Manipulation in Work and Play: A Reply to Gibert

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Abstract

This papers responds to a recent argument by Sophie Gibert concerning the wrong of wrongful manipulation. I argue that the more serious explanatory question is whether manipulation is wrong by default, not whether, when manipulation is wrong, this wrong is 'basic'. The former better elucidates the significance of Gibert's arguments. I then respond to her argument, construed as the argument that manipulation is not wrong by default. First, the putative counterexamples she presents are drawn from areas of work and play – legal advocacy, negotiation, and gameplay – where the moral status of manipulative tactics is very much in dispute; thus, her reported intuitions are not persuasive. Second, even if we grant that manipulation in these contexts is morally permissible, we can explain how it remains wrong by default by appealing to competitive conventions that realize common epistemic, aesthetic, and hedonistic goods. I also show why Gibert's reply to this conventionalist maneuver fails.

Keywords

manipulation; negotiation; sports; games; autonomy; reasoning;

Trickery, guilt-trips, peer pressure, emotional blackmail, hectoring, or shaming people to get what you want is, all else equal, morally wrong. Why is that? One natural line of thought goes like this. These are all varieties of *manipulation*, and so are, all else equal, morally wrong *because* they are varieties of manipulation. Crucial to this line of thought is the idea that an action can be wrong simply on grounds of being a manipulation – or, as I will put it, the idea that manipulation is wrong *by default*.[1]

Recently, Sophie Gibert has presented cases of putatively morally permissible manipulation – in negotiation, gameplay, and elsewhere – to challenge this idea.[2] For example, when a

[1] This notion is broader than 'pro tanto wrong', which typically is used only to permit exceptions, not exemptions. Exceptions *outweigh*, while exemptions *undercut*. Thus, 'wrong by default' is closer to 'prima facie wrong' or 'presumptively wrong'. However, it has the virtue of being more clearly not an *epistemic* notion, since it concerns specifically the grounds on which an action can be wrong. Compare with Robert Noggle, "The Ethics of Manipulation", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2022), URL = <http://tinyurl.com/46ujwp67>, section 3.1; Shelly Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1989); Phillip Montague, "When Rights Are Permissibly Infringed" in *Philosophical Studies* 53.3 (1988): 347–66; and W.D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930).

[2] Sophie Gibert, "The Wrong of Wrongful Manipulation", in *Philosophy & Public Affairs* 51.4 (2023): 333–372. Hereafter, I cite Gibert's paper only by page number in parentheses. I also abstain from providing

basketball player 'psyches out' her opponent to get him to make a bad play, Gibert claims this is an action – indeed, a manipulation – that is not wrong simply on grounds of being a manipulation (352–353). She thinks such cases can be found across life, in work and play. Gibert uses these cases to argue that manipulation is not 'basically' wrong, but rather that particular instances of manipulation are instead wrong when and only when, and then because, they infringe on some other rights the victim has (334–335).

We will consider the details of that argument in due course. Suffice for the moment to say that I think this argument does not succeed. But first I want to discuss the dialectical situation.

1. Explaining the Wrongness of Manipulation

To start, notice that whether manipulation is wrong by default, and whether wrongful manipulations' wrongness is basic, are different questions. The former, as I understand it, concerns whether manipulation as such has an essential, and wrong-making, feature, such that any particular manipulation is permissible only with exceptional or exemptional justification. By contrast, the latter concerns whether, when manipulation is wrong, this wrongness can be explained in purely 'non-moral' terms (see 332–335).[3] These come apart, as we will see.

With that distinction in mind, it is a bit puzzling to me why Gibert's argument is officially targeted at the claim that the wrongness of manipulation is basic, rather than at the claim that manipulation is wrong by default. Let me explain.

The theories she targets construe the wrongness of manipulation as basic in such a way that manipulation turns out to also be wrong by default. She is targeting *Reasoning Views*, a cluster of theories that purport to explain the wrongness of manipulation in terms of how manipulation bypasses, subverts, or worsens the reasoning of its victims (334, 336). Insofar as this bypassing,

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extensive citations of exemplars of the views under discussion; for those, Gibert's paper should be consulted, which is admirably comprehensive.

