mark Timmons, vol. 6 (Oxford, UK: Oxford University Press, 2016), 123–44.
[16] H.L.A. Hart, *The Concept of Law*, 2nd ed, Clarendon Law Series (Oxford, UK: Clarendon Press, 1997), 89.

practice recognize "the violation of a rule as not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."[17] Therefore we might say that only *internally normative* compliance with the procedure established by a practice constitutes participation in the practice.[18] However, even internal compliance with the rules cannot constitute participation in a practice that has become a sham. This reveals the degree to which practices are dependent on the actions of others, not just rule following by oneself.

The second objection, that it is possible to engage in a practice despite some forms of rule-breaking, loses its force once two misunderstandings are cleared up. First, it is incorrect to treat all rule-breaking as a violation of the *practice as a whole*. Most practices "internalize" specific forms of rule-breaking, creating practice-internal responses to different infractions. This is most evident when one considers the idea of a "foul" in sports. Fouls themselves are constituted by the rules of the game. One cannot foul without playing the game. The rules intentionally enable fouling in order to take a subset of a practice's rules and assert that violations of those rules need not undermine the practice, as long as they are treated according to the rules of fouling. Essentially, it is a declaration that a certain degree of procedural sloppiness is part of the practice itself. This sloppiness is not to be ignored, but rather accounted for, in the form of the penalty prescribed by the foul. Not all rule-breaking is, or ought to be, internalized. Some rules are too fundamental for their violation to be internalized, and some violations are too severe to be internalized. For example, it is a foul to hit an opposing basketball player in the head or neck. If you do this, you will be assessed a foul and the opposing team will receive the ball and/or free throws. Egregious fouls, however, will result in an ejection from the game.[19] They go too far to be internalized as part of the practice; to internalize them would risk transforming the game from basketball into boxing.

The other misunderstanding involves mistaking the formal rules of a practice for the only rules of the practice. In reality, rulebooks are not the sole source of rules constituting a practice. All practices are composed of varying degrees of stated and unstated rules and norms. Some practices are more formalized than others, but no practice can escape the need to be partially constituted by unstated norms. At a minimum, interpretive norms are necessary to enable individuals to arrive at a shared understanding of the formal rules. Precedential norms also shape the development of a practice over time, and there is no *a priori* reason to treat them as less constitutive than the formally stated rules of the practice.[20]

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[17] Hart, 90.

[18] For what it is worth, I believe Rawls's original account already included this requirement, although it is not stated explicitly. Nonetheless it is implicit in the claim that defending a move within a practice on some basis other than the rules of the practice is both a justificatory and a constitutive failure. Presumably it is a constitutive failure because it is evidence that one was not truly following the rules since one lacks a proper appreciation for their normativity.

[19] In basketball terminology, "flagrant 2" fouls.

[20] Although unstated rules and norms are usually more *contestable*.

Take chess as an example of a practice that can be *almost* completely formalized. Even chess relies on interpretive norms for the formal rules to actually constitute the practice of chess we know. At the most basic level, the formal rules require the "grammatical" norm that allows people to recognize chess to be a *game*, and not, say, a *ritual*. Following Wittgenstein, the "grammar" of chess cannot be fully formalized in its rules, it can only be understood through actual usage.[21] Hubert Schwyzer helps makes this point when he writes that "what makes chess-playing the kind of thing it is is a matter of what sorts of things it makes sense to say with respect to chess, of what sorts of things are, in a logical sense, relevant or appropriate to say with regard to chess."[22] For instance, it makes sense to say that a chess match was "well played" because we understand it to be a game, and we have access to the grammatical concept of what a game is. Games are the kinds of things that one plays, and play can be of varying qualities. However, it is perfectly possible to imagine that the exact same rules of chess could be used in a foreign culture to express a religious ritual. Ritual "chess" would not be a game—and hence not our practice of chess—it would be a sacred rite, and therefore it would be nonsensical to think it could be "well played."[23]

1.5. When Constitutive Failures Lead To Moral Failures

Constitutive failures can generate moral failures in a number of ways, the most obvious of which is if they lead to deception. In addition to any deception that is required for a cheater to "get away with" her rule breaking, knowingly describing an action in practice-dependent terms while failing to engage in the practice is dishonest. This dishonesty regularly leads to further wrongdoing when someone continues to act as if she was engaged in a practice, but her constitutive failure has changed the normative status of her actions. To better explain this notion, it is useful to introduce Alasdair MacIntyre's distinction between internal and external goods.

