

INDIVIDUALITY AND RIGHTS IN FICHTE'S ETHICS

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Despite sustained and sophisticated philosophical attention in recent years, J.G. Fichte's 1796–97 *Foundations of Natural Right* continues to present some of the same interpretive puzzles that it presented to its first readers. Here I propose solutions to two of those puzzles, which concern the nature of political obligation and its relation to moral obligation. Both solutions are motivated by a novel approach to the text, which looks at it through the lens of Fichte's moral philosophy (as presented in the 1798 *System of Ethics*), into which its results must fit if, as Fichte believes, the possibility of morally sanctioned interactions with others requires standing in some law-governed political relationship with them.

It is not unusual for interpretive problems that arise when a text is approached in isolation to become soluble when the text is placed against a broader systematic or historical background; and that is the general sort of project I undertake here. The reason this particular approach has not yet been taken with the *Foundations* has been that no work on Fichte's ethical theory has, until recently, provided a fruitful point of entry. The interpretation I have defended in work of the past few years,¹ on which Fichte's normative theory is a form of capabilities-maximizing consequentialism, changes the picture, inviting comparison of Fichte's treatment of political duties with those of other consequentialists, and consideration of the role of coordination and agreements in consequentialist ethical theory. As it turns out, work that has been done in those areas sheds a great deal of light on many details of Fichte's political philosophy. In particular, it suggests answers to two longstanding interpretive questions about the *Foundations*: 1. What does Fichte mean when he describes the theory of right as "independent" of moral theory, and what motivates that independence thesis? 2. What does Fichte mean when he describes requirements of right and the principle of right as "hypothetical" imperatives, and how is that characterization consistent with his claim to have derived the concept of right as a condition of possibility of self-consciousness?

1. Cf. M. Kosch 2015 and forthcoming.

I will begin (§1) by posing the question Fichte himself poses at the point in the *System of Ethics* at which he treats the moral status of political duties. What reason has an individual motivated exclusively by moral concerns (as defined up to that point in the text) to be a member of a political community and to abide by its laws, even where breaking the law would appear to better further moral ends in some instances? As I will explain, the answer that Fichte gives to this question (§3) rules out some accounts of the nature of political duties (§6) and their relation to moral duties (§2) that are prominent in the contemporary literature on Fichte's political philosophy. Conjoined with a more precise understanding of the core commitments of Fichte's political philosophy (§4 and §5), Fichte's answer to the question about the moral status of political duties points to interpretations of the independence and hypotheticality theses that are textually and philosophically more plausible than available alternatives.

1. Fichte's ethical theory and the problem of individuality

Fichte's ethical theory, on the interpretation I prefer, is a form of constitutivism on which rational agency has a necessary end — independence (*Unabhängigkeit*) or, alternatively, self-sufficiency (*Selbstständigkeit*) — and moral obligations are construed as rational obligations to act in ways that further that end. Independence has a formal aspect (the activity of the will in making decisions should obey certain procedural constraints, whatever the content of its ends) and a material aspect (the will should adopt some substantive ends and eschew others, and more specifically should take as its overarching substantive end rational agency's own ever greater independence from external limitations of all kinds).

To take substantive independence as an end is to aim at systematically overcoming the determinate limitations with which rational agents are faced along the dimensions that are essential to them. Fichte's account of those dimensions is drawn from a set of arguments that he offers in the *Foundations* and the *System of Ethics* purporting to establish them as transcendently necessary conditions of

self-consciousness. Three such features structure the account of moral duties in the *System of Ethics*: practical intellect (the possession of conative and cognitive attitudes and the ability to deliberate and form intentions); embodiment (external causal efficacy and susceptibility to external causal influence); and individuality (being one of many agents with separate, mutually independent practical intellects and bodies).

Obstacles to the exercise of the practical intellect (practical reasoning) can be purely intellectual (ignorance and intellectual sloth), but can also be somatic and external (poor health, inadequate nutrition or rest, distraction stemming from an external source). Obstacles to the execution of rationally formed plans are either natural (disease, geography, the weather — natural forces powerful enough that they cannot be mastered by existing technology or unpredictable enough that they cannot be incorporated into rational plans); or else they are interpersonal (acts of aggression and other intentional or unintentional interference by other agents). These external obstacles, and not solely obstacles to the purely internal exercise of the intellect in rational planning, are of constitutive concern to rational agents simply as such, on Fichte's view, because he assumes that it is impossible to set any end sincerely while remaining entirely indifferent to the likelihood of achieving it.

He also assumes that there will be future generations of rational agents, and that rational end-setting has a tendency to outstrip the knowledge, technology and social organization available to it at any given time. These assumptions, together with what he takes to be a rational prohibition on privileging the present over the future or one's own case over that of similarly situated others, lead him to conclude that there is a general rational obligation to work to overcome material limitations on rational decision-making and the ability to carry out rational plans, not only in one's own case at the present time, but for all agents and into the foreseeable future. That is the moral end in its material aspect.

The material aspect of independence determines, then, an objective consequentialist conception of right action. The formal aspect adds a set of agent-centered requirements on deliberation that are purely for-

mal and have no systematic substantive upshot (and that therefore do not ground substantive constraints on permissible action). But although substantive agent-centered constraints have no place in Fichte's moral theory, a set of patient-centered constraints — the rights of individuals — does play a very central role in it.

What I am calling the “problem of individuality” is the problem of justifying respect for those constraints, in cases where acting in accordance with them and acting toward the moral end are not jointly consistent in a way that is transparent to the agent at the time of action. This is a version of the familiar problem of how a consequentialist can justify respect for rights. Fichte sets up the challenge, which he describes as a *prima facie* contradiction of the moral principle with itself (IV: 230), at *System of Ethics* IV: 230–32.

He begins by characterizing the problem more precisely. He first rules out the idea that the fact of individuality requires that the end of independence take the form, for each individual, of the agent-relative end of that individual's own independence, emphasizing that all share the agent-neutral end of the independence of reason wherever it is instantiated (IV: 231; *cf.* also IV: 281–82). He then rules out the idea that the fact of individuality means that this shared end is nevertheless the source of reasons that are agent-relative, emphasizing that a requirement to care differentially about one's moral virtue *qua* one's own is as little dictated by the fact of individuality as is a permission to care differentially about one's own wellbeing *qua* one's own (IV: 232; *cf.* also 234–35, 239). The existence of non-derivative agent-relative ends or reasons would indeed threaten to set individuals rationally at odds with one another.² But Fichte tells us that this is not the problem posed by the fact of individuality.