[3] Gibert 'reformulates' her notion of basic wrongness at 335, note 4, but the result is not merely a reformulation. She says there that a wrong is 'non-basic' if *there is* an explanation of that wrongness in moral terms, and 'basic' if *there is no* such (adequate) explanation. But wrongness that *cannot* be explained in *moral* terms is not the same thing as wrongness that *can* be explained in *non-moral* terms. (For there may be middle cases in which a wrong can be adequately explained in either moral or non-moral terms.) The former is what she defines as 'basic' in note 4, while the latter is the definition she uses in the body of the paper (see 333–335).

etc. can be captured in non-moral terms, these Reasoning Views render the wrongness of manipulation basic. Moreover, these Reasoning Views typically construe this bypassing, etc. as essential to what manipulation is. So, if this bypassing explains why manipulation is wrong, then an essential, wrong-making feature of manipulation has been identified. Thus, manipulation is rendered wrong by default.

Gibert’s argument against Reasoning Views turns on cases such as, for example, hiring attractive staff to increase sales (341, 350), playing on someone’s ego in a negotiation (351), and getting in an opponent’s head in a game (352–353). She reports the intuition that these reasoning-worsening manipulations are not pro tanto wrong (341, 350, 353, 358, 360), do not wrong their targets (340–341, 353–355), or do not violate a duty (349, 356). I take these to be ways manipulation might be wrong by default. So Gibert's argument is, in the first instance, contrary to the idea that reasoning-worsening manipulation is wrong by default, rather than to the idea that the wrongness of such manipulation is basic. Granted, it also challenges construing the wrongness of manipulation as basic *in the way that* Reasoning Views do.

However, and importantly, the cases she relies on count as manipulation not only on Reasoning Views, but on any reasonable theory of manipulation. So these cases challenge *any* theory that renders manipulation wrong by default, whether or not it renders that wrong basic. For example, suppose you had the view that manipulation essentially involves a failure to respect your victim as an equal. Plausibly, failing to respect someone as an equal is a wrong-making feature, and what it is to fail to respect another person as an equal cannot be cashed out in non-moral terms. Thus, this feature of manipulation, on your view, is an essential wrong-making feature that cannot be captured in non-moral terms. So, on your view, manipulation is wrong by default, and this wrong is non-basic. Your view is threatened by Gibert’s argument just the same as Reasoning Views are. Or, suppose you thought that whether manipulation is wrong is entirely a matter of, and is then explained by, the pleasures and pains that result from that manipulation. On this consequentialist view of manipulation, the resultant pleasures and pains are not essential, wrong-making features of manipulation, and can be cashed out in non-moral terms. Thus, on your

view, manipulation is not wrong by default, but, when it is wrong, the wrongness is basic. Your view is not threatened by Gibert's argument in the way Reasoning Views are.

So the dialectical force of Gibert's argument seems located in its challenge of the idea that manipulation is wrong by default, not of the idea that the wrongness of manipulation is basic. Hence my puzzlement as to why Gibert frames her argument in terms of the latter.

Gibert takes her own *Reductive View* to be promising in part because, she says, it enables us to sidestep intractable definitional debates about what *manipulation* is to instead pursue inquiry into our *rights* concerning interference – indeed, she touts this as one of her view's most important upshots (see, e.g., 336, 366, 370–371). Here is her view:

> Manipulation is wrong if, only if, and because it influences the target's practical reasoning—though not by providing additional reasons—in a way that infringes one or more of their other rights—specifically, their rights against interference (334; see also 365).

The idea seems to be that, if the Reductive View is right, then whether or not some particular instance of interference is a manipulation will not be directly relevant to whether or not it is wrong; so we can sidestep that 'definitional' question and instead inquire, directly, into whether the interference infringed or violated someone's rights.

And yet it is not all that clear why a debate over the scope and content of our non-interference rights should be more tractable than a debate over what manipulation is. This is not just because debates over rights are, generally, hotly contested. It is also because the former debate inevitably turns on the latter. If, after all, manipulation turns out to essentially involve some wrong-making feature – moreover, an essential feature in virtue of which manipulation *wrongs* its victims – this would go a long way toward grounding a right against being manipulated. But it is precisely through *analysis* of manipulation, the attempt to provide a definition that lays bare manipulation's essential features, that this question is typically settled. There is thus pressure to engage in analysis of manipulation – in the definitional debate – to discover what our non-interference rights are, since a right against manipulation may be among them. So it seems that Gibert's argument only enables us to sidestep definitional debates insofar as it rebuts the idea

that manipulation is wrong by default; the relevance of whether the wrongness of manipulation is *basic* remains unclear.

