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*Autonomy Here and Now: Cavell's Criticisms of Rawls*¹

Abstract. The paper links Cavell's early criticism of Rawls's "Two Concepts of Rules" to the later criticism of *TJ*. In his early paper, Rawls enacts a certain type of foundationalist response to the practical skeptic, commonly referred to nowadays as the *constitutive move*. While sympathetic to the move itself, Cavell's criticism targets a conception of the nature of moral discussion that arises when the move is as it were read into ordinary moral encounters. Cavell's later criticism rehearses the structure of its precursor. In *TJ*, the conversation of justice takes the shape of seeking *legitimacy*, aiming at a level where the limits of our responsibility are predetermined and clearly marked. But this shape stifles the possibility of the kind of conversation whose point is to assess, here and now, what our identification with our society amounts to and what the significance of the choices we make as members of this society exactly is. Having the structure of the earlier criticism in view furthers the understanding of Emersonian Moral Perfectionism, and sheds light on some of its enigmatic features, such as the relevance of Kant's notion of reflective judgment to moral thinking and the essentiality of the friend to perfectionist assent.

According to Christine Korsgaard, one very important merit of the *constitutive move* is that it meets skeptical challenges "with ease"². She thinks Rawls enacts such a move:

And [The principles of Justice], Rawls might say, *just are* the principles of justice for a liberal society. To see why, we need only compare the *problem* faced by a liberal society with the *content* of Rawls's two principles of justice. Echoing Rousseau, we might say that the problem faced in the original position is this: to find a conception of justice which enables every member of society to pursue his or her conception of the good as effectively as possible while leaving each member as free as he or she was before. The content of Rawls's two principles simply reflects this conception of the problem. So Rawls's two principles simply describe what a liberal society must do in order to be a liberal society... Rawls's principles are derived from the idea of liberalism itself... The normative force of the conception is established in this way. *If you recognize the problem to be real, to be*

¹ This paper is inspired by, and substantially draws on, the work of Eli Friedlander and Steven Affeldt. In their Doctoral dissertations they appropriate Cavell's criticisms of Rawls and incorporate other Cavellian themes in developing their respective, original interpretations of Rousseau (Friedlander, Eli, *Expressions of Judgment*, Harvard University Dissertation (UMI), 1992 esp. chapter 3 "Before the Law", 225-268; Affeldt, Steven, *Constituting Mutuality*, Harvard University Dissertation (UMI), 1996 esp. chapter 1, "The Citizen as Legislator", 1-178). I thank Eli Friedlander in particular for showing me the way to and around Cavell. I am also indebted to Martha Nussbaum and Jonathan Lear, whose insights into Kantian Ethics and its difficulties inform this paper to a great extent.

² Korsgaard goes further, actually. She says: "But the importance of the [constitutive move] is deeper than that, for I believe – and I know this is more controversial – that the *only* way to establish the authority of any purported normative principle is to establish that it is constitutive of something to which the person whom it governs is committed – something that she either is doing or has to do" (Korsgaard 2009: p. 57).

*yours, to be one you have to solve, and the solution to be the only or the best one, then the solution is binding upon you*³.

The constitutive move takes on the challenge of a practical skeptic. The skeptic undertakes a certain activity but rejects a guiding principle of that activity, a principle for which normative authority is claimed. Supposedly, upon being shown that the principle is constitutive of the activity he undertakes, the skeptic is silenced. He now *cannot* reject the suggested principle, because the principle is an internal condition of an activity he himself undertakes.

The constitutive move is sometimes traced back to Rawls's seminal paper "Two Concepts of Rules". Already with respect to that paper, Stanley Cavell offers a thought provoking criticism that, while sympathetic to the general foundationalist thrust of the move, points to a certain problematic. The problematic arises when, let me say, the mood of the constitutive move is carried into the metaethical task of understanding of the workings of moral encounter.

This paper suggests that, and spells out the way in which, this early criticism is essentially a precursor of a later more mature criticism Cavell launches against Rawls's conception, in *TJ*, of (what Cavell calls) *The Conversation of Justice*. Mature, because it is informed by, and put to the service of Cavell's own positive contribution to moral thinking, namely, Emersonian Moral Perfectionism. I hope that in relating the latter more difficult, "Cavellian" criticism to the former more accessible, let us say, *disciplined* critical stance, light will be shed on some prominent issues in Moral Perfectionism. Particularly, the constitutive move is closely related to the notion of autonomy. For it is essential to the move to show that the skeptic somehow *identifies* with the rules he, in this case, seeks to reject. It will be a prominent task of this paper to show that the notion of autonomy the move utilizes is not only unsuited for the description of the goings on in ordinary moral judgment - unsuited to show how autonomy manifests in *judging* over and above the fact that the *judgment* accords with autonomous rules - but that this notion encourages a conception of *judging* whereby a place for autonomy in this sense is precisely denied.

The Criticism of "Two Concepts of Rules"

In "Two Concepts of Rules" Rawls distinguishes between justifying a practice and justifying an action falling under it. He elaborates the distinction by showing how it helps to fend off an eminent objection⁴ to utilitarianism. The objection is that in the end utilitarianism cannot account for the obligation to keep a particular promise: applying the utilitarian principle to decide whether one should keep or break a promise essentially dissolves the binding of the commitment made *in promising*, and thereby offends our intuitions about the kind of obligation making a promise is.

Rawls shows that once the logical distinction between justifying a practice and justifying an action falling under it is in place, it is open to the utilitarian to contend that while the utilitarian principle applies to the former, it does not, and indeed the very nature of the practice at stake will not allow it to, apply to the latter. Thus anti-utilitarian arguments, Rawls says,

³ Korsgaard 2008: 322.

⁴ Another objection rebutted is the objection that utilitarianism may end up justifying the punishing of the innocent. Cavell actually addresses both of Rawls's rebuttals in tandem in his criticism. See *CR* 293-303.

take it for granted that the promisor... is entitled without restriction to bring utilitarian considerations to bear in deciding whether to keep *his* promise. But if one considers what the practice of promising is one will see, I think, that it is such as not to allow this sort of general discretion to the promisor. Indeed, the point of the practice is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance. There are obvious utilitarian advantages in having a practice which denies the promisor, as a defense, any general appeal to the utilitarian principle in accordance with which the practice itself may be justified⁵.

There is a distinctive *kind* of illegitimacy involved in entertaining utilitarian considerations when deliberating the breaking of a particular promise, which is directly related to what Korsgaard means by saying that constitutive standards help meet skeptical challenges "with ease". By showing the skeptic, who challenges the rule of a practice he nevertheless participates in, that the rule is constitutive of the practice, we essentially obviate the room for so much the raising of the question. The constitutive move *remaps* the alternatives in such a way that questioning the rules is not open to the participant of the practice. It's a kind of "my way or the highway": you *cannot* both participate in the practice and disobey its rules. The skeptic realizes questioning the authority of the rules trumps responsibilities he had already, participating in the practice, taken upon himself. He is thus more silenced than answered. For he is shown not why he should, here and now, as it were get himself to obey the rule, but rather, why he, in a sense, cannot but obey it, why, in a sense, it is not up to him whether he does or not. How is it exactly that we achieve this in the case of promising? And what is the skeptic's ensuing silence like?

The nature of the illegitimacy involved in the appeal to the utilitarian principle to excuse the breaking of a promise is better understood when we distinguish two kinds of rule: Summary Rules and Practice Rules. Summary Rules essentially sum up or record in the form of a rule a certain pattern of past decisions. Looking back, similarities in cases and decisions are recognized, and based on past patterns rules are established to facilitate decisions in the future. This means of course that the relevant cases and decisions are describable independently of the rules. Since rules are but guides and aids for decisions whose basis is independent of the rules, we can say that such decisions are "logically prior"⁶ to the rules. Thus, one is always entitled to reconsider and overturn the rule's precept, and there is room to question the rule's normative authority in a particular case, or indeed, at all.

In contrast with that, Practice Rules "define a practice"⁷. They thus are "logically prior" to particular cases and decisions, since "there cannot be a particular case of an action falling under the rule of a practice unless there is the practice"⁸. The idea is that the concept of a practice essentially involves people *obeying* or *following* the rules, calling it the manifestation of a "capacity to act in accordance with the representation of laws"⁹:

The rules cannot be taken as simply describing how those engaged in the practice in fact behave: it is not simply that they act as if they were obeying the rules. Thus it is essential to the notion of a practice that the rules are publicly known and understood as definitive;

⁵ Rawls 1955: 16.

⁶ Rawls 1955: 22.