The problem instead concerns whether one agent ought to interfere with the action of another as a means of furthering the moral end, in the specific case in which the other is acting immorally by the first agent's own lights:

My end is reached, when the other acts *morally*. But he is free, and capable of freely acting immorally. In that case, my end is not reached. Do I not in that case have the right and the obligation to disturb the efficacy of his freedom? (IV: 232)

One background commitment that clarifies the discussion that follows is Fichte's belief that there are no morally indifferent actions, no actions that are permissible but not required (IV: 155). This commitment rules out the option that one might be neither required nor forbidden to interfere in such a case (licensing, e.g., an inference from ‘It is not the case that I am obliged to interfere’ to ‘I am obliged to not-interfere’). That is why he takes there to be a single question on the table in the discussion that follows (‘Ought I to interfere or not?’) where readers with other commitments might see two (‘Am I permitted to interfere or not? If so, am I obliged to interfere or not?’).³

It is not immediately clear what Fichte means by “disturb the efficacy of his freedom” in this passage, but in the following pages and in the sections on duties concerning the external freedoms of others (§23 and §24, IV: 276–313), it emerges that what is at issue is interference in the sphere of free individual efficacy that is guaranteed by law. In the extended discussion of moral duties concerning threats to the life and property of others (IV: 300–10), we learn two important things about the obligation to refrain from interference. First, it is in force only if the wrongdoer is acting within his (legal) rights. If he is instead violating my rights or those of a third party, and if the situation is such that the state cannot prevent or later remedy the violation, I am required to interfere, in ways that would constitute rights-violations (harming him physically, even putting his life at risk) were he not breaking the law (IV: 288–89, 301, 305–08). Second, duties concerning others' rights are not in fact limited to negative duties of non-interference, but encompass positive obligations to protect the rights of individuals from

2. *Cf.* D. Parfit 1987 pp. 55–62.

3. Thanks to the anonymous referee who prompted me to clarify this.

violation by third parties. Rights give rise not to agent-centered restrictions, but to patient-centered constraints whose violation the morally conscientious agent must seek to minimize even where he is not himself the cause of the violations.⁴

The question, then, is how rights acquire that status. One possible answer — that rights have a direct moral foundation, i.e. that the moral principle, in addition to setting rational agents the end of independence, also sets limits on the pursuit of that end, in the form of individual rights — is ruled out categorically by the texts. Not only does Fichte provide no moral derivation of individual rights in the *System of Ethics*; he explains there that in order to have rights at all a person must be the citizen of a state. Indeed he remarks (in a striking passage to which I will return in §3) that with someone who is not and refuses to become a citizen of some state one is *morally required to avoid interaction*, precisely because in that situation the person has no rights (IV: 237–38). If there could be moral rights that were not first legal rights, we could make no sense of these remarks. What is more, the remarks are consistent with the view, articulated in the *Foundations*, that the theory of right is a freestanding branch of practical philosophy, independent of ethics and not derivable from the moral principle (III: 10–11, 13, 54–55).

Now, as it turns out, the meaning of this independence thesis and Fichte's view of the relationship between political and moral duties has been the object of some discussion in the interpretive literature on the *Foundations*. In §3 I will propose a novel interpretation of what Fichte means by the independence thesis and how he justifies it, and an interpretation of the relation between moral and political duties that follows from it, both informed by a view of the *Foundations* as seen through the lens of the *System of Ethics*. But first (in §2) I will survey some important contributions to that debate, where the focus has typically been on the *Foundations* alone.

4. I disagree, here, with Darwall, who sees these constraints as agent-centered (Darwall 2005 p. 96).

2. The independence of right from ethics

We are offered, in the existing literature, two sorts of explanation for Fichte's claim that the philosophy of right is a branch of practical philosophy distinct from moral theory and not derivable from it.

The first, due to Renaut, appeals to the fact that, for the Fichte of the Jena period, the problem of right must be solved without assuming the moral motivation of potential citizens.⁵ Renaut sees an evolution of Fichte's views on this score between the 1793 *Contributions to the Correction of the Public's Judgment Concerning the Revolution in France* (VI: 39–288) (in which, on Renaut's reading, Fichte considered political philosophy a branch of ethics) and the view articulated in the 1796 *Foundations*. The change was motivated, Renaut argues, by a realization Fichte owed to Kant's *Toward Perpetual Peace* (1795), in which Kant wrote that the problem of right must be soluble "even for a nation of devils".⁶

Fichte does emphasize in the *Foundations* that the reasons agents have for entering into a commonwealth cannot be exhausted by their moral reasons for doing so (III: 44, 50, 148), and that even individuals motivated by self-interest alone must have reason to enter into a state and abide by its laws (III: 149–52).⁷ This is because, as he explains both in the *Foundations* (III: 148) and in the *System of Ethics* (IV: 233–53), moral virtue is a result of cultivation, not at all a natural state of human beings. Cultivation is possible only through human interaction and so within some sort of society; and among the imperfectly virtuous, society can exist only within a state. (I will discuss Fichte's reasons for thinking this in §4.) This means that political philosophy cannot assume motivations exclusive to morally virtuous agents.

5. A. Renaut 1992; cf. F. Neuhauser 1994.

6. I. Kant 1900–, 8: 366; I. Kant 1996 p. 335. Kant's claim itself was prompted by Erhard's 1795 *Apologie des Teufels* (J. Erhard 1795), which Fichte cites alongside *Perpetual Peace* in the *Foundations*.

7. Likewise the discipline of politics (the applied science corresponding to the science of right, whose task is to make progress toward a more just constitution, starting from actual conditions) "assumes only rational self-interest, without which a human being is not even capable of living among others" (XI: 123).

Now, Fichte's anti-Rousseauian view of human nature and the role of society in its cultivation is first systematically laid out in the fifth of the *Lectures on the Scholar's Vocation* (VI: 335–46); and since these were published already in 1794, the view can owe nothing to *Toward Perpetual Peace*. The idea that coordination is a distinctive practical problem also has its first articulation in the second of those *Lectures* — not, as Renaut supposes, only in 1796.⁸ But the real worry for Renaut's interpretation is that the mere fact that the motivations of rational egoists must be accommodated in a normative account of law does not, all on its own, entail that principles of right cannot be derived from moral principles. For the question of motivation is distinct from the question of content: people may well follow a single set of laws from either moral or prudential motives.⁹

Indeed it is central to Fichte's account of moral cultivation that morally motivated people and people motivated only by self-interest be able to coexist in a single commonwealth, and so be motivated to obey the same law, even if for different reasons. So a change in mind about the derivability of right from ethics cannot be explained solely by the breadth of the range of motivational profiles on which the principle of right must have a motivational grip.

Instead, as Neuhouser points out, Fichte clearly takes the independence to derive from the nature of the principle of right itself, not the nature of citizens' motivations. Fichte explains in this passage (which echoes Kant's language in *Toward Perpetual Peace*, to which Fichte also directs the reader):

8. Renaut 1986 pp. 236–43.

9. For example, the principle of equal division among (rough) equals of a resource to which none has an antecedent claim has traditionally been seen as having an ethical ground (it is part of Aristotle's explanation of the virtue of justice, for example). But it has also been cashed out as a purely prudential principle in certain strategic interactions (*cf.* B. Skyrms 1996 Ch. 1). Kant's example of the honest shopkeeper in the *Groundwork* is supposed to be an example of a policy that can appeal to either moral or prudential interests (I. Kant 1900–, 4: 397; I. Kant 1996 p.53).