In *After Virtue*, MacIntyre maintains that practices provide practitioners with two kinds of goods. "External goods" are the benefits contingently attached to a practice, while "internal goods" are those that cannot be had without actually engaging in the practice.[24] For example, an external good attached to chess-playing might be the prestige and prize money a winner receives. Prestige and prizes are external goods because they can be achieved in ways other than by playing chess. However, the particular form of satisfaction that comes from playing chess well is an internal good of the practice. It is

[21] Ludwig Wittgenstein, *Philosophical investigations*, trans. G. E. M. Anscombe, P. M. S. Hacker, and Joachim Schulte, Rev. 4th ed (U.K.: Wiley-Blackwell, 2009). §§371, 373.
[22] Hubert Schwyzer, "Rules and Practices," *The Philosophical Review* 78, no. 4 (October 1969): 454.
[23] Schwyzer, 456–62.
[24] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981), 176.

> "internal for two reasons: first…because we can only specify [it] in terms of chess or some other game of that specific kind…and secondly because [it] can only be identified and recognized by the experience of participating in the practice in question."[25]

Another distinguishing characteristic of external goods is that they tend to be distributable in ways that internal goods are not. Thus, external goods are something for which one can compete, with winners and losers. Internal goods may be produced by competition, as in the chess example, but "it is characteristic of them that their achievement is a good for the whole community who participate in the practice."[26] Only one chess-player can claim the prestige and prize money from winning a tournament, but everyone who plays can benefit from exercising the excellences that chess calls forth.

Paying attention to the difference between external and internal goods provides an answer to why a constitutive failure can amount to a moral failure, for if one leaves a practice behind, one can no longer enjoy the internal goods of the practice. Only external goods can be pursued by bypassing the practice itself. And the internal goods of practices are quite valuable. Two of the most normatively significant forms of internal goods shared by many practices are the ability to create *normative liability* and *shared wills* among practice participants.

Consider first the internal good of normative liability. Normative liability may sound like an undesirable thing, but what it means is that participants in a practice are liable to have their normative situation changed by their participation in the practice. That is to say, they may acquire new duties or rights, powers or liabilities, etc.[27] The ability to change one's normative situation is a primary reason for engaging in many practices. It enables new relational possibilities. Promising is a paradigmatic example of this. When one makes (or receives) a promise, one acquires new duties (or rights) that did not exist prior to entering the practice. Viewed from a sufficiently abstract vantage point, there is an almost magical quality about this process—a promise is like an incantation which, faithfully executed, conjures up a new normative situation. The ability to alter normative relations between promiser and promisee is whole point of the practice. Promising is far from the only practice to possess normative power. Consider the practice of boxing: ordinarily, a person has a right to be secure from physical assault and a duty not to assault others. However, once a boxer steps into the ring, touches gloves with her opponent, and the bell sounds, she becomes liable to be struck by her opponent and she gains license to strike back. Of course, the extent of this license and liability is constrained by the rules of the practice. For instance, engaging in a boxing match does not grant permission to hit an opponent "below the belt."

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[25] MacIntyre, 176.
[26] MacIntyre, 178.
[27] This is simply another way of saying that practices possess normative power over their participants. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning*, ed. Walter Wheeler Cook (Union, N.J.: Lawbook Exchange, 2010).

