

All Constitutive Rules are Created Equal

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Abstract

I discuss Bartosz Kaluziński's paper, "What Does it Mean that Constitutive Rules are in Force?" (Kaluziński 2018). Kaluziński presents a thesis about the relation between the intentions of players in a game and the rules of the game, a thesis that responds to the question how a player can intentionally violate a constitutive rule of a game and still be playing it. He proposes the following account: 1) *S* knows that he or she is participating in the game *G* (knows the deep convention of playing *G*) and intends to play; 2) *S* has working knowledge of the rules of *G*; 3) *S* intends to act in accordance with some small subset of *R* (rules) of *G*, that constitutes *G*'s hard core; 4) *S* respects the other rules of the game, i.e. in the case *C* of a supposed violation of any rule that is not a part of *G*'s hard core: i. *S* asks him- or herself what decision *D* an emotion-free referee in optimal cognitive conditions would have made in *C* (and answers this question); ii. *S* conforms to *D*. Somewhat unorthodoxly, Kaluziński neither demarcates a subset of the rules as constitutive thus allowing for the violation of the rest, nor appeals to any meta-rule. I accept this framework, and within it argue that Kaluziński's account which appeals to a distinction between core rules and non-core rules fails to do justice to the constitutive function of non-core rules. Instead, I propose to utilize the prohibition-price distinction. This also renders the "ideal referee" redundant.

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1. Introduction

Constitutive rules are traditionally conceived as defining what does count as a move within a practice and what does not (Williamson 1996). In the context of games, this means that constitutive rules define what counts as playing the given game. Thus, it follows that a player who intentionally breaks the rules of the game is not playing the game.

However, on many occasions players or teams who commit tactical fouls do seem to be playing the game. Tactical fouls are intentional violations of some rules of a game, such as a basketball team that is behind in the final minutes of a match fouling in order "to stop the clock". The problem is that the idea that the rules of games are constitutive entails that tactical fouls cannot be a part of the

game, against all appearances. This problem is known as the “incompatibility problem” (Suits 1978, Kobiela 2018).

In his paper “What Does it Mean that Constitutive Rules are in Force?” Bartosz Kaluziński presents a thesis about the relation between the intentions of players who are playing a game and the rules of the game. Kaluziński presents us with three possible types of account of this relation:

1. Participant *S* is motivated (intends, is committed) to act in accordance with *R*.¹
2. There is no link between *R* being in force and *S*’s mental state (*R* is in force regardless of *S*’s intentions, motivations, commitments).
3. *S* is motivated (intends, is committed) to act in accordance with only some subset of the set of rules *R*.

Kaluziński rejects option 2 as representing an unreasonable position. I accept this rejection.

As can be readily seen, if we accept that players who commit tactical fouls are still playing the game, then it seems that option 1 must be rejected because a player cannot be ascribed an intention to act according to a rule while intentionally breaking it. Instead, Kaluziński defends option 3 against option 1. He proposes the following account of participating in a game (Kaluziński 2018: 120-21):

- 1) *S* knows that he or she is participating in the game (knows the deep convention of playing a competitive game) and intends to play.
- 2) *S* has working knowledge of the rules of *G*.
- 3) *S* intends to act in accordance with some small subset of *R* that forms *G*’s hard core.
- 4) *S* respects the other rules of the game, i.e. in the case *C* of a supposed violation of any rule that is not a part of *G*’s hard core:
 - i. *S* asks him or herself what decision *D* an emotion-free referee in optimal cognitive conditions would have made in *C* (and answers this question);
 - ii. *S* conforms to *D*.

The proposal is simple: in order to play a game one must follow its core rules, and if one violates any of the other rules one should accept and do what an ideal referee would decide. Thus the position allows for the intentional violation of rules, except for those that belong to the hard core of the game.

My aim is to criticize this proposed version of option 3 and recommend a version of option 1 that resolves the apparent conflict between 1 and 3.

Kaluziński’s proposed view rests on two main claims: a distinction between hard core rules of the game and non-core rules, and the appeal to the idea of an ideal referee. Let us first consider them in turn.