A right is plainly something one can exercise or not; it follows therefore from a law that is purely permissive. ... But it is simply impossible to see how a permissive law should be derivable from the moral law, which is universally commanding and therefore extends to every [action]. (III: 13)

Now, the obvious response to this worry that morality is structurally incapable of forming the basis of a theory of right because it deals in commands rather than permissions seems to be the one offered by Heydenreich in his 1794 *System des Naturrechts*, with which Fichte was surely familiar:

When I say, *something is permitted to me, I may do something*, this does not mean that my moral reason leaves it up to me, but instead that the moral reason of human beings other than me forbids them from hindering me. ... The person's consciousness that something is permitted (in relation to his fellow human beings) is grounded on the consciousness of the rational prohibitions that are equally valid for all.¹⁰

10. K. Heydenreich 1794 pp. 110–11.

In other words, for an individual *a* to hold a right is just for all other individuals to be prohibited from interfering with *a* in defined ways. So the mere fact that rights involve permissions does not explain the independence of right from morality. As Neuhausser points out, some further story is required.¹¹

Neuhausser's suggestion is that Fichte takes the political realm to have an end distinct from the moral end: the end of promoting citizens' individuality. "Implicit in Fichte's later [*sc.* Jena] position is the view that the political realm has its own distinctive end, the fostering of citizens' individuality, whose value is not simply derivative of the value of moral autonomy."¹² The idea that one may have rights to morally forbidden actions plays a key role in his defense of this interpretation: there can be such rights, he argues, only if they derive from an end distinct from the moral one.¹³ This is the second proposed explanation for the independence thesis.

There are textual difficulties with it. Fichte never in fact speaks of a "value" of individuality or of individuality as an "end". He describes individuality as a fact with which practical philosophy must contend, not as a value it must promote. This is why Neuhausser describes the value of individuality as "implicit" in Fichte's Jena position. Also implicit, on Neuhausser's view, is a conception of individuality richer than the one defined in the deduction, on which to be an individual is just to be one of multiple discrete sites of deliberation and action: "[O]riginal rights can plausibly be understood as conditions of individuality only if individuality is understood in a richer sense that includes the awareness of oneself as having exclusive charge over a specified sphere of activity."¹⁴ Neuhausser offers these modifications to the conception of individuality spelled out in the text because he sees no way of rationally reconstructing the independence thesis (or the deduction of the

concept of right from self-consciousness, which I will discuss in §6) without relying on a notion of what it is to be an individual richer than any Fichte explicitly articulates.

But the problem with this second interpretation goes beyond this absence of direct textual evidence. Recall the question posed at IV: 232ff — Why am I *morally* obligated to respect someone's rights, even when he is acting immorally? — and notice that appeal to a distinct political value, one that by hypothesis has no place in Fichte's moral theory, cannot in principle answer *this* question. Of course Neuhausser does not claim that it does; and he acknowledges that his interpretation raises a problem of systematicity for Fichte's practical philosophy,¹⁵ suggesting that this new problem can be solved by appeal to the overarching notion of self-positing subjectivity at the foundation of Fichte's system. But the problem is more acute than he acknowledges, for if his interpretation of the independence thesis is correct, the demands of right and the demands of morality come into all-things-considered conflict in every case in which someone proposes to act immorally and others can prevent this only by violating his rights. Surely such cases are exceedingly common. This sort of systematic conflict would render Fichte's practical philosophy internally incoherent, as Hegel and others have contended.¹⁶

In fact, though, Fichte believes he does have an answer to the question posed at IV: 232. In nearly all cases (I will discuss the exceptions in §6.3) the answer must be "no". The problem the section sets out to solve is justifying that 'no' answer, showing that there is a moral reason to respect individual rights even where doing so allows immoral action that hampers progress toward the moral end.¹⁷

11. F. Neuhausser 1994 p. 172.

12. F. Neuhausser 1994 p. 158; *cf.* pp. 163, 174–76.

13. F. Neuhausser 1994 p. 173. F. Neuhausser 2016 came out only after this paper was written, but the position there is substantially the same as the earlier one.

14. F. Neuhausser 1994 p. 171; *cf.* F. Neuhausser 2000 pp. xvi–xvii.

15. F. Neuhausser 1994 p. 158.

16. That it is incoherent in just this way was Hegel's charge in his *Differenzschrift* (G.W.F. Hegel 1986 volume 2, pp. 80–94); and it is reiterated in some form in much contemporary secondary literature (*cf.* e.g. L. Siep 1979 pp. 26–35; R. Williams 2006).

17. Surprisingly, this whole stretch of the *System of Ethics* (IV: 229–53) is either overlooked or misunderstood in every contribution to the literature on the relation of right and ethics in Fichte's thought. Williams (2006) and Neuhausser

Discussions of the independence thesis in the literature on the *Foundations* sometimes assume that the independence must be bilateral.¹⁸ But Fichte never describes it, and very clearly does not think of it, that way. His philosophy of right does not rely on his moral theory; but his account of moral duties concerning the lives and freedoms of other individuals relies on and incorporates an appeal to their rights. Although right is independent of ethics, ethics is not similarly independent of right.

So we must conclude, I think, that right is not independent of ethics simply because the principle of right must appeal to people with a broad range of motivational profiles; and it is not independent because right and ethics have distinct, potentially opposed ends. Nor (as Clarke has argued) is it independent because “the sciences of right and morality have discrete, separate domains”.¹⁹ (If they did, there could be no even *prima facie* conflict of the sort Fichte describes at IV: 232.) Right must be (able to be) a *part* of ethics; it is simply not a part that ethics is able to produce from its own principle. In the next section, I explain why.

(1994) do not discuss it. Verweyen (1975) and Zöller (1998) have the passage in view but do not understand it. Verweyen writes, about the passage at IV: 230–32 in which the problem is introduced, “Dieser Gedankengang ist verblüffend” (H.-J. Verweyen 1975 pp. 148–49). Zöller gives it a reading that is patently incorrect, insofar as it contradicts Fichte’s claim that individuality is an essential feature of I-hood and so an essential constraint on the end of independence (G. Zöller 1998 p. 651).

18. Cf. F. Neuhaus 1994 and 2000 and J. Clarke 2009.

19. J. Clarke 2009 p. 366.

3. Coordination

Imagine a group of individuals rationally benevolent according to Fichte’s moral theory as outlined in §1; and consider a typical problem members of such a group might face. They are farmers who ordinarily share the use of a covered market in their village; but the market has been badly damaged in a recent storm. With four sets of hands, the frame for a replacement can be raised in a day. With fewer than four, given available technology, it cannot be done at all. All of the farmers in the area are happy to contribute labor and materials to the project. Each believes that the frame-raising is more worthwhile than the other work any could do, each on her own, on any given day. However, all do have other useful work to do, and each would like to avoid going to the village on a given day, unless at least three others will also show up on that day. Now imagine one of the farmers, on a given morning, aware of the situation, unable to communicate with the others, and unable to discern anything special about the present day or any other that would make it the obvious day to raise the frame for the new market.²⁰ What does Fichte’s moral principle, as described in §1, direct her to do?

The answer is that it does not, all on its own, direct her to do anything in particular. In cases of this type, in which the efforts of multiple individuals are non-additive, what each individual (objectively) ought to do depends upon what others do.²¹

The efforts of multiple individuals are non-additive in the case of many impediments to independence in the material sense. Against many natural threats the efforts of a single individual are strictly pointless; and many morally important projects can be accomplished only by the coordinated action of some group of people. This is what Fichte

20. I assume not only no explicit agreement but also no difference between the days that would be salient to all of the neighbors, because, as Schelling has shown, clues can replace explicit agreement in many such games of coordination. (cf. T. Schelling 1957 pp. 20–22).