⁷ Rawls 1955: 24.

⁸ Rawls 1955: 25.

⁹ Kant 1997: 24.

and it is essential also that the rules of a practice can be taught and can be acted upon to yield a coherent practice¹⁰.

Whereas Summary Rules formulate a regularity the occurrence of which is in principle independent of such rules' being formulated, the formulation and dissemination of Practice Rules – i.e., there being a practice – is responsible not just to the observed regularity of cases falling under these rules, but also to there being such a phenomenon *überhaupt*, to the possibility there being such a thing as a case that falls under the rule of a practice.

Compare: if I disturb your peace by playing loud music all hours of the night, and a law to the contrary is in place, I may properly be said to be breaking the law. It is clear that nothing in the description of the case hangs on the existence of such a law. Indeed, the common recurrence of such neighborly disputes might be thought to have *induced* the relevant legislation, “bottom up” legislation, as it were. Furthermore, were someone's routine conduct to suddenly count, under a newly passed bill, as breaking the law, they wouldn't by that be offending a constitutive standard of what they were doing: they would be doing the same thing as before, only now there is a law to the contrary. Now consider the case of promising. Supposedly it is a law of the practice of promising that you are not to appeal to the utilitarian principle to excuse the breaking of the promise. In contrast to the former example, in this case you (logically) *can't* break the law, since for the case to *be* a case of breaking a promise, for your activity to so much as be described as that of the breaking a promise, a practice of promising with its rules – *rules defining, among other things, forms of admissible excuses, forms of breaking a promise* – must already be in place. The logical priority of Practice Rules, the sense in which rules of a practice are *constitutive*, means that were you to fail to act in accordance with them, you will simply not count as participating in the practice.

We can therefore distinguish two categories of violation of rules: breaking a Summary Rule is perpetrating an action that the law, it so happens, forbids, while breaking a Practice Rule amounts to failing to participate in the activity that the rule (partly) defines. What's important here is a sense in which one *cannot* break the Practice Rules: in so far as those rules are constitutive of the activity they define one either falls in or out: either partaking in the activity so defined and thus abiding by the rules of the practice or doing something different altogether. This is in line with the fact that our reaction to someone's actually appealing to the utilitarian principle to break a promise is one of failing to understand (or “taking it as a joke”) rather than one of reproach or rebuke.

Stephen Mulhal has offered a review of Cavell's various criticisms of Rawls¹¹. It will help my analysis of Cavell's attitude towards the constitutive move to see what Mulhal thinks the locus of Cavell's criticism is. Here is what Mulhal says:

To think of human commitments to which human speech and action gives rise as fixed by a system of defining rules insures that those commitments are limited in advance, and limited in impersonal ways; to think of human relationships as exhaustively determined by out occupation of socially defined roles limits in advance the range and depth of their claims upon us as persons. On Cavell's view, the reality is that the reach of such commitments and relationships is always in the course of being determined, and so must in fact be fixed by us. So Rawls's vision of the moral life effectively makes the self's commitments and relationships less fluid and more evident than they really are, and thereby con-

¹⁰ Rawls 1955: 24.

¹¹ Mulhall 1997.

juries up a fantasy of a self that is more fixed, more invulnerable and more transparent to itself than it really is¹².

I think it is important to see that the 'de-rigidifying' current Mulhal is pointing out, while no doubt present, *hinges on another criticism*, a criticism directed at the constitutive move, and whose consequence is, in a sense, the *deepening* of that move. It is important to see that Cavell's criticism proceeds in two stages: first, there is the suggestion that the depth of the notion of the practice funding the constitutive move is not fully thought out, and secondly, building on that first insight, that there is a failure on the side of Rawls to properly register the form of moral discussions. I am insisting on slicing the criticism this way for at least one important reason. Thinking of Cavell as 'de-rigidifying' Rawls's account might lead us to suppose that Cavell disagrees with Rawls about the shape and content of our commitments, that he gives a picture of their nature that results in conceiving them as either more *lax* (say, that he is more *tolerant*) or more *up to us* (say, that he is more *relativistic*) than Rawls does. I do not think that that is the case. In fact, Cavell iterates, in laying out his criticism, much sympathy with the constitutive move and what it accomplishes, and in the later, perfectionist, criticism he never tires of applauding Rawls's accomplishment in giving a systematic account of the nature and ground of justice (showing "the justice of justice"¹³, as he puts it). Rather than *replacing* Rawls's picture of the way we are bound by the nature of our practice, Cavell is interested in, I would say, articulating the way in which the mode of philosophizing typical to such a foundationalistic enterprise tends to overstep its bounds. By spelling out first the criticism that operates at the foundational level of the constitutive move, and then seeing how this criticism links to the second criticism, the criticism about the nature of moral conversation, I hope to come to a better grip of the nature of this overstepping of bounds. But we will have to go into some detail first.

I said that Cavell is highly sympathetic to the constitutive move as it appears in Rawls's treatment of promising. It is his "complete agreement" with Rawls's basic strategy of defending the utilitarian which prompts Cavell to "articulate as well as [he] can" where Rawls's account falls short. Rawls's own insight, so Cavell's, that "it is part of the concept of promising that one does not keep or break particular promises on general utilitarian grounds" is *stopped short* by his failure to appreciate how fundamental the practice that funds promising really is¹⁴.

Register, for starters, Cavell's "concept of a promise" instead of Rawls's "practice of promising". Cavell hones in on the following from Rawls, quoted above: "There are obvious utilitarian advantages in having a practice which denies the promisor, as a defense, any general appeal to the utilitarian principle in accordance with which the practice itself may be justified". Cavell objects:

[I]t must be wondered whether that is, literally, a comprehensible statement... Since there would be no promise apart from a knowledge of that fact about the concept of promising (that one does not coherently *keep or break* them on general utilitarian grounds) it is not comprehensible to *justify* actions falling under that concept by appealing to such fact¹⁵.

¹² Mulhall 1997: 180.

¹³ *CHU* 25.

¹⁴ *CR* 295.

¹⁵ *CR* 295.

Rawls is found unawares of just how deep the notion of practice that supports the constitutive move runs. For on top of suggesting that the distinction he draws helps the utilitarian fend off the accusation that applying the utilitarian principle to a particular case offends our moral sensibilities, he suggests that the utilitarian can use the distinction to locate the place where the utilitarian principle *may* indeed be used, namely, the justification of the practice as a whole. According to Cavell, however, in so far as one thinks of promising as the kind of practice the rules of which are, in any ordinary sense, *justifiable* one misses a fundamental aspect of the kind of practice it is. This is the aspect that is registered by replacing “practice” with “concept”; it is an aspect that the earlier chapters of *The Claim of Reason*, following Wittgenstein's *Philosophical Investigations*, are interested to work out:

[Rawls] cannot mean merely what Wittgenstein means by referring to “obeying a rule” or “making a report” as “institutions” or practices (*Investigations* §199, §202)... [W]hat[Wittgenstein] means, roughly, is that there are *ways* of doing all of these things, that not just anything you do will *be* competently performing them, that, in a word, they have a grammar, and in that sense are conventional, and in that sense social. He does not... mean that they are conventional or social in the way institutions which characterize particular societies are conventional. But it is in the latter sense that Rawls is, or must be, thinking of practices, anyway so far as his concept of the practice is to show how a utilitarian can, in ways consistent with his position, justify the practice... [W]hat might it mean to urge a reform of the practice of promising? In the Wittgensteinian use of “practice” that would be no more, and no less sensible than urging a reform in the way we obey rules (not: a *particular* mode of obedience to some *particular* rule), or in the way we point to objects¹⁶.

There is a certain depth, a certain, let us say, inveterateness, to the relevant notion of a practice, whereby it is intolerant to the idea of reform in a way that Rawls's notion of a practice seems not to accommodate. Rawls's use of the analogy with games helps Cavell make the point palpable. For Rawls compares the inadmissibility of rejecting the authority of the rule denying breaking promises on utilitarian considerations to the inadmissibility of rejecting the authority of the principle determining that three strikes constitute striking out. But, Cavell points out, while it is comprehensible, and indeed one could make a case for it, to think of the concept of striking out in baseball as allowing four strikes, the concept of a promise cannot stand the corresponding revision.

But if this is right, what sense *can* we make Rawls's suggestion that the practice may be justified along utilitarian lines? Rawls says that the point of the practice of promising is “to abdicate one's title to act in accordance with utilitarian and prudential considerations so that the future may be tied down and plans coordinated in advance” and adds that “there are obvious utilitarian advantages” in having such a practice¹⁷. But, so understood, there is not much between promising and making any commitment whatsoever. Cavell responds: “Indeed there are [obvious advantages to the practice making promises, so understood]. Doesn't one feel that they are *too* obvious? The very existence of human society, and the coherence of one's own conduct depend upon it...[So understood], promising is not *an* institution but the precondition of any institutions among persons at all”¹⁸.