Let me conclude this section by highlighting an additional burden that Gibert's preferred view has. First, notice that there is general pressure to think that manipulation is wrong by default, whether or not that wrongness turns out to be basic. Suppose, again, that you took the aforementioned consequentialist view of manipulation – that whether any particular instance of manipulation is wrong is a matter of, and is then explained by, the pleasure and pain that results. Some may find this strategy misguided, even setting aside whether the explanation is to be cashed out in moral or non-moral terms. The issue seems to be that this ruthless consequentialism fails to secure the idea that a way of relating to others can be criticizable simply on grounds of being *a manipulation*.

Thus, if Gibert is right, complaining that someone's behavior toward you is manipulative will never truly stick – it will either slide into a different sort of legitimate complaint, or bounce off. It seems to me that this complaint is utterly widespread, however. If that is right, then Gibert owes us an error theory as to why and how people are widely mistaken about the moral significance of manipulation.

On Gibert's Reductive View, whether any particular manipulation is wrong turns entirely on whether the victim's non-interference rights (not including a right against being manipulated per se) were infringed or violated. If this is so, an error theory would need explain why, whereas people are generally responsive to violations and infringements of non-interference rights that do not include a right against being manipulated per se, they misconstrue these misdeeds in terms of manipulations rather than, more directly, in terms of (variously) objectionable interference. In addition to explaining this misconstrual itself, the error theory would need to tell us what these non-interference rights *are*, so that the extensional adequacy of the theory (vis-à-vis morally permissible vs. prohibited manipulations) could be assessed. But since Gibert does not offer a theory of non-interference rights (366), it is hard to see how she will address these putative folk errors except in a piecemeal fashion. But that feels distinctly ad hoc.

To bring this out, consider a potential counterexample that comes up in the course of Gibert's defense of the Reductive View. In the example, Molly and Sue are friends who are both interested romantically in Tom. Molly tells Tom truthfully that Sue has only ever dated tall guys, hoping that Tom (who is not tall) will draw the false conclusion that Sue is not interested in him, so that Molly may get to date him instead (367). In the context, the example is supposed to be an instance of wrongful manipulation that Gibert's view cannot explain by reference to some non-interference right (setting aside a right to not be manipulated, which is at issue). Granting that Molly's behavior is manipulative of Tom and wrong, Gibert tries to explain the wrongness by suggesting that Tom has a right to not be *misled*, which Molly violates (368). But Gibert is here helping herself to a right against being misled, in the course of arguing that there is no right against being manipulated, without a broader theory of interference rights. This is clearly ad hoc. Moreover, whatever that theory turns out to be like, it is going to have to do the (to my mind) Herculean task of prohibiting misleading someone while permitting manipulating them.

So I do not buy this reply on its own merits, but I also want to emphasize how little it offers us by way of the aforementioned error theory we need. The putative error in this Molly-Sue-Tom case, after all, is thinking that Molly's conduct toward Tom is criticizable on grounds of being a manipulation. The error theory that Gibert needs to provide therefore needs to explain why we misconstrue wrongs like these as grounded in the manipulativeness of the deed, rather than in (things like) the misleadingness of the deed.[4] Now, granted, we are probably not perfect at parsing manipulation from misleading, since these concepts are so close together; thus, some amount of error seems inevitable. But when the putative truths are both so conceptually close to the putative errors, and are selected in an ad hoc fashion, the resultant error theory is not very persuasive.

To sum up this section, then, it seems the philosophical action of Gibert's paper has to do with whether manipulation is wrong by default, not whether the wrongness of manipulation is basic. That seems to capture the dialectical force of her argument better, and to make sense of why

[4] The error theory need not only do this for cases like the above, in which it appears at first look as though the deed is wrong *only* in virtue of being a manipulation. It needs to do this also for cases in which it appears at first look as though the deed is wrong *at least in part* in virtue of being a manipulation. For example, if I were to criticize Molly's conduct as being both manipulative and self-centered, I am (according to Gibert) making an error all the same.

she views her argument as important progress. However, this focus on default wrongness reveals explanatory burdens that Gibert has not yet discharged. In particular, she owes us a theory as to why we fall into widespread error about the moral significance of manipulation. This error theory is unlikely to be persuasive absent a substantive theory of non-interference rights.

I now turn to the details of Gibert’s argument itself. I argue that the claim that manipulation is wrong by default can still be defended.