21. Cf. D. Regan 1980.

points to as the moral justification for the division of labor in society, in the *System of Ethics*:

Each individual is commanded to promote the independence of reason as much as he can. Now, if every individual does, in this regard, whatever first occurs to him, or whatever seems most necessary to him, many things will happen in manifold ways, and much [will] not [happen] at all. The effects of the actions of several will mutually hinder and cancel one another, and the systematic furthering of the final end of reason will not take place. But it absolutely ought to take place according to the command of the moral law. It is therefore a *duty*, for everyone who grasps the obstacle just described (and everyone who reflects even a little grasps it quite easily), to remedy it. But it can be remedied only if the various individuals divide among themselves the various things that must happen for the promotion of this end, each assuming a particular portion for all the others, and conversely in a different respect giving his own over to them. Such an arrangement can arise only through a convention, through the assembly of many with the aim of [accomplishing] such a division. It is the duty of everyone who grasps this to bring about an assembly of the sort described. (IV: 258)

Fichte here describes the social division of labor as a conventional solution to a set of coordination problems (conventional not in the narrow Lewisian sense,²² but in the somewhat broader sense of being a stable solution to a coordination problem that admits more than one possible solution). Morally motivated agents will recognize that they have problems of this sort and will have to find ways to solve them, collectively.

They cannot rely on their moral principle to do this work, as Fichte here explains, because an objective consequentialist principle, directed

at individuals, is indeterminate in such cases. Neither it nor a generalized principle or rule derived from it (so long as it is directed at individuals and specifies only actions with no provisions for coordination) can guide agents in such circumstances.²³ Generalized principles or rules (of the sort offered by utilitarian generalization or rule-utilitarianism) are not sufficient to deal with such cases, in part because not all coordination problems are solved, as they are in the frame-raising case, by each person's doing the same thing that all of the others do. Some are solved only if each person does something different from what each of the others does.²⁴ Still others are solved only if individuals' efforts are distributed in more complex ways.²⁵ No moral principle directed at individuals can solve the various coordination problems that moral agents face. For that, they need conventions of the sort Fichte describes.

Note that, although objective consequentialist theories are indeterminate in such cases when directed at individuals, they may be perfectly determinate when directed at a group.²⁶ The farmers (together) ought to raise the frame, since that is the best use of their (collective) time. The moral community (together) ought to promote the independence of reason as much as it can. The problem is that the group is not, or not yet, an agent. The agency is spread across a number of independent *loci* of practical deliberation and causal efficacy: the individuals. This is the significance of Fichte's claim that individuality introduces a

22. Cf. D. Lewis 1969.

23. This is what D. Regan 1980 is taken to have established. As Regan and others emphasize, coordination problems like the one described do not show that unsupplemented act-utilitarianism cannot be consistent with the best outcome in all cases — only that it cannot guarantee the best outcome. Cf. D. Regan 1980 Ch. 3, 4.

24. This fact lies at the basis of a well-known class of counter-examples to Kant's formula of universal law. Cf. e.g. B. Herman 1993 Ch. 7 p. 138.

25. For examples cf. D. Parfit 1987 p. 53, D. Regan 1980 Ch. 2. Cf. D. Regan 1980 Ch. 11 for a discussion of the limits of his own cooperative utilitarianism in dealing with this kind of case.

26. Cf. D. Parfit 1987 pp. 72–73 and note 41 at pp. 510–11.

distinctive dimension of limitation essential to rational agents and relevant to the determination of their moral duties. Coordination is a moral problem because, and only because, rational agents are individuals.²⁷

But coordination is not a problem confined to specific tasks like frame-raising, nor to any other means toward or component of the moral end. The most fundamental coordination problem that rational agents who are individuals must solve is the problem of dividing the space of possible activity amongst themselves in a way that allows them to pursue independent projects. This is a problem that arises as soon as agents engaged in pursuing any rationally formed plans whatsoever have to live alongside other agents so engaged. It is not exclusive to individuals who in other respects satisfy the demands of Fichte's moral theory: even agents motivated solely by rational self-interest have it, so long as they are individuals.

Fichte calls this most fundamental coordination problem the problem of right. The basic mechanism by which it is solved is the assignment to individuals of rights defining spheres of permissible action. Fichte thinks that in almost all circumstances (I will describe the one exception in §5) this assignment must be enforced by a coercive apparatus: the state. Since they will need a mechanism for solving this problem if they are to live alongside one another, morally motivated Fichtean agents will need to be members of a state. This is what Fichte concludes, in the section of the *System of Ethics* devoted to the problem of individuality:

The agreement [concerning] how humans may mutually act upon one another, that is the agreement concerning *their communal rights* in the sensible world, is called the *social contract* (*Staatsvertrag*); and the community that has come to [such] an agreement [is called] the state. It is an absolute duty of conscience to unite with others in a state. Whoever does not will this, cannot be tolerated in society, because one cannot enter into community with him with a clear conscience: because, since he has not declared how he wants to be treated, one must always fear treating him against his will and right. (IV: 237–38)

This is the explanation for the moral obligation to respect others' rights, to protect those rights from violation by third parties, and to create rights where they do not yet exist (by "unit[ing] with others in a state").

The science of right is the science of the *a priori* rational constraints on possible stable, law-governed solutions to the problem of right. Its content is the set of normative principles governing the interaction of rational individuals with one another simply *qua* rational individuals (that is, the rational principles of strategic interaction in the case of politics). To say that it is independent of moral philosophy is to say no more than that those principles cannot be derived from the normative principles that govern rational choice in non-strategic situations (which, for Fichte, derive from the moral principle). This is not a surprising or controversial claim. Yet it suffices, all on its own, to explain Fichte's independence thesis.

4. Constraints on solutions to the problem of right

Fichte describes the problem of right as a technical one in the most literal sense: solving it is a matter of engineering an arrangement that makes possible the unimpeded exercise of external causality on the part of multiple agents who are able to interfere with one another and who have an interest in avoiding such interference, an arrangement that can be implemented by multilateral agreement among a group of agents none of whom is able to impose any such arrangement unilaterally.

27. Cf. D. Regan 1980 p. 144.

ally, and that is compatible with constraints imposed by the physical, rational and communicative capacities of those agents. In this section I outline what I take to be the core features of such an arrangement, on Fichte's account.

Since by hypothesis not all potential co-citizens are perfectly morally motivated, the technology that solves the problem of right must be one that functions for individuals with a wide range of ends. But Fichte does not think the problem of right is soluble for just any population in just any circumstances with just any interests and rational capacities. Agents who are potential co-citizens must have the degree of rationality required to direct actions with a view to future consequences; and they must share certain fundamental interests.²⁸

These are the interests described in the section of the *Foundations* on "original right". There Fichte outlines two sorts of claims rational agents inevitably make on one another when they interact: the claim to bodily inviolability, and the claim to "original" property. Neither of these claims is a claim to a right in the strict sense; instead they are articulations of the most fundamental interests of rational agents simply as such, interests that structure the problem of right and so constrain solutions to it. "An original right is ... a mere fiction, but one that must, for the sake of the science, necessarily be thought" (III: 112).