The ‘inveterateness’ of which I speak is developed in earlier parts of *The Claim of Reason* through an exploration of Wittgenstein's notion of a form of life. A major hindrance to

¹⁶ CR 294.

¹⁷ Rawls 1955: 16.

¹⁸ CR 298.

a proper understanding of this notion is a certain way of taking the idea of convention. In trying to account for the "conventionality" of certain basic modes of response typical of human beings we are tempted to understand them as the agreed upon arrangements a particular culture has found convenient or beneficial to pursue because of conditions particular to its history or environment. This way understanding the conventionality of our practices seems to be present in Rawls's various formulations, and it is clearly the background when Rawls suggests that "there are obvious advantages in having a practice [of promising]"¹⁹. Cavell, by contrast, proposes to think of conventions in that context

as those forms of life which are normal to any group of creatures we call human... Here the array of "conventions" are not patterns of life which differentiate human beings from one another but those exigencies of conduct and feeling which all humans share. Wittgenstein's discovery, or rediscovery, is of the depth of convention in human life, a discovery which insists on only of the conventionality of human society but, we could say, on the conventionality of human nature itself...²⁰.

This is consequential to the way we should conceive of the constitutive move, because the two ways of understanding convention set up differently *one's relation to the practice* whose rules one questions. We can say that under Rawls's understanding there is room for someone *giving or withholding consent* to the practice itself, whereas in Cavell the moment of consecration to a practice is dealt with in terms of *initiation* whose point is precisely to problematize a straightforward notion of consent or agreement to a practice.

The primal moment where the question of the relation to the practice is taken up by Cavell is his exploration of what he calls the Wittgensteinian *scene of instruction*. The scene is threaded throughout the *Philosophical Investigations*, revealing an anxiety that is inherent questioning about one's relation to one's practice, precisely because one recognizes that neither justification nor identification here proceed in an ordinary manner. Cavell would agree with Rawls that one *cannot* appeal to the utilitarian principle to justify breaking a promise since one thereby trumps the conditions of the very activity one purports at the same time to be involved in. And, both Cavell and Rawls conceive of the moment as displaying some kind of incompetence. But while in Rawls the incompetence is related to the problematic of signing off on something one at the same time disavows, in Cavell the inveterateness of the practice sheds new light on the kind of incompetence at stake: it is a lack of mastery of a deep and broad set of capacities, capacities that account for the possibility of proper maturation to human society.

This is what I meant when I said that Cavell's criticism deepens constitutive move. Under Cavell's picture, we are implicated by the practice of promising in more fundamental and incorrigible a way than Rawls's conception of Practice Rules of seems to allow. The identification with the practice that figures in the constitutive move is not to be thought of in terms of giving consent to, or taking up of, or entering into, a proposed set of conventions; it is not to be thought of, that is, in terms of *affirming* a practice. Rather, the inveterateness of the practice and the kind of capacities that fund the possibility of partaking in it, imply that the problem of identification here is, let us say, a metaphysical problem; jeopardizing these practices is not jeopardizing something *with which* we identify. These rules are

¹⁹ As when he says: "In a practice there are rules setting up offices, specifying certain forms of action appropriate to various offices, establishing penalties for the breach of rules, and so on. We may think of the rules of a practice as defining offices, moves, and offenses" ("Two Concepts of Rules", 25). It is worth mentioning that this conception of the conventionality of the practice of promising appears also in *TJ*. See for instance *TJ* 344.

²⁰ *CR* 111.

not external to us in the way that the rules of this or that chessboard game, this or that institution, are. Rather in questioning our identification with these rules there is a sense in which we question *our identity itself*: "I am thrown back upon myself, I as it were turn my palms outward, as if to exhibit the kind of creature I am, and declare my ground occupied..."²¹

Now, quite the contrary from trying to *relativize* or make more *tolerant* our view of these practices, Cavell, precisely in appreciating their depth and the inalienable way in which they implicate us, precisely, if you will, in emphasizing their *rigidity*, paves the way for a proper charting out of the form of moral discussions. First, connecting the notion of a practice to fundamental capacities acquired through initiation helps to see that moral discussions proceed from, and *assume as unproblematic*, mastery of the relevant capacities and identification with the rules:

It is perfectly true that in learning what a promise is we learn what defenses it is appropriate or competent to enter, and where, should we not keep it. But these are just the defenses we learn in learning to defend *any* of our conduct which comes to grief: those excuses, explanations, justifications (I will call them, as a whole, *elaboratives*) which make up the bulk of moral defense²².

In discussing a case of breaking a promise, then, we are not going to focus on the defining rules of the practice, but rather, taking them for granted concern ourselves with such questions as

whether what you said was (tantamount to) a (serious) promise, whether you were really *prevented* from keeping it (or perhaps only succumbed to temptation or intimidation), whether, knowing what was likely to happen you ought to have made it, whether you did what was possible to alleviate the consequences of the promise...²³.

The point is a general one, and concerns a violation of the point and purpose of moral conversation that Rawls's focus on defining rules of a practice is prone to. The appeal to rules as a response to a moral challenge amounts to, as the dynamics of the constitutive move reveals, *silencing* that challenge, showing that it *cannot* arise. And this makes it seem as though in moral discussions we *set each other straight*, point out how the interlocutor, incompetently, violated a rule unawares. But,

A moral reason can never be a *flat* answer to the competent demand for justification. If a moral question is competently raised then a moral response *must* allow a discussion whose conclusion will be the fuller articulation of the position in question...One may, of course, refer to the rules of an institution in one's defense; the effect of that is to refuse to allow a moral question to be raised. And that is itself a moral *position*, for which one must accept responsibility²⁴.

Secondly, and analogously, the rigidity of Practice Rules – their peculiar intolerance to violation – is flashed out in Rawls through the analogy with games. But, precisely in demonstrating this rigidity, there is demonstrated also the inadequacy of the Practice Rules

²¹ CR 115.

²² CR 296.

²³ CR 297.

²⁴ CR 303.

model to reflect the dynamics of moral discussions, specifically, the resolution of moral conflict. For starters note that it is essential to games that *what counts as a violation of the rules* will be conclusively settled, and games are set in such a way as to avoid ambiguities and disagreements with respect to that. But there are no moral umpires, and, as we have seen with promising, moral conversation is set in an evaluative key to the resolution of, among other things, the question *whether* a rule was violated.

Furthermore, in games there is a clear cut demarcation of what must be done (what the rules do not leave open for the player's judgment) from what ought to be done (strategic recommendations for playing the game well). The principles for playing well may be codified as rules, narrowing down the alternatives, but this must be *settled prior to the game* or else the game cannot be practiced. In morality, however, the demarcation of a border between 'playing' and 'playing well', the establishing of the balance between must and ought, is precisely *the starting point deliberation*. Moral discussion starts where a choice presents itself between two or more *morally problematic* actions. It is when my 'must' meets your 'ought not' that we begin deliberation. Obviously, I say, I would not offend this poor man if I did not *have to* help my sister. Obviously, you say, you ought to help your sister, but at the price of offending that man, you ought not to. Cavell points out that the philosopher's, in this case Rawls's, dwelling on "You ought to do X" vs. "You ought not to do X" obscures this mode of conversing. Moral discussions treat mastery of Practice Rules, or elaboratives, as given, but nonetheless engage the details of the situation at hand to flash out what the interlocutors take responsibility for, what their positions are.

[U]nlike the case of games, what is and is not an alternative open to you is not *fixed*. Actions are not moves, and courses of actions are not plays. What you say you *must* (have to, are compelled to...) do, another will feel you *ought* to do, generally speaking, other things being equal, etc., but that *here* you ought (would do better) *not* to... What you say you *must* do is not "defined by a practice", for there is no such practice until you make it one, make it *yours*. We might say, such a declaration defines *you*, establishes your position²⁵.