If one leaves a practice, the rights, duties, permissions, and liabilities of the practice also disappear. If someone is accused of assault and her defense is that it was not assault because "we were boxing," it matters whether they were really boxing. In this way, boxing's normative power is revealed to be an internal good to the practice. Since cheating requires that one continue acting as though one is still part of the practice (and thus as thought the permissions still applied to oneself), cheaters risk committing further wrongs by acting as if they possess normative permissions they do not have. The consequences of this point should not be glossed over because they are substantial. This implies that a boxer who is cheating in such a way as to be "not boxing" no longer has the moral permission to strike her opponent. If she does so anyway—which is likely since cheating is usually done in secret—she is committing the moral equivalent of assault. This point is especially pronounced in politics. Imagine someone who has cheated their way into elected office. This illegitimate official then begins to act as though she were the rightful holder of the office, acting in her constituent's name despite lacking their authorization. This is a wrong that goes beyond deception; the illegitimate exercise of political power transforms authority into raw coercion. The illegitimate office holder is nothing more than a tyrant in democratic disguise.

There are some cases where this will seem entirely plausible. For example, it is intuitive to think that a boxer who cheats by repeatedly striking her opponent in the back of the head would be guilty of murder if that results in her opponent's death. The use of this dangerous move, which is clearly "not boxing," means the moral permissions boxing normally provides do not apply. In other cases, however, this conclusion seems too strong. For example, it would be odd to treat all the pronouncements of a politician as illegitimate because she violated a minor campaign finance law during the election. This suggests that not all cheating is enough to qualify one as no longer engaged in the practice. As noted in the previous section, this distinction can be accounted for within the constitutive framework by recognizing that some forms of rules violations are "internalized" by the practice. This allows practices to provide the criteria for when a violation amounts to a break from the practice.

"Shared willing" is another fundamental internal good, this one common to all practices. The idea, defended by Tamar Schapiro, is that a practice is a procedure that seeks to promote an end *through the creation of a shared will*. "In a practice, actions are attributable to a shared will because and insofar as participants make reciprocally binding claims upon one another to adhere to the rules of the practice."[28] The ability to pursue the ends of a practice through a shared will is vital because it allows groups to arrive at common solutions to contested problems without sacrificing each individual's autonomy. Practices "[define] a way of making a problem, along with its solution, count as ours."[29] The importance of this is

[28] Schapiro, "Compliance, Complicity, and the Nature of Nonideal Conditions," 343.
[29] Schapiro, 342.

revealed when one notices how many practices can be conceived of as *contests*.[30] We create practices to enable both the winners and losers of independently valuable social "contests" to accept the results without sacrificing their autonomy. This is only possible if the practice creates a shared will among all participants. To state the same point another way, the purpose of creating a practice is not simply to efficiently achieve a given external good. Rather, it is to enable new, collective forms of acting that we may not always like, but we can nonetheless will for ourselves as part of the group agent.

When someone breaks a rule in a way that is a constitutive failure, part of what that means is that she is no longer part of the shared will that the practice sustains. If she nonetheless continues to act as though she is part of the practice, using her putative engagement to secure a strategic gain over her co-participants who genuinely remain within the practice, she is subjecting others to her unilateral will. In one sense this can be explained simply in terms of the deception involved, but there is something more insidious about this form of wrongdoing because it involves "[making] lawfulness into a mechanism by which [her] private will is served, rather than an ideal standard in virtue of which a public will is constituted and expressed."[31] Essentially what a cheater does is to turn a practice into a sham. The cheater is responsible for undermining the ability of others, who remain rule following, to constitute the kind of shared willing that enables them to respect the decisions of the practice regardless of their personal preferences. In this way the cheater wrongs the rule followers by undermining their capacity for collective autonomy.

Again, this need not involve deception. Consider an example of public cheating offered by Green: an impatient driver cuts in line during a traffic jam by driving on the shoulder of the freeway. This is cheating because it is against the rules and it is unfair to the other, rule-abiding drivers, but it is not done deceptively.[32] Among the many ways this is wrong—it violates the fair play principle, it results in an unjust distribution of goods, etc.—it also subverts the ability of every one of the lawful drivers to experience their (admittedly frustrating) delay as the product of a will that is "their own." When everyone follows the rules, the rules themselves do not have the character of a foreign will closing of shortcuts each driver might take, like driving on the shoulder of the road. Instead, the traffic jam is simply a shared frustration. When people start cutting the queue, however, law abidingness is transformed into subservience to the cheater's unilateral will. Even if most drivers remain law abiding, the character of their obedience has been perverted.