The body is defined by Fichte as that part of the world in which the will is immediately causally efficacious (III: 56–59; cf. IV: 214–15). Since all mediated causal efficacy is possible only on the basis of immediate causal efficacy, an agent with an interest in her causal efficacy has a privileged interest in the unimpeded exercise of her immediate causality. This is a defeasible, but very general, moral interest reflected in the fundamental division of duties in the *System of Ethics* (where one class of duties concerns the rational agent as body (IV: 214–16; 261–69)). It

28. It is important to see that Fichte does assume some constitutive ends of individuals capable of citizenship. Remarkably, this has been denied (cf. M. Baur 2006). But Fichte could construct no science of right without some such assumptions, because a commonwealth functions by structuring incentives in a way that produces voluntary compliance (at least enough of the time).

is also a defeasible, but very general, prudential interest. The agent presupposed in the *Foundations* is assumed to have this interest.

Property is defined by Fichte as a fixed set of action possibilities under an agent's exclusive and enduring control, in which she may exercise her mediated causal efficacy without threat of interference by other agents (with the added proviso that it be sufficient to provide her means of subsistence). That is, instead of viewing property as a relation between an individual and an object or set of objects, Fichte views property as a relation between an individual and a specific set of possible actions (III: 210). One's property is one's entitlement to engage in these unimpeded.

The original interest in property is more complex than the original interest in bodily integrity, insofar as there are many ways in which the possession of a fixed sphere of action possibilities may be valuable to a rational agent simply as such. But most fundamentally, as Fichte explains in *Foundations* §11, the interest in property is an interest in being able to construct the sort of complex long-term plans of action that are characteristic of rational agents, and to do so rationally. This interest gives rise to a presumption in favor of a property regime in which control is exclusive and permanent, because both permanence and exclusivity facilitate planning. But individuals who cannot maintain themselves in existence have no interest in planning, and so, Fichte argues, a constraint on any property arrangement is that it must allow each individual to survive by activity within the sphere allotted to them. Fulfilling this constraint may require redistribution should conditions change (III: 212–15, 218, 233, 259, 257 *et passim*; cf. *The Closed Commercial State* III: 402–05). This in turn places restrictions on the permanence of any given property arrangement.

Property differs from bodily integrity on Fichte's view in that the former, but not the latter, is possible only by explicit collective agreement. Individuals have no need to negotiate the answer to the question of whose will is to have immediate causal efficacy in which body.²⁹

29. This does not mean that there is nothing conventional about the notion or

But there is no naturally privileged connection between an agent and any particular outer sphere of possible activity. Such a connection is not forged by labor (III: 116n, 219); nor is it forged by intention alone, since two agents may independently form incompatible intentions involving the same activity (III: 124–26). Instead it is forged by a multilateral agreement specifying the division of action possibilities among agents, which Fichte calls the “property contract”.

The ends motivating original rights claims require not a mere mutual noninterference agreement, but instead a reasonable expectation that there will in fact be no interference; and Fichte argues that, among agents of the sort he assumes in the *Foundations*, the former does not suffice for the latter. Some will, by hypothesis, be moved by prudential considerations alone, and for these there will be gains to be had from some violations. But even agents fully committed to the agreement can be expected to make some mistakes. Violations are inevitable, and Fichte argues that an unenforced multilateral agreement could not survive these (III: 97–100, 137–39).

What is required for the security and stability of the property agreement is an arrangement that would, by threat of sanctions, eliminate any motive for violation (III: 141–42, 150–87 *passim*). Fichte's assumptions about constitutive interests and minimal rational capacities enter here, again, as presuppositions of the possibility of any such incentive system and as constraints on its construction. Ruling out the possibility that disputes could be adjudicated and remedied by the parties themselves (III: 96–102, 146–49), Fichte argues that the stability of any property contract relies on a multilateral agreement to serve as a third party judge and enforcer for one another where required: a “protection” contract (III: 101).

He goes on to argue that such a contract is impossible in a state of nature (III: 148–49), and that it would differ in this respect from a

non-binding multilateral property agreement, which would merely be fatally unstable, but not strictly impossible, in a state of nature. This is because, first, a protection agreement would require positive performance rather than the mere noninterference required by the property contract (III: 148). That means its fulfillment could never be cost-free (and parties to it could never be ignorant of its costs). And, second, it would require that different parties perform their services to one another at different times (III: 198–99). But no one motivated solely by considerations of maximizing his own individual wellbeing could be expected to repay past protection with (costly) present protection; and no one who assumed his fellows so motivated would provide protection to begin with, for he would know he could expect no repayment (III: 199).³⁰ Fichte concludes that a protection contract by multilateral agreement would be “intrinsically void” (III: 200) unless accompanied by a third, “unification” contract, whereby each individual would contribute to the constitution of a coercive power distinct from each of them individually: the coercive power of all of them together, exercised by a state apparatus (III: 201). It is this unification contract that brings them out of a state of nature and into a commonwealth.

In agreeing to it they also tacitly agree to a fourth, “subjection” contract, according to which each individual's freedoms are forfeit if he violates the law (III: 206). The default response to violations is expulsion, the deprivation of citizenship and of any protections enjoyed in the state (III: 260–61; 262–85 *passim*). This is because, first, the threat of expulsion functions as the deterrent that ensures voluntary compliance (at least in the typical case: sufficiently “untamed” or imprudent individuals cannot be deterred and so cannot be citizens [III: 273–74]). Second, since (for reasons I will explain in §6.1) individuals' perceived status as potential co-citizens rests on their actual cooperative behavior, the violator takes on, in the eyes of others, something like the status of

institutionalization of bodily inviolability, only that the conventional aspect of these rights is confined to the understanding of ‘inviolability’ and does not extend to the distribution of spheres once that meaning has been fixed.

30. What Fichte here describes looks to be the familiar inability of the transparent rational egoist to make certain agreements, in the absence of an external enforcement mechanism. Cf. D. Parfit 1987 p. 7.

a wild animal (III: 260), a “piece of livestock” (III: 278–79), or a “force of nature” (III: 280).

Fichte allows that parties may agree to a fifth, “expiation” contract, which would provide for a set of sanctions short of total forfeiture to stand in as deterrent (III: 261). But on his view such sanctions have no moral justification, and their legal justification is exhausted by their ability to bring about voluntary compliance (III: 262). The only purpose of punishment is security; and this is likewise the only basis for determining a punishment’s severity (III: 265). By the same token, expulsion is always an option that can be chosen by the violator (III: 272–73), because membership in a state is, on Fichte’s view, at every moment voluntary.

Fichte assumes that all of these arrangements must be implementable by institutional mechanisms human beings can design for themselves (with no real or imagined threat of external enforcement to bind them), and describes in §16 constraints on governmental institutions adequate to that task. But he cautions that any actual solution to the problem of right will include determinations he has not described, imposed by the geographical and cultural situation of the people trying to solve it (III: 286ff). The problem of right is different for every population and every generation.