2. Core and Non-core

Kaluziński distinguishes between core rules of the games that cannot be violated without entailing that the game is not played—or, to use his terms, “has been terminated”—and non-core rules whose violations entail some kind of penalty,

¹ “R” and other abbreviations explained in the abstract.

but which can be committed within the game. It is important to note that Kaluziński *does not* claim that the non-core rules are not constitutive rules² (and are, for example, regulative rules). This is an important merit of his account, which enables him to avoid a common confusion in the Philosophy of Sports which has been apparent since Suits seminal work (1978).³ In addition, Kaluziński does not appeal to additional rules—either in the guise of an *ethos* or in that of meta-rules—that make for the difference between the core and non-core rules of the game.⁴ Thus, Kaluziński remains loyal to the basic idea that games are defined by some agreement between players, and that this agreement typically consists of a general agreement to play a game, and a set of (constitutive) rules that define the game. To these rules we can add regulations—perhaps the rules of tournaments, age limits of players in youth leagues, etc.

The question is “What are the core rules of the game?”. Kaluziński claims that these are the rules whose violations entail a termination of the game—when a player violates such a rule, they are no longer playing the game. The criterion cannot be identical with actually being ejected from the game—players can receive a red card in football for violations that Kaluziński would consider as non-core violations such as shirt holding (and violating a regulation such as an age-limit can also lead to the termination of a game), or not be ejected for violations of core rules such as handling the ball on purpose. Instead, I take it that what Kaluziński claimed is that a player who, e.g., uses his hands in a football game is not playing football, whereas a player who is holding an opponent’s shirt is.

3. The Ideal Referee

In his account of what it means for the players to be subject to constitutive rules—in particular what it means for the players to be subject to rules that they intentionally violate—Kaluziński introduces the notion of the ideal referee. This seems to be a natural response when it comes to professional games—the players are subject to the rules in that they are subject to the rulings of a referee who applies the rules.

However, Kaluziński is quick to note of course that many amateur games do not employ actual referees. Instead, they rely on self-officiating. In addition to this wide-spread phenomenon we can quote the fact that also the existence (present and past) of some degree of self-officiating in professional sports, such as the practice of some Cricket batsmen to “walking”—i.e., batsmen acknowledging that they are out and leaving the pitch independently of any decision by the umpire.

At this point Kaluziński invokes the idea of an ideal referee, and claims that what respecting the rules amounts to is acting in accordance with what such a referee would rule in any instance of a supposed violation of a non-core rule. This is supposed to meet a constraint: providing a unified account to both refer-

² This point was also made by John Mabbott (1953, 108f).

³ Kobiela (2018) presents a charitable and interesting explications of Suits’ distinction between constitutive and regulative rules, and its applicability to the issues at hand. Since Kaluziński does not invoke this distinction, I will not raise any criticism of this distinction here.

⁴ For a criticism of such views see Eylon and Horowitz 2018.

eed and non-refereed games. Kaluziński claims, convincingly in my opinion, that what it means to play a game and in particular for the rules to be in force in both refereed and in self-officiated types of games amounts to the same thing, regardless of the question of the presence of an actual referee. So he turns to the idea of an ideal and hypothetical referee in order to meet this constraint.

4. A Normative Conclusion

The first issue I want to raise is that the proposed account has normative implications. This is a problem for a conceptual analysis that is supposed to provide a normatively neutral analysis of participating in a practice.

From Kaluziński's invocation of the ideal referee it seems to follow that trying to deceive the referee cannot be a part of any game. In other words, imagine a game similar to football in every way with the proviso that the participants really value the ability to deceive the referee e.g., by diving and pretending to be fouled. We can think of various cultural contexts in which such a proviso can make sense—the referee represents the hated authorities, etc. According to Kaluziński, it seems that such a game is *impossible*, because a player has to conform to the decision of an ideal referee—one that is not fooled by diving.

However, such a game seems perfectly possible, and arguably even real.⁵ The issue is not whether we view such a game as valuable, moral or not. The point is that the analysis of what it means for the rules of the game to be in force yields a conclusion that a certain type of apparently coherent and imaginable game is impossible.