[30] Often practices are explicit contests, like Rawls's games, trials, and parliaments, but even other social practices can be thought of as contests of a sort. The practice of etiquette, for instance, is a "contest" between individuals who want to speak their mind and individuals who want to feel respected. The rules of etiquette structure the balance between speaking freely and respecting the sensitivities of others. These are two interests in conflict, if not always two individuals.

[31] Schapiro, "Compliance, Complicity, and the Nature of Nonideal Conditions," 344.

[32] Green, "Lying, Cheating, and Stealing," 57.

§2. Gamesmanship

Gamesmanship, like cheating, involves advantage-seeking behavior within a cooperative, rule-bound relationship. Gamesmanship is conceptually distinct from cheating in that, with one paradigmatic exception, it does not involve the violation of any rules.[33] Is that sufficient to make it normatively distinct? Put another way, is gamesmanship necessarily fair since it does not violate any rules? And is avoiding rule breaking sufficient to ensure constitutive success? I believe the answer to both questions is "no." Gamesmanship is neither fair nor constitutively successful.[34] But first, let us consider the best case for thinking gamesmanship is fair and a part of a practice.

2.1. The Case for Gamesmanship

A superficially compelling case can be made that gamesmanship is fair and constitutively successful. Cheating was found to be unfair because rule-breaking violates the fair play principle and it distributes success according to an improper procedure. By not violating any rules, it seems the gamesman escapes both moral pitfalls. By limiting her advantage seeking strategies to the confines imposed by the rules, the gamesman can plausibly claim to be doing her fair share in upholding the system of rules from which all benefit. Furthermore, insofar as the procedure established by the rules is itself just, there is no procedural reason to dispute the fairness of any distribution resulting from faithfully following the procedure.

Consider the E.R.A. case described in the introduction. Senator Chichester might defend the fairness of his strategy by pointing out that all of the rules that enabled his success—namely, the required absolute majority of the house for ratification and the option of abstention—were fair and fairly enforced rules. Any senator could have used Chichester's strategy if he or she had wished to do so. The fact that Chichester chose to use the strategy when others did not was a product of contingent strategic circumstances and his own "political imagination," not a failure to play by the same rules as everyone else.[35] Not only was Chichester's strategy formally available to all the other "players" in the contest, but he showed further respect for the rules by choosing to abstain rather than pursuing a strategy prohibited by the rules. For instance, Chichester could have attempted to defeat ratification by secretly bribing a supporter of the E.R.A.

[33] The exception is when gamesmen treat a penalty as a price, as occurs with strategic intentional fouling. Arguably this is not an exception at all, since fouling, as I argued in Section 1.4, is internalized by the practice.
[34] Of course, even if the answer to both questions is "yes," that does not necessarily mean that gamesmanship is morally permissible. It might be wrong in other ways. Nonetheless, if avoiding rule-breaking is all that is necessary to make a strategy fair and constitutively successful, then critics of gamesmanship will have to look elsewhere to justify their moral misgivings.
[35] Kenneth A. Shepsle, *Rule Breaking and Political Imagination* (Chicago ; London: The University of Chicago Press, 2017).

to flip his or her vote from a "yea" to a "nay." That Chichester did not take any of the alternate paths prohibited by the rules further supports the idea that he did his part to uphold fair play principle.

It is harder to argue that Chichester's actions satisfied the demands of distributive justice, since his strategy relied on rules that violate normatively desirable features of decision mechanisms like monotonicity, neutrality, etc. However, that is a problem with the fairness of the Virginia Senate's rules of procedure, not Chichester's use of them. If we assume the Virginia Senate's rules were fair, then Chichester's actions may have resulted in a just distribution of success.

Gamesmanship also has a strong *prima facie* case for being constitutively successful. The constitutive account of practices rests on the idea that a practice's rules "define procedures compliance with which constitutes participation in some new form of activity."[36] As long as we think gamesmen comply with the procedures of a practice, by definition they would seem to be constitutively successful. Since gamesmen routinely exhibit an almost monomaniacal focus on not breaking any rules, it is plausible to believe they are complying with the procedures that constitute participation in the practice-defined activity.