It is not always soluble, as we learn from Fichte’s discussion of two sorts of case. In discussing the example of a lifeboat that can hold only one of two shipwreck survivors (a staple in texts on natural right in this period), Fichte denies that the philosophy of right applies to such a case:

The question of right is: how can multiple free beings coexist as such? This question presupposes that there is some possibility of coexistence. If this possibility is absent, then the question of the determination of this possibility disappears entirely, and with it the question of right. (III: 253)

The situation is one in which no meaningful coordination is possible, since by stipulation there is no distribution that satisfies the most basic

interests all parties to it have (in this case, survival), and so there is no possible agreement such that both parties stand to gain from it more than they stand to gain from unilateral action.

A different sort of case is discussed in §16. Fichte allows that the system of government he describes there cannot function if most citizens are sufficiently corrupt (III: 180–81). He does not explain exactly what he means, but the point seems to be that some minimal disposition to deal honestly and keep agreements in some proportion of members of a group is required if that group is to be able to solve the problem of right for itself.

We can conclude from these two discussions that Fichte takes the problem of right to be insoluble in principle in conditions of extreme scarcity or in the absence of some minimum of political culture. But it seems that even those for whom it is soluble in principle can fail to solve it in practice, simply because the technical problem that faces them is too complex for them to solve. The problem is solved only when everyone who would coexist with others as a free being among free beings in a stable and law-governed way is able to do so: when each can rationally plan, secure in the knowledge that others have on balance no prudential reason to interfere in those plans, when each is protected from physical violence and has a secure employment sufficient to fulfill her basic needs and those of her dependents.

It should be obvious, as soon as the solution is described in those terms, that we know of no historical instance of the problem of right having been (entirely) solved by any group of people. Far from denying this, Fichte explicitly characterizes right as a property had in degrees by different social organizations. The null degree is the complete absence of a constitution, of which even “the worst is better than none” (XI: 125). “Politics” is the discipline whose aim is to make “progress from a not entirely right, but also not entirely un-right, constitution to one that is more right” (XI: 124), where what it is to be “more right” is to better satisfy the fundamental interests set out in the “original right” section of the *Foundations*.

What is important to notice (and this is a point to which I will

return in §6.2) is that the *Foundations* is intended to articulate only *a priori constraints* on stable solutions to the problem of right. It does not purport to provide, itself, such a solution, because there can be no *a priori* solution. The principle of right does not specify any actual limits to anyone's rightful exercise of external freedom, but instead only requires that some limits be set. The setting of these limits must be the result of an actual agreement (III: 152; cf. III: 196). This is why the obligations of right described in *System of Ethics* §18 are described only as obligations to become or remain a citizen of some actual state and to abide by its actual laws. There could be no richer description, since what rights individuals have depend on the positive law of the commonwealth to which they belong.

5. Ideal and non-ideal moral communities

I began in §1 by asking what reasons a morally motivated Fichtean agent has to enter a commonwealth and abide by its laws, and in §3 I explained Fichte's answer: that membership in a commonwealth is a necessary condition of coexistence-as-free, and therefore of any form of cooperation. But some of the essential features of the commonwealth described in §4 seem justified only on the assumption that not all citizens are perfectly morally motivated. In particular, Fichte's argument that an institutionalized enforcement mechanism is required for the stability of any property contract seems to require (and not merely to permit) that individuals' interests be at odds. Given Fichte's view that morally motivated agents share an agent-neutral end, it might seem that the perfectly rationally benevolent agents of §3 should not in fact need to be citizens of a state. That would conflict with Fichte's conclusion at IV: 237–38.

There is in the end no difficulty here, but there is a qualification to explain concerning ideal moral communities. There is no difficulty because, while it is true that Fichte's argument for the necessity of protection and so unification contracts (and so the state) requires that individuals' proximate ends be imperfectly aligned, it does not follow from this that perfectly rationally benevolent individuals would not

need a state apparatus with all of the features outlined in §4. That is because even individuals sharing the agent-neutral end of furthering the material independence of rational agency wherever it exists would often disagree about the factual question of what would promote it in some instance. (This follows from the fact that they reason fallibly and from imperfect information.) And individuals who share an end but disagree about means sufficient to bring it about find themselves in the same strategic situation as individuals whose interests are only partially aligned for any other reason.³¹

This is plausibly why Fichte moves seamlessly, in the pages following IV: 230, from a characterization of the problem of individuality as the problem of what to do when another agent proposes to act immorally and one could prevent this by violating her rights, to a characterization on which two agents simply have a conscientious moral disagreement (IV: 233) — a move which must otherwise seem bizarre. It is also plausibly why consensus is presented as itself a morally obligatory end in §18. Moral disagreement, and the moral obligation to overcome it, is such a central theme in the treatment of individuality in the *System of Ethics* because the primary moral significance of individuality lies in the fact that individuals are independent sites of practical deliberation. We are obliged to strive to overcome the disagreement that is the inevitable result.

Fichte tells us at the end of §18 that, were a group of individuals to achieve full consensus on every question relevant to practical deliberation, that group would need no coercive enforcement mechanism — no state — in order to coexist as free (IV: 253; cf. *Lectures on the Scholar's Vocation* VI: 306). But he does not say that such a group could do without the sort of general coordination mechanism provided by

31. In showing that agreements would be possible in a society of act utilitarians incapable of binding themselves, Gibbard assumes a number of conditions, one of which is that the parties agree on the expected benefits of the relevant courses of action, which requires agreeing not only on the end of maximizing utility, but also on the facts that bear on how a given course of action will affect the total utility. Cf. A. Gibbard 1990 pp. 195–96 and A. Gibbard 1978 pp. 107–09.

the assignment of rights to individuals.³² Perfectly rationally benevolent Fichtean agents in full agreement about the morally relevant facts would still plan, and their plans would still have to be reconciled (IV: 230). Theirs would be a problem of pure coordination, their interests being perfectly aligned. They could maintain a conventional solution to it by unenforced multilateral agreement, since they could rationally adhere, and expect one another to adhere, to its terms (if not exceptionlessly then at least enough of the time).³³ But they would still need some explicit arrangement of spheres of permissible activity; and obligations to respect that arrangement (to respect rights to bodily inviolability and property) would be in force even in such circumstances.

6. Right as a system of hypothetical imperatives

With the outline of the essential provisions of the commonwealth (§4 above) in mind, let me turn to the second puzzle in the interpretive literature on the *Foundations* to which I propose a solution. This is a puzzle about the status of political obligation (or, differently put, about the normativity of the principle of right). Fichte describes right as a technically practical science, describes the realization of a community under the principle as a matter of “arbitrary choice”, and describes the principle of right itself as a hypothetical imperative (III: 89; cf. III: 9–10, 54; VI: 306–07).

This characterization is consistent with — indeed entailed by — the interpretation I have given so far, on which the value of coordination is instrumental. Morality gives us one set of reasons to become members of a political community; prudence gives us another, partially overlapping, set. In either case the state is a merely instrumental good, not an end in itself; and this is why political obligations are hypothetical imperatives.