Appreciating how deeply ingrained Practice Rules are, how, in a sense, inalienable they are, should help us locate better their role in ordinary moral discussions. When engaged in moral conversation, we are not invoking a pre-inculcated set of conceptual relations, institutional rules that then go on, without our intervention as it were, to settle the dispute. Rather, the complexity of moral life calls for the deliberation and assessment of choices that are, to use Cavell's term, *elaboratively loaded*. Choices that call for moral discussion involve the entertainment of a whole host of Practice Rules. They are, as it were, the building blocks of our discussion. The discussion concomitant to these loaded choices makes clear, to ourselves and others, the significance for us of the various considerations that bear on the choice, considerations the intelligibility of which can only come to view for someone initiated into the use of elaboratives, someone who knows the Practice Rules (what's the value of *keeping* my word to mean to someone who knows not what *giving* one's word is?) Our choices manifest the position we *take* vis-a-vis these various considerations, and, more often than not, we respect one set of considerations at the peril of another. But since *we* are responsible, and are held responsible, for such choices, moral discussions are of the form of *creating our practice*. Finding where our musts end and oughts begin is ours, rather than Practice Rules', to do.

²⁵ CR 309

We get an extremely interesting result: Cavell's analysis and criticism of Rawls's constitutive move brings to the fore something like a *sublation* of this move. The constitutive move has the skeptic realize that he attempts to reject a constitutive part of a practice with which he identifies. Cavell, we have seen, puts pressure on the nature of this identification through the exploration of the notion of convention that funds it²⁶. The interesting result is that in pressing *this* idea of identification with a practice, resources are revealed that allow Cavell to sharpen and lay bare the contours of moral life in such a way that *another* notion of identification becomes apparent. This new notion of identification, albeit located at a level logically posterior to the one Rawls engages, is of immediate practical significance: it pertains to the agent's actual practical involvements. Rather than in the way of a *philosopher's* invoking a logically antecedent "convention" (either in Rawls's or Cavell's sense) to which the skeptic is supposedly committed, identification in this sublated sense arises when an *interlocutor* addresses a competent challenge to an agent's doing, goading him to assess, to *determine* his position from within the very real details of his involvement in the case: the particular considerations the case elicits provide the material for the delineation of a position he can live with, and bid the interlocutor to respect.

See also that this notion of identification introduces two elements that are essential to the act of taking responsibility, the act that gives moral discussion its shape, as it were: *confrontation* and *expression*. Practical identification takes place amidst the elaboration of a moral position; it is the act of taking responsibility for such a position. As such, identification is as a task for which confronting another's challenge is essential. At this level, then, you cannot be your own judge because the very space in which judgment unfolds is the space of elaboratives, of responses to an inquiry, to a competent challenge. Assuming a position, taking responsibility, is an expressive task set and enabled by the interlocutor whom you confront, a task that, at *this* level, might be called the task of constitution of practical identity; for it is only in carrying it out that the content of a morally loaded choice appears, here and now, as something *to* identify with. This brings out one last important point. We can now see that, since to respond to a moral challenge by deferring to Practice Rules is to essentially delegitimize the interlocutor, render him incompetent, by responding in such a way we deprive *ourselves* of the conditions of moral judgment. This point will be further developed in Cavell's criticism of *TJ*, to which I now turn.

The Criticism of TJ

Already in the preface to *Conditions Handsome and Unhandsome* Cavell himself hints at the possibility of linking his meta-ethical excursions in the third part of *The Claim* to his lectures on Emersonian Moral Perfectionism, and particularly with the criticism against moments in Rawls's *TJ*²⁷. Emersonian Perfectionism is not offering a formulation of a competing, perfectionist, principle of justice, nor challenges Rawls's principles as they stand. Actually, the eschewal of codification, which is a key feature of Moral Perfectionism, is important for Cavell, among other things, precisely *for* keeping in critical conversa-

²⁶ It is worth mentioning that the rejection of Practice Rules of the sort that govern moral discourse, or moral criteria, receives treatment in quite a different philosophical trajectory in the fourth part of the *Claim of Reason*, through a philosophical diagnosis of skepticism of other minds. It seems to me that this extremely difficult and obscure part of the book is owed much more attention than it has received. Not the least of reasons is that it raises a connection, not yet sufficiently explored, between foundationalist aspirations in morality and a Wittgensteinian conception of the nature of philosophical enterprises.

²⁷ *CHU* xx.

tion with theories of justice from either Teleological or Deontological camps. Yet this very eschewal makes for a difficulty in pinpointing the level at which this “outlook or dimension of thought”²⁸ represents a viable criticism of these theories, and even raises the more perturbing question as to whether there is room for fruitful conversation at all between the enterprises. I leave *this* philosophical question aside and, convinced that there is, take my cue from the earlier meta-ethical criticism just surveyed.

Call democratic judgments the various forms of evaluation that citizens in societies of “good enough justice”²⁹ engage in with respect to their own conduct as members of such societies and with respect to the form and conduct of their society’s institutions. Understand a “society of good enough justice” to be a society like our own, a liberal society that, while not yet a well ordered society is nevertheless committed to the furthering of assimilation and implementation of the principles of justice. Understand also “conduct as members of such a society” to mean not only one’s conduct *vis a vis* the institutions of one’s society but rather, taking into account the pervasiveness of the political, one’s conduct in so far as that is guided by one’s attempts to answer the question “how to live?” or how “to be useful in the world?”³⁰. Democratic judgment in this broad sense covers a wide territory indeed, from high flown and abstract engagement with a legislative motions or constitutional chapters, to intimate explorations of career choice or the fate of a marriage.

But now consider that our earlier reflections about the nature of moral conversation may be pertinent to democratic judgments, in so far as the question of identification is raised in these judgments in its highest pitch. And indeed Cavell thinks that actual judgments about what to do in particular cases, judgments such as we *discuss* in ordinary moral encounters, are essentially linked to the level of engagement typical of democratic judgment. Moral Perfectionism amplifies this level of engagement and investigates it, as it were, as a topic all on its own:

Of course one will feel that in each case of moral conflict... persons are deciding what kind of life they wish to lead, what kind of persons they mean to be. But that is the point. One might say that in our remarriage comedies and in their derived melodramas, this is all that is being decided, that our interest in these relatively privileged couples is their pure enactment of the fact that in each moral decision of our lives, our senses of ourselves, and of what, and whom, we are prepared to consent to, are at stake. Emerson will put such an idea [saying]: “Character teaches above our wills. Men imagine that they communicate their virtue and vice only by overt actions, and do not see that virtue and vice emit a breath every moment”³¹.

This helps locate Cavell’s discomfort with *TJ*. In the early criticism Cavell tried to fend off the tendency to have the foundationalist thrust of the constitutive move play a role in the adumbration of the nature and dynamics of moral conversation. In *TJ*, Rawls’s accomplishment in flashing out the intelligibility of justice – in “mak[ing] perspicuous how the justice of justice is to be assessed”³² – is given a definitive role in the portrayal of the form of our commitments to one another as citizens of a democratic society³³. This, I will show,

²⁸ *CHU* 4.

²⁹ *CHH* 3.

³⁰ *CW* 36.

³¹ *CW* 39.

³² *CHU* 25. It does so by providing “tests of institutions according to the ability to mitigate [the] burdens of both natural and social orders”.

³³ Another criticism focusing on this issue, albeit in a different register, still also anchored in the test case of promising, is found in Thompson 2004.

results in a Cavellian criticism that essentially apes the structure of the criticism in *The Claim*. *TJ* tries for a delineation of the limits of our responsibilities according to a conception of justice whose resources fit the foundationalist animus of the book. *TJ*'s depiction of the form of democratic judgment – a judgment that is, after all, made from the perspective of an agent deliberating here and now – is therefore inescapably vitiated.

According to Rawls, a well ordered society is one that could originate by way of a fair contract between the parties in the OP. In this procedure rational agents, conceived as representatives of citizens in a liberal democratic society, select principles of justice to regulate the basic structure of society. The principles and the form of a well ordered society are thereby both derived and justified. Go back to Korsgaard's characterization of Rawls's constructivism. The OP models the conditions of a problem that *we*, citizens of a present and less than perfect liberal democratic society, face, namely, the problem of distributive justice. Since this is *our* problem, and the OP models *it*, the solution arrived at via this procedure is one we ought to accept. Now it is clear that the critical moment for a constitutive move reading such as Korsgaard's turns on the relation between our problem and the way the OP models it. The question is whether we acknowledge the problem that the OP models as our own, whether we identify with it, whether the OP retains the point and purpose of our initial preoccupation.

It is important, in order to properly engage that question, to clearly distinguish between our standpoint here and now as citizens of *this* society, and the standpoint of the agents of construction, inhabiting a well ordered society, presumably a society (forever) not (yet) our own. The OP is a mediating conception that serves to get us from conceptions that we endorse – conceptions supposedly prevalent in our culture (as per the notion of public reason) and implicit in our considered judgments (as per the notion of reflective equilibrium) – namely, the conception of persons as free and equal and the conception of society as a fair system of corporation over time, and towards the principles of justice as they define a conception of a well ordered society. The challenge to Rawls's theory, so far as Korsgaard's reading of the constitutive move into it is concerned, lies then in accounting for the identification with those conceptions that provide the materials of construction.