2. Permissible Manipulations: Replying to Gibert’s Argument

Gibert’s critique of Reasoning Views is divided into two parts, each aimed at a particular subfamily of Reasoning Views. In the first part, she criticizes the *Non-Rational Influence View*, according to which manipulation is wrong (when it is) because “it influences the target’s reasoning non-rationally” (340). I agree with Gibert’s remark that no compelling distinction between rational and non-rational influence has been offered (340–341), and I endorse her critique that the Non-Rational Influence View threatens to massively overgenerate cases of wrongful manipulation, since there seem to be a wide range of non-manipulative influences that will count as ‘non-rational’ on most construals (*ibid.*). By contrast, according to the other subfamily of Reasoning View, the *Quality of Reasoning View*, manipulation is wrong (when it is) because “it interferes with the target’s practical reasoning in a way that makes that reasoning worse” (347). This view can be specified with a theory of what (good) reasoning is, but Gibert argues against it in its ‘general’ form by presenting examples of influence that seem to make the target’s reasoning worse on a wide range of conceptions of good reasoning, and yet, according to Gibert, are not wrong, not even by default (348–349).

Gibert’s examples are drawn from sales (349–350, 354–355), negotiation or bargaining (351–352), games (352–353), legal proceedings (353–354), and defense (of oneself or others) (355–356). To give you the flavor of these examples, here are a few. A saleswoman guides a customer first to the suits, and only after to the sweaters and ties, so that the high prices of the suits will anchor him and make him willing to pay more for the sweaters and ties than he would have if he had shopped in reverse order (354). A lawyer arguing a case in court brings an expert

witness who is charismatic and a family man so that he might win over the jury (353). A basketball player trash talks her opponent about playing it safe, so that the latter will make risky, bad plays (353). And so on. It is important for Gibert that these cases do not substantially harm their victims or violate any rights that we otherwise think they have; this enables us to consider whether the mere fact that the victims’ reasoning is made worse suffices for that influence to be wrong, at least by default. Gibert reports the intuition that, in these cases, the influence is not.

According to the Quality of Reasoning View, however, manipulations are wrong when and because they make the victim’s reasoning worse. But we have before us cases of reasoning-worsening influence that, according to Gibert, are not wrong, not even by default. This calls into question the explanatory success of the Quality of Reasoning View.

As I discussed in section 1, if these cases work, they work against any theory according to which manipulation is wrong by default. The examples Gibert presents count as manipulations on just about any theory of manipulation on offer. So I am going to treat her critique more broadly, as bearing directly on the claim that manipulation is wrong by default. Now, my reply will not turn on commitments that a proponent of a Reasoning View cannot accept, and so it does double duty as a reply on behalf of Reasoning Views. But its real significance is as a defense of the claim that manipulation is wrong by default.

In general, my argument is going to look like this. First, Gibert’s reported intuition that the manipulations in question are not wrong (or, are morally permissible) is itself open to serious doubt in most of her cases; it turns out, on closer inspection, that the manipulations she points to in legal advocacy, gameplay, etc. are in fact morally controversial (section 2.2). Second, even if we grant that these manipulations are morally permissible, the claim that they are nevertheless wrong by default can be explained by appeal to competitive conventions surrounding the relevant activities. Gibert objects to this conventionalist maneuver, so I will also show that her objection fails (section 2.3).

2.1. Manipulation in Defense of Oneself or Others

Let me first address Gibert’s examples of manipulation done in defense of oneself or others, where my counterargument is simplest. By way of illustration, Gibert asks us to imagine a negotiator who manipulates a hostage taker into surrendering by exploiting his fragile masculinity. Gibert remarks that the negotiator does not act wrongly by manipulating the hostage taker (355). However, such cases do not present problems for a view that only ascribes default wrongness to manipulations, rather than all-things-considered wrongness. Evidently, that the victim of the manipulation is a hostage taker means that, all things considered, the manipulation is morally permissible. Gibert seems to be suggesting that even ascribing merely default wrongness to this manipulation is incorrect, however, when she remarks that “[n]o reparations or apology are called for, after the fact” (355–356). The idea seems to be that there are not even any ‘trace’ effects of a duty overridden here – hence no way in which the hostage taker was wronged in virtue of his being manipulated, and so nothing wrong, not even by default, about doing so (compare with 341).

But this cannot be right. When a hostage taker is *arrested*, forcibly seized and locked up, he is treated in a way that, in other circumstances, would amount to a gross violation of his rights – to self-determination, freedom of movement, etc. And yet it is not as though the hostage taker is entitled to reparations or apology for having been locked up. So the mere fact that the hostage taker, when he is manipulated instead, is not entitled to reparations or apology for the manipulation does not do the work Gibert needs it to. That is compatible with the manipulation still being wrong by default, in the way that locking someone up is wrong by default.