So I take the hypotheticality thesis to be a point in support of my interpretation. But the thesis itself is controversial. Although it has been taken at face value by many interpreters,³⁴ others have seen a tension between Fichte's characterization of membership in a community of right as an object of arbitrary choice, and his claim to have derived the principle of right from conditions of possibility of self-consciousness. Neuhauser, for instance, takes the hypotheticality thesis to be “obviously in tension with Fichte's earlier claim in §4 that thinking of oneself as standing in a relation of right to other subjects is a necessary condition of self-consciousness, since such a relation cannot be both a condition of self-consciousness and a matter left up to arbitrary choice”.³⁵ Darwall sees a similar tension: “[T]here are reasons for thinking that

32. E. Düsing (1991) takes the passage at IV: 253 to assert that individuality itself would disappear in a condition of total consensus. But neither here nor in the parallel passage in the *Lectures on the Scholar's Vocation* does Fichte say anything that supports that conclusion.

33. Gibbard (1990) writes that agents committed to promoting the impartially best outcome and agreeing about how to bring it about would sometimes face situations like the one faced by Parfit's hitchhiker, since their future compliance with any agreement would be predicated on their belief, at the time of compliance, that compliance would produce the best outcome overall. But such situations would be rare. Cf. A. Gibbard 1990 pp. 232–33.

34. Cf. e.g. L. Ferry 1987–88, A. Renaut 1986 and 1992, and G. Zöllner 1998.
35. F. Neuhauser 2000 p. xviii; cf. F. Neuhauser 1994 p. 179.

Fichte cannot hold to a voluntaristic interpretation if he is to maintain that the conditions for self-awareness are sufficient to validate the principle of right".³⁶

The worry is motivated textually, at least in part, by Fichte's assertion in the third theorem that "[t]he finite rational being cannot assume other finite rational beings besides itself without positing itself as standing with these in a determinate relation, which one calls the relation of right" (III: 41 — original in italics). Since to posit oneself as standing in the relation of right with others looks, at least on its face, to involve having rights and acknowledging others' rights, it seems to these interpreters that Fichte means to argue in the deduction that "political rights are among the necessary conditions of self-consciousness".³⁷ My reading requires a different understanding of what it is to posit oneself as standing in a relation of right with others, and of what the summons argument is meant to establish.

6.1 *The summons and the problem of right*

The point of the *Foundations*, as I have said, is to propose a set of *a priori* constraints on any solution to the technical problem of coordinating the activity of rational agents engaged in independently planned action in a shared external world. But in order to motivate his account of constraints on solutions, Fichte takes himself to first have to assure his readers that the problem is one they actually have, and that it is soluble in principle at least in some cases.

The first main part (§§1–4) claims to give a transcendental deduction of a concept, which for Fichte is an argument showing that the concept is a necessary one, in the sense of being possessed by any self-conscious being as such. The concept is RIGHT. Since the concept is a technical-practical concept (one whose instantiation is the solution to a practical problem), that task involves an articulation of the problem. The problem is: how can multiple rational agents co-exist as free? The second main part (§§5–7) claims to give a deduction of that concept's applicability, which for Fichte is an argument showing that and how the concept in question can be applied in the sort of experience of which self-conscious beings as such are the subjects. In the case of a technical-practical concept like RIGHT, the aim is to show that the conditions of possibility of solutions to the problem could in principle obtain.

Fichte's ingenious move in the opening pages of the *Foundations* is to link the possibility of rational agency conscious of itself as such with a particular form of human interaction — the form of human interaction he calls a "summons" or "upbringing" (III: 39). The connection Fichte alleges between upbringing and the possibility of self-conscious rational agency has been much discussed in the interpretive literature.³⁸ I take Fichte's aim to be to show that the disposition to

36. S. Darwall 2005 p. 109. Franks (2005) and Ware (2010) also take there to be a *prima facie* problem here, and both propose solutions to it. Neuhausser sees the hypotheticality thesis as contributing to a gap in the overall argument of the *Foundations*, writing that it "appears to invalidate the crucial transition from §3 to §4 and raises the question of how, then, the concept of right can be claimed to be an *a priori* concept of reason rather than an arbitrary human invention" (F. Neuhausser 2000 p. xviii). For similar complaints about a gap in the argument, cf. L. Siep 1979 pp. 26–35, R. Williams 2006, and O. Ware 2010.
37. F. Neuhausser 2000 p. xv. Cf. also P. Baummanns (1990) pp. 120, 124, 168.

38. A few examples (there are many more): F. Neuhausser 2000; F. Neuhausser 2001; A. Honneth 2001; P. Rohs 1991b pp. 86 ff.; S. Darwall 2006 pp. 20 ff., 252 ff., *et passim*; A. Wood 2006; A. Wood 2016.

form second-order evaluative attitudes, to engage in practical reflection and so to impose normative demands of any kind upon oneself, is the product of this kind of social interaction. This seems to me a valuable insight for which Fichte has been rightly admired. But my concern here is not with the connection between the summons and self-consciousness, but instead with the connection between the summons and the problem of right. For it is through an analysis of the basic features of this form of social interaction that Fichte brings out many (though not all) of the determinations of that problem.

Most fundamentally, for there to be a problem of right, there must be a multiplicity of rational agents, and so one primary aim of the summons argument is to ground a transcendental argument against the possibility of practical solipsism, an argument to which Fichte will appeal again in the *System of Ethics*.³⁹ But although this is one primary aim of the summons argument, it is far from the only one. That is a good thing, because although the existence of a problem of right requires a multiplicity of individuals, this is far from the only thing it requires.⁴⁰ Many of the other conditions, however, are themselves built into the summons situation; and so if Fichte succeeds in establishing that self-consciousness is possible only on the basis of a summons, he succeeds at the same time in establishing that these conditions — again, conditions for the existence of a problem of right — actually obtain, if there is agency conscious of itself as such.

A first set of necessary conditions is causal, and it is laid out mainly in the deduction of the body and of reciprocal influence at III: 55–73.

39. It replaces the failed anti-solipsistic argument of the second of the *Lectures on the Scholar's Vocation* (VI: 302–06), which had the same systematic role.

40. I believe I disagree with Neuhausser's reconstruction here, insofar as he seems to take Fichte's view to be that conceiving of oneself as an individual suffices for having the concept RIGHT (cf. F. Neuhausser 1994, F. Neuhausser 2001 p. 40). Of course he supplies Fichte with a richer account of what it is to conceive of oneself as an individual than the one on which I rely. But articulating the problem of right requires appeal to considerations that cannot plausibly be built into the concept INDIVIDUAL on any construal — for example, the consideration that the space individuals share is finite, or that individuals have at their disposal a way of signaling their intentions to one another.