This assessment appears to be further bolstered by Rawls's main purpose in writing "Two Concepts of Rules." In that piece, Rawls argues for the necessity of distinguishing "between justifying a practice and justifying a particular action falling under it."[37] Practices are justified by their ability to promote practice-independent ends. For example, baseball might be justified, as a practice, by its ability to promote goods like enjoyment, health, and entertainment—goods that exist independent of the practice. Actions falling under a practice, however, can only appeal to the rules of the practice for their justification. This is because the only way to engage in a practice-defined activity is to actually follow the rules of the practice. As a result, to justify an action within a practice by appeal to a practice-external standard would be to justify it *as something else*. For example, within the practice of baseball the only justification available for how many strikes a batter is allowed is to appeal to the rules. It would be inappropriate for a batter, in the middle of a game, to argue that he should get four strikes instead of three because "that would make the game more enjoyable, healthy, and entertaining." These may be the ends of the practice, but they have no normativity within the practice. One can believe that baseball would be a better practice if it allowed four strikes instead of three, but when one is already inside the practice, the rules are justified simply because they are the rules. Practice-external reasons are only available to reformers, not players.

By showing that there is a distinction between reasons for a practice and reasons within a practice, Rawls is able to provide a limited defense of something like rule utilitarianism. He argues that utilitarian reasons justify practices like promising and punishment, both of which are very valuable social practices to have around. However, that does not mean that one can permissibly apply the principle of utility to

[36] Schapiro, "Compliance, Complicity, and the Nature of Nonideal Conditions," 334.
[37] Rawls, "Two Concepts of Rules," 3.

individual decisions within the practice. Rather, one must follow the rules of the practice, otherwise one is not engaged in the (*ex hypothesi* justified) practice at all. Promising is a clear case of this. Promising is very useful practice, but only if its rules are understood to close off utilitarian reasons when deciding whether to keep one's word. To say "I promise to keep your secret unless I think more utility will be gained by revealing it" is not to make a promise at all, it is simply to articulate an intended decision procedure—one that undermines the utility promising is supposed to generate. The only way to justify breaking a promise is in terms of the excusing conditions that are part of the practice itself. Someone who thinks it is acceptable to give utilitarian considerations weight when deciding whether to keep a promise fails to understand what a promise *is* in the first place.

This argument for two levels of justification appears quite congenial to gamesmen, who claim to justify their actions on the basis of the rules of the practice alone and wish to exclude the arguments of critics who allege it is wrong to violate the "spirit" of the practice. Rawls's argument seems to rule out this kind of critique, which sounds a lot like trying to justify an action within a practice by appealing to the reasons that justify the practice itself.

2.2. Gamesmanship vs. Pseudo-Gamesmanship

Despite the arguments of the previous section, I argue that gamesmanship remains wrong like cheating. Often this is because much of what passes for gamesmanship is actually cheating. Many "gamesmen" are not engaged in gamesmanship at all. Instead, they are engaged in *pseudo-gamesmanship*. Pseudo-gamesmanship is when a cheater attempts to cloak her wrongdoing in the guise of gamesmanship by appealing to a tendentious technicality in the rules. This is disingenuous rule formalism at its worst.

In Section 1.4 it was argued that it is a mistake to treat the formal rules of a practice as the only rules of the practice, but this is a mistake gamesmen make all the time. More accurately, it is a mistake they rely on their opponents to make all the time. In truth, a practice is a system of rules, principles, and norms oriented toward achieving some good. Avoiding breaking the explicit rules of the practice is not enough to distinguish gamesmanship from cheating. True gamesmanship exists, but it requires that one also comply with the practice's *principles* and *norms*.