Moreover, the default wrongness of such manipulations does not cry out for explanation. Gibert, however, thinks it does. A plausible way to explain, in general, why an action can be both wrong by default and all-things-considered permissible, and yet the party that would otherwise be wronged is not entitled to reparations or apology, is to say that the otherwise-wronged party

forfeited the relevant claim-right.[5] Cases where the otherwise-wronged party is themselves doing something morally wrong, and must be stopped, are paradigmatic cases. But Gibert objects:

> [W]here it is plausible that rights-forfeiture takes place, such as the case of…the hostage taker, proponents must explain why an act of wrongdoing results in the forfeiture of a right specifically against having one's reasoning made worse [i.e., being manipulated], rather than something more closely related to wrongdoing—for example, a right against having one's immediate projects thwarted. Moreover, the theory must explain not only which right is waived or forfeited, but against whom (357).

To see that this complaint does not stick, imagine trying to level such complaints vis-à-vis *arresting* the hostage taker. Why, one may ask, does the hostage taking result in the hostage taker's forfeiting his right specifically against being locked up, rather than something more closely related to the wrongdoing, such as his right against having his immediate projects thwarted? After all, the arrest does much more than thwart the hostage taking, and is not necessary for doing so, either – he could instead simply be disarmed and detained long enough to free the hostages. Similarly, one may ask, *against whom* is the hostage taker supposed to have forfeited his right against being locked up? These questions do not present any serious obstacle to the idea that the hostage taker forfeits the relevant rights. To the extent they are questions seriously asked, the answers will fall out of a general view of how moral transgressions are to be dealt with, what social arrangements are defensible for doing so, etc. The same is true of Gibert's questions regarding *manipulating* the hostage taker rather than arresting him.

2.2. Manipulation in Work and Play: Adversarialism and Gamesmanship

I turn now to manipulation in business negotiation, legal advocacy, and gameplay.[6] Gibert claims that, for example, when a partner in a business negotiation plays to her opposite's ego (by showering him with reverential praise, say), or when a lawyer selects an expert witness who is

[5] The contrast is to cases in which the action is both wrong by default and all-things-considered permissible, *but* the party who is or would be wronged (where this explains why the action is wrong by default) remains entitled to reparations or apology. These will be cases in which the wronged party's claim is simply weaker than other moral stakes – as when one must break a promise to save many lives – but remains in force. There is an *exceptional* justification for infringing the claim. In the case of claim-right forfeiture, the claim is not in force at all in the situation at hand. There is an *exemptional* justification in place.

[6] Gibert also discusses manipulative sales tactics (354–355), but my reply in those cases would be identical to my reply in cases of manipulative business negotiation.

charismatic, or when a basketball player psyches out her opponent, these people do not wrongfully manipulate their targets. Key to these cases, again, is that the victims of the manipulations are not supposed to be otherwise harmed, nor have any other rights of theirs violated. Gibert reports the intuition that these manipulations are not only generally morally permissible, but not even wrong by default (see 351–354). Yet, there are in fact ongoing disputes about the permissibility of manipulation in these contexts.

For example, the 'communitarian' approach to negotiation is developed around the idea that parties to a negotiation ought not mislead, bluff, etc., but can and should seek out mutually satisfactory agreements in a cooperative way, thus treating negotiation as concerning *integrating* various interests rather than *distributing* various goods in a zero-sum fashion.[7] Although these debates in professional ethics typically, but do not always, focus on cases of deception rather than the broader category of manipulation, it would not be surprising at all to find that proponents of this approach do *not* view the sorts of manipulations Gibert hangs her case on – such as playing to someone's ego – as morally permissible, nevermind not even wrong by default. For example, Jonathan Cohen specifically discusses the example of doing someone a small favor so that they will feel indebted to you when negotiation over the real stakes begins.[8]

Similarly, 'zealous advocacy' in adversary legal systems, in which lawyers serve their clients' interests in court by any legal means, including lying, cheating, manipulating juries, etc. – is highly contentious as the normative standard of legal advocacy.[9] Furthermore, in the US legal system, which is much more adversarial than say, Europe, lawyers are nevertheless bound by a variety of

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[7] The label 'communitarian' I take from the critical Charles B. Craver, "Negotiation Ethics for Real World Interactions", in *Ohio State Journal on Dispute Resolution* 25.2 (2010): 299–346. For advocates of this approach, see, for example, Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving", in Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole (eds.), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford: Oxford University Press, 2021): 49–54; Jonathan R. Cohen, "When People are the Means: Negotiating with Respect", in *Georgetown Journal of Legal Ethics* 14.3 (2001): 739–802; and Chris Provis, "Ethics, Deception and Labor Negotiation", in *Journal of Business Ethics* 28 (2000): 145–158.