One problem from the quarters of identification could be this: in so far as the conceptions of the moral person and of society as a fair cooperative system restrict parties in the OP in ways which they themselves do not, upon reflection, approve of, the results of the construction lose their legitimacy. I do not think, however, that this problem poses a *fundamental* criticism to Rawls's theory. Because *TJ* wants to get at principles that embody autonomy and part of its methodology is therefore to consider such criticisms, if successful, as like extensions of its own enterprise. Those criticisms are not only welcome, they are invited. The OP and reflective equilibrium, and later on the idea of public reason, all reflect a commitment to *testing* the identification at stake, to ensuring that the principles do properly represent our considered judgments. Moreover, *TJ* is working out the suggested principles, considering them against other alternatives, having the various suggestions compete, so to speak. So criticisms about the content of the principles merely suggest that *TJ* does not accomplish what it sets out to do, but nothing about *what* it sets out to do and even the *way* it does it is threatened. The problem is, merely, one of execution.

The identification problem as I understand Cavell to raise it is, however, one that survives any perfecting of execution. In fact Cavell on many occasions professes both admiration for Rawls's accomplished and systematic execution, and agreement with the content of the principles. I want to ask how Rawls's account is exposed to a problem with respect to

the possibility of viewing oneself as the source of the law, of identifying with the law – a problem, call it, with his conception of what autonomy comes to in moral life – *whatever the final content of the principles of justice may turn out to be*. Put the question this way: Suppose that the principles of justice *do* describe the content of our sense of justice, just as the rules of the practice of promising properly describe the concept of promising. Is there still a problem in what Rawls *wants from his project*, a problem akin to the problem I have explicated, in the case of promising, with the place Rawls's constitutive move assumes in moral life? The content of the principles thus put aside, we might call such a problem, after Cavell, a problem of relating to what we know.

Cavell acknowledges that a shift of critical focus from the content of the principles to, let us say, the mode of entertaining them or relating to them in societies of good enough justice, leaves one somewhat vulnerable to the charge of neglecting the more pressing matters of political justice. Nevertheless, he insists on articulating a threat to democracy originating not in the particular faults of this or that system of laws – which he is happy to admit is indeed a prior concern, even a condition to his own undertaking³⁴ – but rather a threat jeopardizing systems of rules as such, a danger originating not in the content of the rules but in their form, in their nature *as rules*.

What is problematic in our relation to rules? Rousseau is clearly in the background here. Consider from *The Geneva Manuscript* the suggestion that the *will* cannot be obligated, say, “tied down in advance”. Autonomy seems to be here subject to a *temporal* requirement:

...it is contrary to the nature of will, which has no dominion over itself, to engage itself for the future. One can obligate oneself to do, but not to will; and there is a great difference between executing what one has promised because one has promised it, and continuing to will it, even when one has not previously promised to do so [You could call this the difference between consent and freedom]³⁵.

In both promising and principles of justice we have taken the force of the constitutive move to be somehow attributed to a logically prior act of identification. By describing the case as one of promising, you demonstrate a commitment to the rules of the practice; seeking to solve the problem of justice, where that problem is formulated in terms of the conceptions of the moral person and of the well ordered society, you avow commitment to the best solution to be found. But the identification befitting the foundationalist thrust of the constitutive move is not located in a temporal space. This is because it addresses a skeptical worry of a particular shape. In Cavell's terms I would describe this shape as the temptation to reject our criteria. The constitutive move is but the laying out for the skeptic to see that his doubts are inconsistent with commitments he himself is prepared to assume. Yet this assumption, both in the case of the appeal to the nature of the practice and in the case of the OP, represents a level of identification far removed from the agent's temporal situatedness, from the weave of cares and commitments pertinent to a particular, temporally situated choice. I am not here assessing the satisfactoriness of the constitutive move itself. All I am pointing out now is that since the skeptic does not raise his question from any particular point in time, the answer he is given in principle does not draw on resources pertaining to any particular temporal investment.

Democratic judgment is a form of evaluation governing our interactions as agents always from a particular perspective, a circle of cares and commitments, a weave of attach-

³⁴ CHU xx.

³⁵ Rousseau J.J., *Geneva Manuscript*, II, ii, 10.

ments, attractions, obligations and necessities. In so far as Rawls's *TJ* aspires for the principles of justice to inform those judgments he runs the risk of neglecting to pay heed to the temporal requirement of autonomy Rousseau insists on. This is because the foundationalist thrust that goes into the development of the principles keeps the level of identification operative in the account divested of the agent's particular determinations. And, in so far as democratic judgments are an essential part of democratic life – in so far, that is, that they are part of democracy's inner workings – to misrepresent their form in this way is to misrepresent the conditions of democracy. That is why Cavell's criticism is fundamental: the problem it flashes out, no amount of tinkering can mend since it concerns no particular detail of the theory. It is the theory's *application* to democratic life that is at stake. I want to say, it is the theory's *conception of itself as something to be applied* that is the problem. And for a theory that harbors practical aspirations and that enjoys such success – I would say even, practical prestige – as *A Theory of Justice* does, a problem *here* is not to be overlooked.

To start assessing Cavell's discomfort let us call up a place in *TJ* where Rawls clarifies, by way of "intuitive considerations"³⁶, the sense in which the difference principle is egalitarian. To do so, Rawls attempts to flash out the way the difference principle is compatible with the principle of redress. While the difference principle does not adjure the eradication of undeserved inequalities – like "the distribution of natural talents and the contingencies of social circumstance" – it *does* command that we use the resources pooled from these inescapable contingencies in such a way that the fortunate "gain from their good fortune only on terms that improve the situation of those who have lost out"³⁷. Thus, to my mind in one of the most exhilarating passages, Rawls goes on to offer a rebuttal of the thought that the impossibility of perfect redress excuses ignoring injustice, "as if the refusal to acquiesce in injustice is on a par with being unable to accept death"³⁸:

the natural distribution is neither just nor unjust; nor is it unjust that people are born society at some particular position. These are simply natural facts. The basic structure of [Aristocratic and cast] societies incorporates the arbitrariness found in nature. But there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action. In justice as fairness men agree to share one another's fate. In designing institutions they undertake to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit... and while no doubt imperfect in other ways, the institutions which satisfy [the two] principles are just³⁹.

Now I do not purport to object to the content of Rawls's reply. I am interested in the role given the words "men agree to share one another's fate", a phrase Cavell picks up on to interpret the book's practical ambitions. Notice the kind of muddle affecting the embittered egalitarian. His intolerance to inequality renders him inapt to properly distinguish the limits of our responsibilities: he considers things that are out of our hands, hard inescapable natural facts, unjust. Rawls sets him straight. Our agreement to share each other's fate is invoked to make the embittered egalitarian re-appreciate the boundaries of the dominion of justice, to have him see what is ours to mend and what is ours to bear. Cavell recognizes a

³⁶ *TJ* 102.

³⁷ *TJ* 101.

³⁸ *TJ* 102.

³⁹ *TJ* 102.

tone of "elegaicism"⁴⁰ running through the book. I take this paragraph to be representative of such a tone. Note the conclusiveness of our impotence, the hard facticity of nature that sets the limits to what fits our hands. And then the sharing of the coping with what the inescapable conditions of human existence have *left* us with, and the suggestion that the principles of justice *exhaust* what there is to do with what is thus left, and the sense of sublimated pride that goes into bearing this forlorn recognition.

What is useful to me here appears not a paragraph later, when Rawls considers an objection to the effect that "those better situated deserve their greater advantages whether or not they are to the benefit of others"⁴¹. To answer that objection Rawls invokes a distinction between the level of the choice of the principles of justice – that is the level of his response to the embittered egalitarian – and the level of implementing those principles in an already just society. What I want you to gain a sense of, and in that way help bring out what is for Cavell the brunt of the problem, is the way the finality of the demarcation of our responsibilities which we gauged in the former level, *trickles down* to the latter:

It is perfectly true that given a just system of cooperation as a scheme of public rules and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces that it will reward are entitled to their advantages. In this sense the more fortunate have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them. But this sense of desert presupposes the existence of a cooperative scheme; it is irrelevant to the question of whether in the first place the scheme is to be designed in accordance with the difference principle or some other criterion⁴².