The distinction between rules and principles is most famously defended by Ronald Dworkin in "The Model of Rules." Dworkin argues that a principle is distinguishable from a rule because a principle provides a defeasible reason for acting a certain way under certain circumstances, while a rule is "applicable in an all-or-nothing fashion."[38] If a rule is valid under the circumstances, then the outcome the rule stipulates must be accepted. A principle, however, can be valid without being dispositive because it could conflict

[38] Ronald M. Dworkin, "The Model of Rules," *The University of Chicago Law Review* 35, no. 1 (1967): 25.

with other principles. Principles provide factors that should be weighed when making a decision about what rule to apply or how to interpret an ambiguity in the rules. Many instances of pseudo-gamesmanship rely on opportunistically confusing principles for rules, or rules for principles. This is a straightforward interpretive error, and it is cheating when done intentionally.

Norms also play a constitutive role in practices. Since no system of rules laid down by finite human minds can preempt every ambiguity or foreclose every perverse interaction among the rules, practices are forced to rely on some form of interpretive good faith to paper over these unavoidable shortcomings—otherwise the practice itself would become unjustifiable. In Section 1.4 we saw that interpretive even explicit rules is impossible without relying on norms. This is even truer when weighing competing principles. Additionally, there are cases where even non-interpretive norms can become incorporated into the constitution of a practice. This is most clearly the case in the practice of common law, where long established precedents can come to have the status of fundamental laws.

I should caution against taking my argument for the practice-constitutive status of principles and norms too far. Determining which norms are merely descriptive and which are constitutive is a tricky business, and there are good reasons to exercise strict construction when interpreting many practices. This is especially true in adversarial practices like politics and law. However, it remains the case that norms and principles have equal potential claim to be considered part of a practice's constitutive rules, and at least some low-level interpretive norms and principles are unavoidably part of every practice.

Even with the value of strict construction in mind, prominent examples of "gamesmanship" often reveal themselves to be cases of cheating when one remembers that practices are composed of more than just explicit rules. President Donald Trump's recent use of the National Emergencies Act to fund construction of a border wall is a conspicuous example of this kind of pseudo-gamesmanship, as was the ploy Senate Republicans used to avoid giving a hearing to President Barack Obama's Supreme Court nominee, Merrick Garland, thereby delaying until the next president took office. In both cases, there was no denying that the parties were engaged in unconventional politics. However, each claimed to be within their rights because they were not violating any rules. In other words, each claimed their strategy was permissible because is was gamesmanship, not cheating. Yet in both cases they were violating basic interpretive norms, precedents, and constitutional principles, all of which are part of the practice of American politics. Violating a practice rule is not gamesmanship, it is cheating, and all the attendant wrongs identified in Section 1 accompany this fact.

Although much of what passes for gamesmanship is really pseudo-gamesmanship, there are some strategies that can claim to be the real thing. Senator Chichester's stratagem for defeating E.R.A. ratification is a good example. The senator's tactic did not rely on a tendentious reading of the rules for its effect. Rather, it worked by exploiting a strategic opportunity born of the interaction between the rules of the game

and the specific circumstances of that particular vote—namely, that support among the senators was evenly divided, that the Lieutenant Governor would only get to cast a vote if the final vote was a tie, and that an absolute majority of the Senate was required for ratification. Granting that the senator's strategy was within the rules, I nonetheless contend that it was wrong.

2.3. Why Gamesmanship is Wrong

Cheating is wrong because it (1) violates the fair play principle, (2) distributes the benefits of the practice on an unjust basis, and (3) creates a constitutive failure that destroys the internal goods of the practice and leads to other wrongdoing. Each of the three wrongs is a direct product of the fact that cheating necessarily involves breaking the rules. Gamesmanship does not break the rules, but it manages to be wrong in the same three ways as cheating. At root, this is because gamesmanship is a form of *fighting dirty* in which the rules of a practice are only instrumentally internalized. As a consequence, gamesmanship amounts to a kind of constitutive failure much like cheating. Furthermore, fighting dirty itself violates the fair play principle and leads to distributive injustices.