[8] Cohen, "When People are the Means", 745–746.

[9] For an overview, I am guided by Greg Sergienko, "The Ethics of the Adversary System", *bepress Legal Series* Working Paper 396 (2004), URL = <https://law.bepress.com/expresso/eps/396>. Major criticisms of zealous advocacy include David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988); Alan H. Goldman, *The Moral Foundations of Professional Ethics* (Totowa, NJ: Rowman & Littlefield, 1980); and Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World", in *William & Mary Law Review* 38 (1996): 5–44. A widely read defense of zealous advocacy is Monroe Freedman, *Lawyers' Ethics in an Adversary System* (New York: The Bobbs-Merrill Company, Inc., 1975).

rules regarding what they may do with evidence and what they may say in a legal proceeding. For example, evidence (including expert testimony) is only 'receivable' (or, as it is more commonly known, *admissible*) in court if it is relevant, and even relevant evidence can be excluded by the judge if she thinks there is a serious risk that that evidence will mislead or befuddle the jury.[10] Furthermore, the American Bar Association enjoins all lawyers to exhibit 'candor' in court proceedings, which involves, for example, disclosing evidence damaging to their case and not knowingly making false statements.[11] So, many of the manipulations that we imagine US lawyers to engage in routinely are, in fact, formally prohibited and subject to sanction.[12] I will also venture that you do not need to search long before you find someone who is all too willing to condemn US legal advocacy, precisely *because* of the impression that US lawyers regularly lie, cheat, and manipulate to win. So it is not at all clear to me that these manipulations are generally morally permissible, or not even wrong by default.

Finally, 'gamesmanship' – the manipulation of other players, or officials, in games, through pressure, taunting, diving, strategic fouling, etc. – is also morally controversial. Many such tactics are subject to sanction and regulation. For example, American football players can be penalized for gamesmanship under the broad umbrella penalty 'unsportsmanlike conduct', and rugby players can be penalized for faking an injury.[13] More broadly, it is very common to hear athletes criticized for trash talk, gloating, diving, protesting official calls as a matter of course, etc. Admittedly, it is difficult to sort out the details here, but it is not at all obvious that such criticisms have *no* moral valence whatsoever. Gamesmanship is in fact sanctioned or criticized, or both, in many cases. So when Gibert remarks that a chess player, engaged in gamesmanship by picking her teeth to distract her opponent and get him to play less well, "could not be sanctioned for her behavior" (353), this is

[10] On evidence receivability, see J.L. Montrose, "Basic Concepts of the Law of Evidence", in *Law Quarterly Review* 70 (1954): 527–555; for an overview pitched to philosophers, see especially section 2 of Hock Lai Ho, "The Legal Concept of Evidence", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition), URL = <https://plato.stanford.edu/archives/win2021/entries/evidence-legal/>. US Federal Rule of Evidence 403 empowers judges to exclude relevant but misleading evidence.
[11] See the American Bar Association's Model Rules for Professional Conduct Rule 3.3.
[12] Of course, there is a difference between formal rules and actual practice, and zealous advocacy that runs afoul of these rules can still fly under the radar; for discussion, see, for example, John Dzienkowski, "Lawyering in a Hybrid System", in *William & Mary Law Review* 38 (1996): 45–61. The point here is what *normative* standard is in operation, and the existence of such rules is evidence that zealous advocacy is viewed by some as problematic and needing to be curbed. If that is right, we should not be so quick to accept manipulative tactics in advocacy as morally permissible.
[13] For this latter example, I am indebted to Niël Conradie.

questionable. While there may not be any formal rules or sanctions against this particular tactic, such rules and sanctions are routinely employed; and it is not at all obvious that this chess player would not be open to the criticism (which has the ring of the moral) that she is not playing fair, or being a good sport. Nor is it clear that her opponent could not "reasonably demand that she stop" (353). Though this is delicate, because gamesmanship is often deployed precisely to make an opponent lose his composure. Protest can thus be risky and self-defeating.[14]

So Gibert's reported intuition that these manipulations are not only morally permissible, but not even wrong by default, should not have much persuasive force. For the simple fact is that the extent and permissibility of manipulation in negotiation, legal advocacy, and gameplay is much more complicated, and controversial, than she allows.

2.3. Competitive Conventions

Moreover, even if we grant that manipulating juries, opposing players, and negotiation partners is morally permissible, we can appeal to conventions around these activities to explain why they are all-things-considered morally permissible even while being wrong by default. This is the second avenue whereby the claim that manipulation is wrong by default can be defended.