Again, I do not object here to what Rawls says. Of course the distinction is valid and the notions of legitimacy, claims upon and obligations of a community, and entitlement to deserts play such role as Rawls describes. I want, rather, following Cavell, to question Rawls's picture of the interaction between the levels. What does Rawls mean by "presupposes" in "this sense of desert presupposes the existence of a cooperative scheme"? What becomes of our "agreement to share one another's fate" at the level of living with our institutions and with one another rather than designing the institutions and laws? Grant that our claims, entitlements and obligations in the second level presuppose this first level agreement. Is this to mean that securing identification with the first level design amounts to doing all that we can, all that fits our hands, in justice? What is the form of a challenge to the application of the principles? Grant that the embittered egalitarian is confused about the limits of our responsibilities at the first level. Are challenges arising from the second level of the form of such muddle as well? Recall the four strikes example. There, it is only at the level of instituting the practice that considerations of utility are of use. If we think of the agreement to share our life together as governing standards of justice, like in the example the principle of utility governs standards for the practice of baseball, are we then to conclude that, in the same way appeal to the governing principle is debarred once the practice is instantiated in the case of games, it is likewise debarred in the case of justice? What then *can* we appeal to?

Cavell identifies this 'trickling down' to be present in various *moments of expression* in *TJ*, moments covering both dimensions of the democratic judgment – the appraisal of the conduct and form of society and of one another. In these moments of expression the OP and

⁴⁰ *CHU* 29.

⁴¹ *TJ* 103.

⁴² *TJ* 103.

its consents are made pertinent to our responsibilities here and now, forming the book's conception of what Cavell dubs "The Conversation of Justice"⁴³. Such is, for example, the moment of responding ("there are many things to say"⁴⁴) to someone failing to see a *reason* to abide by their moral sentiments, sentiments of, after all, psychological origins. Or, a yet more fundamental moment, where at stake is the public acceptance of the principles, and the sense in which members of society may be said to be autonomous and its scheme voluntary ("whenever social institutions satisfy [the principles of justice] those engaged in them can say to one another that they are cooperating on terms to which they all would agree if they were free and equal persons whose relations with respect to one another were fair"⁴⁵).

Let us focus on a moment of expression where at stake is the assessment of each other's conduct in the broad sense characteristic of (one aspect of) the democratic judgment. The trickling down is manifest, according to Cavell, when Rawls discusses a rational person's "plan of life":

A rational person may regret his pursuing a subjectively rational plan, but not because he thinks his choice is in any way open to criticism. For he does what seems best at the time, and if his beliefs later prove to be mistaken with untoward results, it is through no fault of his own. There is no cause for self reproach⁴⁶.

Formulated in a normative key this reads:

[A] rational individual is always to act so that he needs never blame himself no matter how his plans finally work out... [He] can say that at each moment of his life he has done what the balance of reasons required, or at least permitted⁴⁷.

Admittedly, the chapter on "Deliberative Rationality", where this quote is extracted from, pertains to highly abstract features of rationality and does not specifically address decisions in a moral key. Yet the fact that those principles are to govern the choosing of a plan of life, means that they pervade considerations typical of democratic judgment⁴⁸. Furthermore, Rawls refers to texts by Thomas Nagel and Charles Fried, and the discussions there do involve the moral aspect of life plan considerations. Moreover still, consider the comparison Rawls makes between the guiding principle of a plan of life and the principle of right:

the principle of responsibility to self resembles a principle of right: the claims of the self at different times are to be so adjusted that the self at each time can affirm the plan that has been and is being followed. The person at one time, so to speak, *must not be able to complain* about actions of the person at another time⁴⁹.

The principle of deliberative rationality is important for Cavell because it makes manifest *TJ*'s conception of moments of expression: they are similar in form to the incompetence

⁴³ This term provides also the title of the chapter of *Conditions* where the criticism of *TJ* is expatiated. *CHU* 101.

⁴⁴ *TJ* 514.

⁴⁵ *TJ* 13.

⁴⁶ *TJ* 422.

⁴⁷ *TJ* 422.

⁴⁸ In *Cities of Words* Cavell elucidates: "I suppose [Rawls means one need not blame oneself] for such decisions as having made what turns out to be a bad investment, or having refused a particular offer of marriage, or not having had children, or having taken a job that seemed lucrative instead of staying in school, and so on" (*CW* 177).

⁴⁹ *TJ* 423 (my italics).

response, the deference to Practice Rules, that we have encountered “Two Concepts of Rules”. In that, so Cavell, the conception represents a rejection of Moral Perfectionism.

Understanding Emersonian Perfectionism as an interpretation of Rousseau's and Kant's idea of freedom as autonomy means understanding it as questioning what or who the self is that commands and obeys itself and what an obedience consists in that is inseparable from mastery. Rousseau's criticism of society in these terms is that we are not expressed in the laws we give ourselves, that the public does not exist, that the social will is partial (conspiratorial). Kant... [asks] whether our obedience is partial, that is heteronomous, taken on the part of incentives not internal to the law. Emerson's turn is to make my partiality itself the sign and incentive of my siding with the next or further self, which means siding against my attained perfection (or conformity), sidings which require the recognition of an other – the acknowledgment of a relationship – in which this sign is manifest⁵⁰.

What pains Cavell in the Rawlsian conversation of justice is a form of expression which defers to a moment of identification far removed from the agent's concerns here and now. We have already observed the role this moment plays in the constitutive move, the role it plays in rebutting a certain kind of skeptic. And we have also seen that the worries and considerations characteristic of ordinary moral conversation are of a different sort than those of the skeptic, and that hence a different way to conceive of identification is appropriate in the relevant logical level. Now I do not think, here too, that Cavell suggests that there is anything wrong with the grounding *TJ* offers to the principles of justice. His concern is with the way the OP is open to the present, to the conversation of justice going on here and now; his concern, that is, is with the way the foundationalist animus appropriate to the ‘first level’ – the level where we meet challenges like that of the embittered egalitarian – keeps functioning after, as it were, the skeptics typical of that level have been silenced.

Both the “above reproach” passage and the “two senses of desert” passage suggest that Rawls thinks of this opening to the present through the notion of *legitimacy*. And there are two main difficulties with putting that notion to work in the context of the conversation of justice, difficulties that touch the heart of what Cavell wants from a conception of autonomy subject to a temporal requirement. First, there is the vitiation of the form of democratic judgment. Cavell says:

When the conversation of justice is directed to the constitution of the original position... [it] comes to an end in a state of reflective equilibrium. To prove that... there is an optimal resolution to this conversation (a set of principles whose choice will receive optimal agreement) is one of Rawls's notable achievements... It seems to me that Rawls is taking encouragement from the proof concerning the resolution for the original position, to regard “above reproach” as a rational response to the question of affirming a plan of life in our actual society. Whereas this bottom line is not a response but a refusal of further conversation⁵¹.

Granted, the conversation ends, but why is it not a response? The problem is that to conceive of questions directed at one's plan of life in terms of legitimacy is to focus, so to speak, on the wrong part of the judgment:

It is, I surmise, because a moral judgment of a state of affairs (not [yet] issuing in a judgment as to the action imperative in the face of this state) has a perceptual dimension and

⁵⁰ *CHU* 31.

⁵¹ *CHU* xxv.

assesses pleasure and pain, and because it is informed by sensibilities in various stages of perceptiveness or impressionability, that moral judgment is sometimes held to have an aesthetic dimension. Perfectionists, judging the world and themselves in it, may seem to dwell in this dimension. Rawls has shown why this dimension must not affect the moral necessity of reflective equilibrium (the fact of matching between judgments and principles) expressed in the joint choice in the original position of the principles of justice. But this should not compromise the moral necessity of reflective judgment (the demand for and exposure to, the matching of one's judgment by the judgment of others) in measuring the degree of one's life's, hence of one's society, departures from compliance with those principles⁵².