In an essay on the rules of war, Thomas Nagel provides a helpful conceptualization of what it means to "fight dirty":

> "To fight dirty is to direct one's hostility or aggression not at its proper object, but at a peripheral target which may be more vulnerable, and through which the proper object can be attacked indirectly."[39]

For example, in a war the proper target of one's hostility is the adversary's soldiers, materiel, communications lines, etc. However, it may be tempting to go after "softer" targets, like enemy civilians, in an attempt to sap the adversary's will to fight. To do so would be to fight dirty. Nagel argues that fighting dirty is morally prohibited because it fails to treat the target of hostility as a subject. Whenever you intentionally do something to another person, hostile or otherwise, "it should manifest an attitude to him rather than just to the situation, and he should be able to recognize it and identify himself as its object."[40]

Gamesmanship consists in using the rules of a practice to fight dirty. This is to say that a gamesman uses the rules of a practice to attack practice-peripheral targets instead of directly pursuing the object of the practice. What constitutes a peripheral target versus a proper object will vary from practice to practice, but in general the proper object of a practice is the set of reasons or excellences the rules of the practice aim to call forth. Practice-peripheral targets are all the other reasons or qualities that could create an advantage in the practice. In other words, the proper object of a practice is the practice's internal goal, the direct pursuit of which makes the practice as a whole justifiable according to practice-independent reasons.

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[39] Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1, no. 2 (1972): 134.
[40] Nagel, 136.

To better illustrate this, consider an extended example drawn from the practice of basketball. Reigning NBA MVP James Harden is the most polarizing superstar in the NBA. His talent is undeniable, but for many basketball purists his scoring accomplishments carry an asterisk similar to the one attached to Barry Bonds' home run record. Harden, to be sure, has never been accused of *cheating* like Bonds. The complaint against Harden is that a substantial portion of his success is attributable to his unmatched ability to intentionally draw fouls. What is wrong with this? In sportswriter Rodger Sherman's representative words:

> "The rightful way to score is by throwing a ball into a basket. Free throws are interruptions in the regular course of play, although we accept them as a reward for players whose moves are so effective that nobody can guard them legally. Harden, however, often seeks to get fouled as a primary action, subverting the natural order of things. And of course, there are the flops. *Harden's game feels cynical, like he is exploiting a loophole* [emphasis added]."[41]

In the language of a sports fan, Sherman is criticizing Harden for being a gamesman, i.e. someone who fights dirty. Sherman argues that the proper object of basketball, as any true player would know, is a free-flowing game in which players score by "throwing a ball into a basket" (presumably while having their shots contested by the defense). This is "the natural order of things." Free throws interrupt this object. They are part of the practice of basketball, to be sure, but only to deter behavior that would otherwise inhibit the practice from realizing its proper object. Harden's style of play, by seeking to get fouled as a primary action, loses sight of the proper object of the game, fixating instead on an indirect vulnerability in the game. It is not difficult to explain why Harden chooses to attack defenders in an attempt to draw a foul rather than attacking the basket in an attempt to score more directly: free throws are much easier to make than contested shots. Scoring simpliciter, however, is not the object of basketball, nor is winning. The object is competing in such a way as to constitute an excellent game of basketball. Only someone who values winning more than the game itself could fail to recognize this. That, in a sentence, is the difference between a gamesman and a sportsman.

If gamesmanship consists in fighting dirty, i.e. using the rules to attack peripheral targets in a practice instead of pursuing the proper objective directly, why would that be *wrong*? The basketball example can make gamesmanship seem like an aesthetic complaint, not a moral one.

Nagel's moral critique of fighting dirty is that it fails to treat the target of hostility as a subject. In the context of a practice, the "target of hostility" ultimately is the other agent or agents who are being told they must respect the gamesman's strategy "because the rules say so." However, if the rules are not being used to pursue the proper object of the practice, then the other players can rightly ask why they should care

[41] Rodger Sherman, "All the Ways James Harden Can Make You Foul Him," The Ringer, May 14, 2018, https://www.theringer.com/nba/2018/5/14/17350878/james-harden-fouls-drawn.

what the rules say. The only reason the rules of basketball are normative for the players is because they accept that the proper object of basketball is an end worthy of pursuing *together*. If the rules are applied to a peripheral target, there is no practice-internal reason for the group agent to will such an end. We could say that a gamesman like James Harden, by using the rules to attack peripheral targets, has lost sight of what basketball really is. Allowing him to (ab)use the rules in this way risks turning basketball into something else. This amounts to turning the practice into a sham, which prevents others from engaging in the practice. To be clear, gamesmanship is not wrong because it violates the ends of the practice. It is wrong because it turns the practice into something unfit for pursuing the ends of the practice.