To see how this might work, consider that defenders of zealous legal advocacy sometimes argue that lawyers ought to be permitted to not disclose evidence damaging to their case. This is because, they claim, requiring disclosure will backfire by disincentivizing investigation and so weakening the evidence base on which trials proceed. Moreover, the *opposing* counsel, who would otherwise be incentivized to discover for themselves the damaging evidence, will also be more cautious. By contrast, a norm permitting non-disclosure makes investigation less risky, and so the proceedings as a whole will be based on more evidence, even when the individual legal teams are entirely self-interested in their selection of the evidence they bring.[15] If this argument is sound,

[14] See Leslie A. Howe, "Gamesmanship", in *Journal of the Philosophy of Sport* 31 (2004): 212–225.
[15] See Sergienko, "Ethics of the Adversary System", 12; Luke M. Froeb and Bruce H. Kobayashi, "Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?", in *The Journal of Law, Economics, and Organization* 12.1 (1996): 257–276; and Paul Milgrom and John Roberts, "Relying on the Information of Interested Parties", in *The RAND Journal of Economics* 17.1 (1986): 18–32.

there is a common epistemic good to be obtained by having a more permissive norm of non-disclosure, one that arises out of self-interested competition.

I do not positively endorse this argument – I lack the expertise to assess it properly. The point, rather, is just that this sort of view seems to support having particular competitive conventions in place for the sake of a common good that can be obtained thereby. You can easily concoct a similar justification for being cutthroat in business negotiation. These justifications, when influential enough, can ground competitive conventions around negotiation and legal advocacy. As a sociological claim, it is plausible that such conventions, with these kinds of justifications underlying them, are in place in much of the WEIRD world.

Similarly, it is a platitude that, in gameplay, many of the moral rules to which we ordinarily hold one another are suspended. What would otherwise be assault is standard play in boxing or rugby, and what would otherwise be odious double-dealing and ruthlessness are standard play in *Monopoly* or *Risk*. The sphere of play creates a 'magic circle' within which extraordinary forms of activity are possible and permissible.[16] What is made possible or permissible varies with the game, but it is obvious that the rules and norms of specific games – the conventions constituting and governing those games – affect what is permissible in playing them. But just as the fact that knocking out one's opponent in boxing is permitted does not undermine the claim that knocking someone out is wrong by default, the fact that various manipulations in gameplay are permitted also does not undermine the claim that manipulation is wrong by default. Moreover, the conventions that emerge are plausibly justified by the specific common goods they help realize – the distinctive pleasures and artistry of the games they make possible.[17]

The idea is that *competitive conventions* can make manipulations all-things-considered morally permissible in legal advocacy, business negotiation, and gameplay. Such manipulations remain wrong by default, when abstracting away from these particular contexts; but, in these

[16] Johan Huizinga, *Homo Ludens: A Study of Play Element in Culture* (Boston: Beacon Press, trans. by R.F.C. Hull 1955; originally published 1938). For some recent discussions (including defending the 'magic circle' notion from criticism), see Jaako Stenros, "In Defence of a Magic Circle: The Social and Mental Boundaries of Play", in *Proceedings of DiGRA Nordic 2012 Conference* (2012): 1–19; and Jesper Juul, "The Magic Circle and the Puzzle Piece", in Stephan Günzel, Michael Liebe and Dieter Mersch (eds.), *Conference Proceedings of the Philosophy of Computer Games* (Potsdam: Potsdam University Press, 2008): 56–67.
[17] C. Thi Nguyen, *Games: Agency as Art* (Oxford: Oxford University Press, 2020).

contexts, there is an exempting competitive convention in place for the sake of some common goods. If we want to put the point in terms of claim-rights, we may say that, whereas participants would otherwise have a claim-right against being manipulated, by participating in these conventionally structured activities, they forfeit that claim-right in that context.

Gibert's objection to this conventionalist response goes as follows. It begins with the observation that, even though she has herself provided examples of morally permissible manipulation in these contexts, there are nevertheless manipulations that remain morally *wrong* in those very contexts (358). While it is permissible to play to a man's ego in negotiating with him, for example, it is wrong to manipulate him by dredging up sensitive information about him so that he will be too ashamed to negotiate well (352). Gibert summarizes this point by saying,

> [T]he targets of influence in these cases [i.e., manipulated negotiators, gameplayers, etc.] do *not* grant permissions to have their reasoning made worse; if they did, then *any* reasoning-subverting influence would be legitimate (358, emphasis in original).