The invocation of Kant's idea of reflective judgment is meant, I take it, to mark a shift of emphasis similar to the one we have marked moving from an account grounding the authority of the rules of a practice to an account of the mode of discussion that morality is. The assessments of one's life plan treat the principles of justice like the assessment of the worthiness of an act treats the central concepts of our moral economy. When thinking about what we do when we assess the compliance of our life plan with those principles, Cavell points out, we should wear the notion of legitimacy. This is because it makes us conceive of the subject matter of assessment, the life plan (or the act), as already clearly articulated, ready for determination under the principles or concepts in our possession, which themselves are without difficulty culled. It is a picture of simple application. The skeptic that questions the authority of the practice haunts us and so we problematize what in these assessments is unproblematic and thereby thwart their form. Just like the notion of position was invoked to alert us to the different kind of evaluation at stake, so is the notion of reflective judgment invoked now. "Above reproach" represents precisely the kind of response that stifles the nature of this mode of conversation, the kind that the appeal to Practice Rules represented in the case of ordinary moral conversation. Cavell indeed calls up the analogy with games to make his point here, too:

My criticism of the analogy was that no rule can function in the moral life as the three strikes rule functions in its game. One who asks for four strikes in a game of baseball is incompetent at the game and can perhaps be taught what it is. In the moral life the equivalent finality is carried not by a rule but by a *judgment* of moral finality, one that may be competently opposed, whose content may then enter into moral argument, one whose resolution is not to be settled by appeal to a rule defining institution; a judgment, hence, that carries consequences unforeseen or forsworn in games⁵³.

What is crucial for my purposes here is the thought that in holding fast to the notion of legitimacy, in failing to judge democratically, we manifest a failure of autonomy as well. This is exemplified through the examination of an extreme example – Nora in Ibsen's *A Doll's House*. Her rebuke induces Torvald to respond in a manner similar to what we hear in Rawls's "above reproach" – an appeal to rules that takes them to carry a finality that precisely replaces the work of judgment that Nora seeks. Cavell thinks Torvald's response, beyond (and because of) the fact that it serves to delegitimize, make incompetent, Nora's challenge, betrays moral incompetence on Torvald's part:

⁵² *CHU* xxvi-ii.

⁵³ *CHU* 113.

Torvald's judgment, "You're talking like a child" is of Nora's incompetence as a moral agent; his judgment condemns him while the legal rules are perhaps on his side... Torvald's road back begins... in recognizing his former valuing of Nora was not based on his judging for himself, and bearing responsiveness to his judgment, but on the imagination of rules that, as it were, replaced his judgment. (As rules do... in games. This is something that allows games to be *practiced* and *played*, their intentions to be shaped, their consequences to be confined, scored. The limits of responsiveness are known – contract like – in advance)⁵⁴.

It is here that we see most clearly how Rawls's understanding of the conversation of justice in terms of legitimacy runs counter to what Moral Perfectionism wants from it. The problematic of conformity, embodying the threat to democracy Emersonian Perfectionism is most interested to combat, is not only left untreated in the Rawlsian account, but there is a current in that account which actually promotes it. What we find here is that, so to speak, autonomy is not enough. Or, if you will, that you can be autonomous in one sense without being autonomous in another. Presumably the laws embody Torvald's identification in the way Rawls's account of the OP wants them to. In that sense Torvald can be said to be autonomous. In that sense, as well, since the constitutive move goes through for both Torvald and Nora, legitimacy may be invoked, Torvald is not *wrong* to invoke it. But in another sense autonomy is precisely what Torvald's response lacks.

It is against the backdrop of the perfectionist call for understanding autonomy in a temporal key that we should hear Cavell's early, seemingly superficial, criticism of the appeal to rules:

If my remarks... are right, then a suggestion emerges about why philosophers appeal to rules in theorizing about morality, and about how rules are then conceived. The appeal is an attempt to explain why such an action as promising is *binding* upon us. But if you *need* an explanation for that, if there is any sense that something more than personal commitment is necessary, then the appeal to rules comes too late⁵⁵.

If my explorations are on the right track, then there is a reading of these lines whereby what is being criticized here is not the constitutive move itself, not the attempt to show the normativity of the laws *per se*, but rather the tendency to have that move overstep its bounds, play itself out at a level where normativity is to be unpacked in terms of "personal commitment". The democratic judgment invokes the agent's identification here and now, with respect to the particulars of his life plan, its specific motivations and attractions; the compromises and sacrifices considered; the managing of constraints, and the reactions to unexpected turns of events; the irreversible consequences, already felt and not yet arrived at, etc. The outlay of one's cares and commitments cannot be flashed out, hence cannot be endorsed, identified with, besides thus entertaining the substantive details of one's determinations, an exploration of considerations in light of the complexity that surrounds such determinations. And the crux of the matter for Cavell is that *this* sort of exploration, because of its "aesthetic dimension"⁵⁶ – the essential evaluative component inseparable from such issues – essentially proceeds from a recognition of partiality by way of conversation among peers⁵⁷.

⁵⁴ *CHU* 114-115.

⁵⁵ *CR* 307.

⁵⁶ See *CHU* xxvi-ii.

⁵⁷ See *CHU* 31.

Interestingly, this result with respect to identification rehearses the sublation of the constitutive move we have encountered with respect to the concept of practice. Cavell says: "the question of whether morality has its foundation in reason is given the following slant of answer in Emerson: perfectionism has its foundation in rethinking"⁵⁸. The ingenuity of Emersonian Perfectionism lies in the insight that concrete moral self legislation, as taking place always in the present and from its complex and sensitivity laden perspective, both issues from and utilizes a state in which we find ourselves and with which we are somehow dissatisfied, a state Cavell calls the "attained state of the self"⁵⁹ (or society, as I promptly discuss). The fact that the possibility of autonomy thus presupposes the recognition of partiality, suggests that the occasion of self legislation contains an irreducible element of criticism, and hence an essential public register, a concrete role for the other, figured as a friend. For a critical examination of the sort democratic judgment calls for there has to be a challenge to one's determinations as they stand, a shaming awakening to a shortcoming of one's "attained self", of one's sensibilities as they cope, have unto now coped, with the complexity of this expansive evaluative task. *This* kingdom of ends is entered into in companionship; *here and now* autonomy is a task that cannot be accomplished alone.

I have limited the discussion up to now only to one aspect of the democratic judgment, namely, where it is concerned with evaluating one's conduct or plan of life. But in that I never registered the way Moral Perfectionism conceives the two aspects of the judgment – that of evaluating one's self and that of evaluating one's society – to be interwoven. For Cavell, "[M]easuring the degree of one's society's distance from strict compliance with the principles of justice is a function of taking the measure of one's sense of compromise with injustice or rather with imperfect justice in one's life within actual institutions"⁶⁰. Thus all I have said about the shape of the judgment of a life plan equally applies to the shape of the assessment of the departure of the institutions of one's society from the ideal. Cavell likes to refer to this aspect of the judgment as the moment where justice "takes up its sword"⁶¹. It is the moment where conclusions from the ideal part of the theory make claims on our society, a society less than well ordered. Rawls says that in non ideal cases "our judgment is guided by the priority indicated by the lexical ordering [of the principles]". Still recognizing the abstract nature of the principles he says:

Thus as far as circumstances permit, we have a natural duty to remove any injustices, beginning with the most grievous as identified by the extent of the deviation from perfect justice. Of course, this idea is extremely rough. The measure of departures from the ideal is left importantly to intuition⁶².

Cavell takes issue with this phrasing from Rawls most of all. He asks "What else is left?" Not only is there the impression formed that not much is left, but the very suggestion that measuring is *left* – now that the foundationalist work of setting the principles is done – suggest the very permeating of foundationalist thrust into the here and now. The lack of stipulation of the way this measuring is supposed to go suggests that Rawls is thinking of intuition here along lines similar to those offered when intuition assumed significant role at the most crucial foundationalist local of the book, namely, the process of reflective equili-

⁵⁸ CHU xxix.

⁵⁹ CHU 12.

⁶⁰ CHU xxvii.

⁶¹ CHU xxiv.

⁶² TJ 246.

brium. The idea at play there is that our considered judgments, intuitively made, are both checked by and provide a test for the principles the theory offers. Cavell worries that in leaving democratic judgment “importantly to intuition”, there is “concealed the assumption, or picture, or premiss, that intuition can only be checked, or rationalized, or brought into reflective equilibrium, by principles”⁶³. Invoking the model of reflective judgment once more, Cavell then reiterates the kind of vitiating democratic judgment is subject to, illicitly inheriting as it does features originating in a project foundationalistically oriented:

[T]he matching of principles with considered judgments yielding reflective equilibrium does not describe the process of bringing a present perception (say, of constitution of intolerable inequality or discrimination) under what Kant describes in the *Critique of Judgment* as reflective judgment... In arriving at reflective equilibrium the picture is that judgment finds its derivation in a principle, something more universal, rational, objective, say a standard, from which it achieves justification or grounding... In reflective judgment, rather, the idea is of the expression of a conviction whose grounding remains subjective – say myself – but which expects or claims justification from the (universal) concurrence of other subjectivities, on reflection; call this the acknowledgment of matching⁶⁴.