Whereas this limit on the range of possible games can arguably be normatively justified, it makes little sense to limit thus the range of possible games on conceptual grounds. Surely a game of “let's fool the referee” is perfectly coherent, and playing according to its rules is possible.⁶

5. Prohibitions and Prices

Kaluziński goes to great lengths to respect the basic intuition that the rules of the game are constitutive rules, and tries to accommodate tactical fouls by allowing that some rules may be violated. There is a tension here that we should be wary of. The idea that a rule can be constitutive and at the same time violable renders its status as constitutive unclear. The appeal to the referee's decision in clarification is suggestive in that it shows why the player who violates the rule is still playing the game, but at the cost of rendering its status as constitutive unclear. This is made manifest by the fact that if a player intentionally violates a regulative rule, a similar account as Kaluziński's account of violation of non-core constitutive rules could apply *mutatis mutandis*.

The solution lies in replacing the core rules/non-core rules distinction with an extensionally similar distinction between prohibitions and prices. A prohibi-

⁵ As some readers might readily acknowledge, the example is not only imaginary. Certain games, or in particular cultural approaches to, e.g., football, have been described by participants and observers as embodying such a view. Cf. Eylon and Horowitz 2018 (section XI).

⁶ I argue (Eylon, *forthcoming*) in fact argues that a game such as “let's the fool the referee football” is also normatively legitimate.

tion is just that—a player cannot intentionally violate a prohibition and be said to play the game. A price, on the hand is a cost attached a certain action. Fouling towards the end of a close basketball game is an example of a price: one is *allowed* to foul in order to stop the clock, at the cost of (typically) awarding the other team free throws.

The case of basketball is unique in that “being caught” by the referee is necessary for the successful utilization of the tactic—otherwise the clock will not be stopped. But we can extend this to fouling in football in order to stop a counter-attack: as long as players own up (in self-officiating games), or accept the verdict of the referee, the rule has not been violated.

The advantage of this view is that it does not imply that constitutive rules cannot be violated within games, thus clarifying the sense in which rules that apparently can be violated are in fact constitutive rules that function in defining what is permissible and what is not within a game. Thus, the proposed view (elucidated in Eylon and Horowitz 2018) has two advantages. First, it maintains that if a player intentionally violates a constitutive rule then they are not playing the game. Second, it distinguishes between the official rules of a game, and the rules that actually constitute a particular match. Consequently, it is possible to follow the official rules, or play by some amended version of them, or by any set of agreed upon rules.⁷

6. The Referee Revisited

We can now return to the question what it means for the rules to be in force. Clause four in Kaluziński’s account, which turns to the referee in order to account for the intentional violations of non-core rules is now redundant. Players should follow the rules—all of them: prohibitions and prices alike.

In self-officiating games this means just players must own up and pay the prices for their actions. In refereed games, it is typically part of the agreement between the players that the calls of the referee override signals from the players and it is up to the referee and only the referee to allocate penalties. In addition, it is also possible in refereed matches to allow (e.g., as a price) for deception of the referee that recognizes skills such as diving as skills of the game, as described above.

Thus the constraint of providing a unified account of refereed and non-refereed games is met. In both types of games, playing the game required players to follow its constitutive rules, and violating them means that one is not playing the game. According to the proposed view, the rules are in force within the game as long as the players follow them. In refereed games this means what the game agreement prescribes—adhering to the referee’s decisions.

In self-refereed games the proposed view means that those standing to gain from an unacknowledged tactical foul must own up. In particular, note that is not necessarily the fouling player as Kaluziński’s account suggests—if we play a

⁷ On the basis of these claims it is possible to argue for an additional normative claim: Strategic fouls of a type T (e.g., stopping the clock) are justifiable iff there is an agreement or a convention according to which they are legitimate. This normative thesis is argued for in Eylon, *forthcoming*.

self-refereeing basketball game that is also clocked, stopping the clock requires the fouled player to enable the fouling team to stop the clock by admitting that fouling was successful—that the fouling player indeed committed a foul.⁸

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⁸ I am grateful to an anonymous referee for this journal for extremely helpful comments and suggestions.