From this, the following explanatory challenge is supposed to arise:

> Thus, the…proposal must be that, in my cases [of manipulations that are putatively not even wrong by default], the targets waive (or forfeit) a right against having their reasoning made worse *in certain ways*—specifically, in ways that do not infringe their other rights. Now there is a mystery to be solved: what explains why the act that, on this proposal, constitutes waiver (or forfeiture) has the highly selective scope that it has? (358, emphasis in original; compare with 343).

But this challenge makes two critical mistakes. I will proceed using the language of 'manipulation', rather than Gibert's 'reasoning-subverting influence', for reasons already given.

First, it simply does not follow from the fact that a participant forfeited a claim-right to be manipulated, that *any* manipulation of her (in that context) would be legitimate, *full stop*. For the manipulation may violate a different claim-right she has not forfeited, by, for example, endangering her or violating her privacy. What *does* follow is that any manipulation of her (in that context) would be legitimate *qua manipulation*; she could not legitimately complain on grounds of having been manipulated. On the conventionalist's account, the man whose shameful past is dredged up in the midst of a negotiation cannot legitimately protest that his opposite is manipulating him, but he can legitimately protest that she is violating his privacy, for example.

Second, and relatedly, there is no special explanatory challenge here. On the conventionalist's account, participation in these activities forfeits (in that context) the claim-right against being manipulated. Participation does *not* forfeit claim-rights against other forms of objectionable treatment (in that context), for all that has been said. That we can selectively forfeit or waive claim-rights is utterly familiar: I grant you permission to enter my house, but do not thereby grant you permission to destroy my property. I can then legitimately complain about your breaking down my door qua destruction of my property, but not qua trespass. This is just how claim-rights work. *All* claim-right-forfeitures have a 'highly selective scope' in this sense.

3. Concluding Discussion

I have argued that the dialectical import of Gibert's argument has to do mainly with whether manipulation is wrong by default, not whether the wrongness of manipulation is 'basic'. This construal seems to better capture the force of her argument, and what she takes to be its most important upshots. However, I argue, it also clarifies an explanatory burden her Reductive View has: She owes us an error theory concerning widespread complaints about manipulation. Absent a substantive theory of rights, this error theory threatens to be ad hoc.

I then turned to her argument for the claim that manipulation is not wrong, not even by default. When we look in detail at the cases Gibert relies on, we discover complications and controversies that ought to make us hesitant to endorse her reported intuition that these are cases of morally permissible, indeed not even wrong by default, manipulations. Moreover, even if we grant that they are morally permissible, there is room to defend the claim that they are nevertheless wrong by default by appealing to competitive conventions whereby participants in negotiation, advocacy, and so forth may be permissibly manipulated. Gibert argues that this conventionalist maneuver creates a mystery that cries out for explanation, namely, how it could be that participants, through participation, grant permission to be manipulated in precisely those ways that do not infringe on their other rights. I showed that this reply bespeaks a mistaken conception of how claim-right forfeiture works.

Can *both* of these tacks be taken to defend the claim that manipulation is wrong by default? One might think not. On the one hand, I emphasized the moral controversy around, for example, zealous legal advocacy and the manipulations therein; on the other, I sketched how there may be a competitive convention in place that *exempts* the manipulations therein and makes them permissible. The latter claim, if true, seems to undermine the former by ruling in favor of one side of the controversy. That may be right, but I think that both of these claims can be true at the same time, to the extent that the relevant conventions are both *in place* and yet *contested*. I then interpret the moral controversies surrounding adversarial legal advocacy, gamesmanship, and so forth, as really being meta-controversies about what conventions should be in place.

Lastly, it is possible that, when Gibert remarks on the 'highly selective scope' of forfeiture the conventionalist envisions, there is indeed something in need of explanation. In particular, it may be that the conventionalist owes us an explanation as to why participation in a game like basketball, or in a business negotiation, constitutes a forfeiture of a right against being *manipulated*, *but not* of a right to one's own privacy, to bodily autonomy, etc. Here, I think that Gibert rightly points us toward how much of the conventionalist story remains to be filled in by investigation into the actual contours of activities like these. Dialectically, though, this is not in itself a challenge, since we do not yet have any reason to think this story cannot be filled in. For example, we do not expect it to be a deep mystery why boxers are permitted to knock each other out, but chessplayers are not. More generally, Gibert's argument is important for showing the commitments one must take on to defend the claim that manipulation is wrong by default – and these commitments are not trivial, but bound up in the contingencies of how we cooperate, and compete, with one another in work and play.[18]

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