The work of *grounding* is not annulled when moving to the level of practice. What Cavell wants us to recognize, though, is that the structure of justification when assuming the perspective of the present, when measuring departure from the ideal, is different than that fitting the work of establishing the ideal. Grounding, here and now, is sublated.

The vitiating of the form of judgment as it pertains estimating society's departure from the ideal raises the issue of consent to or identification with society. For the idea of consent as it is offered in *TJ* goes only so far as identifying with the principles of justice is concerned. Rawls's carrying social contract theory's conception of justice to a “higher level of abstraction”⁶⁵ manages to avoid the violent moment that preoccupied classic contract theories, the moment where actual society makes one party to injustices of which one does not approve. The price to pay, however, is that, despite the fact that the account proceeds from conceptions originating in actual society, consent is hedged – it is limited to the principles these conceptions ground, and so it is left, in the final account, removed from actual society. This is yet another form of putting the basic thought this paper wishes to track, namely, that in pushing identification to the level of the constitution of the practice, one is liable to misconstrue the relation between that level and the level of engaging the practice. For if identification is taken care of at a level preceding actual participation in the life of society, one comes to think that merely following society's “kosher” rules, assuming they are that, already embodies all there is to ask from autonomy. And, more to the present concern, one might think of assessing one's society as the measuring of its departure from what one has given one's consent to.

But first, this is not the right way to picture consent, because it pays no tribute to the fact that we are members of the society we assess:

The idea of directing consent to the principles... seems to lead to an effort to imagine confining or proportioning our consent – to imagine that... the contract might specify how far I may reduce my consent (in scope or degree) as justice is reduced (legislatively or judicially). But my intuition is that my consent is not thus modifiable or proportionable (psy-

⁶³ *CHU* xxv.

⁶⁴ *CHU* xxvi.

⁶⁵ *TJ* 3, 11.

chological exile is not exile)... it reaches into every corner of society's failure or ugliness. Between a society approaching strict compliance with the principles of justice and one approaching causes of civil disobedience, there is the ground on which existent constitutional democracies circumscribe everyday lives... Consent to society is neither unrestricted nor restricted; its content is part of the conversation of justice⁶⁶.

Secondly, in a democratic judgment that assesses one's society, it is precisely by having that picture of "proportionable" consent that an "above reproach" like response, a response stifling the conversation of justice, is encouraged. A response such as this we find in a moment of expression in Rawls's discussion of envy. Rawls attempts to isolate a moral component sometimes accompanying envy, namely, resentment. Resentment arises when we attribute the good fortune of others to some injustice. Therefore, Rawls thinks, "Those who express resentment must be prepared to show why certain institutions are unjust or how others have injured them"⁶⁷. This means that Rawls continues to conceive of the pertinent moments of expression as continuing the foundationalist work, albeit now utilizing certain evidence from personal grievance to help the task. And so when no constructive evidence of the sort is brought up, when pain is voiced but a finger is not, or not firmly, pointed, society can claim to be above reproach, discussion cannot even begin. And this is the problem. It is not exactly that society is not above reproach in those cases. Rather, what bothers Cavell is what we are imagining these moments of expression to look like. Just like my saying that I am above reproach to someone who challenges my conduct or life plan was shown to stifle the kind of expressive work essential for *my* autonomy (in a temporal key), so too my demanding that someone shows what laws or institutions are inconsistent with the principles of justice stifles the expression of *my* consent to my society, offends the possibility of *my* identification with my society – rather than its principles. To ask to point to injustice of laws and institutions is to immediately defer the complaint raised from within the practice to the level of the constitution of the practice. It is to deal with the complaint through the notion of legitimacy. But determining the legitimacy of laws and institutions is not what these moments of expression are about. It is again in immersing oneself in an exploration of the sources of the other's complaint, the other's pain, and offering your response to them, one by one, one on one, that one manages to give consent to society, to truly become its member.

Cavell contests Rawls's dismissal of envy unaccompanied by specific claim of injustice by suggesting an analysis of pictures of "envious" confrontation as they appear in the comedies of remarriage. Confrontation, conversation, of this sort is shown to contribute to the felicity of democracy by way of making room for consent to a state of society implicated in injustice that is not surveyed by society's rules or the form of its institutions.

How I respond... to your... resentment and indignation is fateful to what I want of my society, to its democratic aspirations. To say something to the effect that "I am above reproach" is to end my relation with this other, and to that extent injure the texture of my society...

[In the comedies of remarriage] the [couple's] responsiveness to others, on which the films insist, means that their response to a charge of unbearable discrepancy between their position and those of the mass of society would, in effect, be to take it seriously, which means to consider that the charge comes from a competent agent, one who know the rules of their shared institutions as well as they do. It means, consequently, to let the question-

⁶⁶ *CHU* 107-8.

⁶⁷ *TJ* 533.

ing of their fortune cause them to ask whether they wish to confirm their consent to a society in which their favored position has depended, however much they feel they have earned or deserved it, too much on their social connections, on their genetic and developed powers of quickness and charm, and on luck. So they are forced to become conscious, as it were to taste the fact, that their society is in some measure at best in partial compliance with the principles of justice... [T]hey will all, out of different perspectives in different cases, affirm their consent to their society... But now they consent in the consciousness that their society's partiality compromises them in relation to justice, implicates them in some measure of injustice...⁶⁸

Conclusion

While expatiating the Kantian interpretation to *TJ* Rawls says that “to express one’s nature as a being of a particular kind is to act on the principles that would be chosen if this nature were the decisive determining element”⁶⁹. But this gives the impression, as I guess dates back to Kant, that acting on principles is a matter of unproblematic application of them to an already clearly articulated conception of the situation. And already with respect to Kant Cavell says:

What is *the* maxim of your action now, that is, what are you doing and why are you doing it? Are you sitting quietly in a classroom or studying philosophy or satisfying a requirement or testing whether your interest in literature or theology can be taken where it wants to go without a detour into philosophy, and are you doing any of these things, and countless others, out of self love, or self punishment, or to please your parents, or to delay a career in the law, or to win a bet, or out of sheer joy? This indefiniteness in the description of an action alerts us to the task of locating Kant's apparent ease in selecting a maxim... [in Kant] a person is pictured as *being stopped from acting* by asking himself a question, namely whether the maxim can be universalized, willed as a universal law⁷⁰.

Thus Kant’s picture of the prohibitive role of the Categorical Imperative presents us with a person already impressed by a sense of transgression, say temptation, which induces the testing of the maxim. But this suggests that the description and sources of one’s action, here and now, are laid bare to the one testing them, and it was this, we saw, that Cavell attempted to criticize saying that “rules come too late”. It is when the rules (of the categorical imperative, or of justice, or of the practice of promising) are conceived in such a way as to exempt you of the responsibility to articulate your position, articulate what is that *you*, here and now, are taking responsibility for, that we find that autonomy in Kant’s sense becomes the enemy of autonomy, say, in Emerson’s and Rousseau’s sense.

Cavell thinks that Rawls’s handling of the moments of expression in *TJ* makes expressing one’s nature by “acting on the principles that would be chosen if this nature were the decisive element” take over – replace, Cavell says – expressing one’s nature, to borrow from Rousseau, *as a being against nature*. That is, whereas the task of constitution of the practice is met in such a way that the content of the rules expresses our nature as free and equal, there is still the question of how acting on those principles is to be construed, how freedom is to be *exercised*. And Rawls is “encouraged” by the way the constitutive move resolves skeptical quandaries, silences the skeptic, at the foundational level, to a similar

⁶⁸ *CW* 180, 183-4.

⁶⁹ *TJ* 253.

⁷⁰ *CW* 136.

form of response to challenges raised at the practical level, the level of the democratic judgment. However,

An early lesson of democracy is that one is not to legislate his or her tastes or opinions, but only the good of all... this early lesson is not just one among the lessons of a democracy: any may have to bear the burden of showing that a certainty of moral position may be based merely on taste or opinion – not inevitably, but in a given case. A philosopher will naturally think that the other has to be argued from his position, which is apt to seem hopeless. But suppose the issue is not to win an argument but to manifest for the other another way. The trial may end soon, your spade turned. But that is not, for perfectionism, the end of the confrontation, since its point was not argument. (let's hope there's no law against your cultivating with your spade just there). It becomes the perfectionist moment, where one begins showing how to manage individuation, its economy, the power that goes into passiveness... In a democracy the speaking of public thoughts seems, in its open possibility, the easiest way to speak. For Emerson it is the most necessary and the hardest. The distinction between private and public, subjective and objective, a feast for metaphysical and moral dispute, becomes the daily fare of democracy⁷¹.

⁷¹ *CHU*, 31

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