Because it transforms practices into shams, gamesmanship also violates the fair play principle. The moral force of the fair play principle does not, at its core, have any necessary connection to rule following. Rather, it establishes a duty to do one's fair share in maintaining a practice from which you benefit. One way to maintain a practice is to follow the rules when it's "your turn" to do so, but that is hardly the only way. If following the rules in a specific circumstance would undermine the practice itself, the fair play principle gives you a reason *not* to follow that rule. In effect, the principle contains an anti-sham clause.

Finally, if gamesmanship is allowed to go unchallenged it, like cheating, results in a procedurally unfair distribution of the practice's external goods. Insofar as distributive justice depends on the existence of the practice, and gamesmanship undermines the possibility of the practice itself, the goods distributed by gamesmanship are unmoored from their procedural justification.

§3. Chichester's Wrong

By way of conclusion, let us return to Chichester's abstention ruse one last time. Chichester was engaged in what we might call the "practice of democratic politics." This practice is justified insofar as it efficiently promotes goods like peace, stability, and good policy. However, not just any method of securing these goods will suffice. Democratic politics is a *practice* because it is necessary that these goods be secured in a way that is collectively *ours*. This is only possible if the practice constitutes a joint will, and a joint will is only possible among those who possess a jointly willable shared end. However, the ends of the joint will cannot simply be peace, stability, and good policy. If that were the case it would contradict Rawls's argument in "Two Concepts of Rules." Rather, the orienting end that enables the joint will is based on a practice-internal vision of the proper way politics is to be conducted. According to this practice-internal standard, politics is supposed to operate in a way that treats all citizens with equal respect and concern, promotes responsible deliberation, etc. What these internally framed ends have in common is that they concern how the ends of the practice must be pursued if it is to remain fit for joint willing. Most of the time the specification of the practice-internal ends will take the form of the rules of the practice (which include

some principles and norms). The application of any given rule, however, must not undermine the practice's fitness for constituting a joint will. To allow such use of the rules would be self-defeating.

Now consider how Chichester used the rules to defeat ratification of the E.R.A. Instead of following the rules in pursuit of the proper object of democratic politics—which is something like "persuading a majority of one's co-citizens to agree with you"—the senator chose to use the rules to attack a peripheral target: the quirk in the abstention rules. In Section 2.1 we said that Chichester might defend the fairness of his strategy by arguing that, since it was permitted by the rules, anyone could have done it. However, this is not quite true. The only people who could have done it are those who saw the opportunity abstention rules provided for someone to exploit. And here is the key: *someone who was truly committed to the practice of democratic politics would never have been able to see the loophole as a live option*. It literally would not have occurred to her because it causes political outcomes to hinge on factors that ought to be irrelevant from the practice-internal perspective. To borrow a phrase from Bernard Williams, Chichester had "one thought too many," which reveals that he was not acting on an internal view of the practice to begin with.[42] We might say that Chichester was acting in conformity with the practice, but not really engaging in it. This failure to engage is a constitutive failure, and it means that Chichester's ploy effectively substituted his unilateral will for the joint will of the Virginia Senate. For this reason Chichester's gamesmanship, like all gamesmanship, was wrong.

A closing caveat: Recognizing gamesmanship to be wrong does not mean it will be easy to agree about what constitutes gamesmanship. The line will always be fuzzy. Nonetheless, a boundary problem is not a normative problem. There will be clear cases of gamesmanship, and I have argued that these cases are wrong for the same reasons cheating is wrong. That there will also be contested cases does not change this fact.

[42] Bernard Williams, "Politics and Moral Character," in *Moral Luck: Philosophical Papers 1973 - 1980* (Cambridge, UK: Cambridge University Press, 1981), 18.