For two agents to stand in the summoned-summoner relation, they must have wills that are immediately causally efficacious in some part of the external world (they must have bodies [III: 58–59, 69]). These parts of the world must be distinct, for were they not, the one could not distinguish her own efficacy from the efficacy of the other, and so could not conceive of herself as a distinct will. Each must have some sort of causal efficacy with respect to the will of the other, however, for there could be no interaction if their wills were wholly immune to one another's influence. Such efficacy cannot be immediate, for there could be no independence if their wills could work directly and immediately upon one another. Instead the one must be able to act with her body upon the body (but not directly upon the will) of the other (III: 64–65, 69). Their causal interaction must be able to take two distinct forms: direct physical interference on the one hand, and signaling that acts upon the sense organs but does not involve direct physical interference on the other (III: 61–73). They must be able not only to act upon one another in a way that violates the sphere that the summons will assign to each but also to act upon one another in a way that does not violate it (and so must have some medium of influencing one another's will apart from physical interference). It must, further, be the case that not every exercise of external causality on the part of the one impinges on the body of the other: there must be a physical space between and around them, within which the two can causally interact in a mediated way, or refrain from doing so (III: 68).

A second set of necessary conditions is epistemic. Fichte assumes without argument that the physical space separating agents is populated in part by other causally efficacious but non-rational beings, and that discovering one another within this environment is therefore a problem rational agents must be able to solve. He claims in the deduction of applicability that nature has settled this question for us by giving us bodies of a certain sort, bodies that signal, naturally, that their owners are rational beings (III: 76–85). But what he writes elsewhere (e.g. in §43 of the first appendix, one of the sections dedicated to the upbringing of children) makes much more sense:

It is a natural drive in human beings to suspect beings outside of themselves of rationality, where this is at all plausible, and to treat objects (for example, animals) as though they had it. The parents will treat their child in the same way, summoning it to free activity; and in this way rationality and freedom will gradually become manifest in it. (III: 358)

So, at least, the parents hope. What is certain is that the answer to the question of who is a rational being is settled, for Fichte, through interaction in which rationality and freedom are, or gradually become, manifest in behavior. In fact this is stated, though not in such clear terms, already in the deduction (III: 37).

A summons is a strategic interaction in the sense that what it is rational for each to do in it depends on her expectations about what the other will do, which she recognizes to depend in turn on the other's expectations about what she herself will do, and so on.⁴¹ (Typically, it is what Schelling called a "mixed-motive" game, in which agents share an interest in coordination, but also have competing interests that cause them to favor different solutions.⁴²) Fichte is here appealing to a general feature of such interactions: each participant can affect the expectations, and therefore the behavior, of the other participant, only by how she herself behaves. The summoned must do as she is asked if the summoner is to continue to regard her as a being who is at least potentially free and rational. But the summoner must do likewise —

41. By "strategic" here (and throughout) I mean only that the situation is one in which what each ought to do depends on his expectations about what the others will do, which in turn depends on the others' expectations about what he will do, and so on. There can be strategic situations, in this sense, also where players' interests are perfectly aligned. Cf. T. Schelling 1958, p. 205: "It is to be stressed that the pure co-ordination game is a game of strategy in the strict technical sense. It is a behavior situation in which each player's best choice of action depends on the action he expects the other to take, which he knows depends, in turn, on the other's expectations of his own."

42. Cf. T. Schelling 1958, pp. 207ff. For another application of Schelling's thought to the interpretation of Fichte's characterization of the summons, cf. N. Nomer 2010.

must obey the very constraints she is trying to impose — if she is to be recognized as issuing a summons.

[T]he knowledge of the one individual by the other is conditioned on the other's treatment of it as free (that is, that the other limit his freedom through the concept of the freedom of the first). This mode of treatment is however conditioned on the action of the first toward the second, this action through the action and through the knowledge of the second, and so on to infinity. ... Neither can recognize the other if both do not reciprocally recognize one another. And neither can treat the other as a free being if both do not reciprocally treat one another that way. (III: 44)

So recognition of one another as rational agents is necessarily connected to some behavioral expression, which must be present on both sides for recognition to take place. In the absence of such behavior, they show up for one another as non-rational animals. (This explains the striking statements about lawbreakers described in §4.) Since it must take place in this kind of interaction, such recognition can only ever be mutual.

This epistemic point — that the one can know the other to be free and rational only because and to the extent that the other's actions demonstrate that it recognizes the freedom and rationality of the one — gives rise to constraints on rational conduct only for agents who *want* to appear to others to be rational beings. The summons need not be successful (III: 34, 44). Grasping the fact that I can affect others' behavior by affecting their expectations about my own does not constrain me to interact with them in that way. I have concepts other than RATIONAL BEING under which I can (correctly) subsume them (ANIMAL; MATERIAL OBJECT), and it is possible for me to act on others as if they fell only under such concepts (III: 86–87). It is irrational to do so only if I have ends inconsistent with others' treating me in exactly the same way, a result I can foresee as soon as I have any understanding of the situation.

Instrumental reasoning requires ends on which to operate, and we find these built into the summons situation as well. Both agents are assumed to have an interest in coordination on non-overlapping spheres of permissible activity, and thus to already have, or be capable of being inspired to have, their own bodily integrity and external causal efficacy as ends. Likewise built in is a requirement of (again, instrumental) rationality to recognize the symmetry of the interests involved (III: 44–48). Agents refusing to recognize in others interests they know them to have can expect to come to no meeting of minds.

These specifications of the summons situation correspond, as they are meant to, to aspects of the problem of right. Right exists as a problem to be solved not only because there are many individual *loci* of deliberation and causal agency, but also because they must share a space of external action, because their exercises of their freedom can come into conflict (they are able to interact causally and to impede one another's actions), and because they have their own unimpeded causal efficacy as an end. It is in principle soluble only if they can agree to an arrangement that removes such conflict without itself being an instance of such conflict (i.e. if they are able to use and understand signals). Its solution is the outcome of a bargaining process in which individuals recognize one another as having standing to make claims on one another and mutually recognize those claims.⁴³ Effectively signaling agreement requires actually adhering to the terms. Some form of cooperation is the expected outcome.

By the end of the deduction of applicability, Fichte takes himself to have established that any being that has once been "summoned" or "brought up" to be a rational being (and so any self-conscious rational agent) is able to understand these aspects of the strategic situation that I have just described, and to see that others are likewise able to

understand them. The "ongoing universal expectation" that all other rational beings will recognize me as a rational being (III: 45–46) and the correlative requirement of "theoretical" consistency (III: 47, 48, 50, 86) that I cannot expect such recognition unless I recognize them in the same way (where such recognition is a behavioral, not a merely intellectual, fact) is, I submit, Fichte's articulation of what it means to posit oneself as standing in a relation of right with others.

To posit oneself as standing in a relation of right with another is to acknowledge that we two have, together, the problem of right, and that we have interests that typically dictate that we should go about solving this problem together, negotiating constraints on our respective activities to make compatible our respective exercises of our external causal efficacy. If we manage to solve this problem, we will, collectively, take on new moral duties with respect to one another (duties whose fulfillment, because of the nature of the coercive apparatus that makes them possible, will be a prudential imperative as well): duties of right (IV: 295–301; cf. III: 8–11).

6.2 *Fichte's positivism*

It is remarkably common for Fichte's readers to take the *Foundations* to be an account of what fundamental rights people *have*. The assumption that it must aim to provide such an account explains Neuhausser's understanding of the doctrine of original right as an account of actual rights, as well as his characterization of Fichte's argument in the deduction as aiming to establish that "political rights are among the necessary conditions of self-consciousness". But Fichte explicitly disavows any such aims. "[I]n the sense in which people often take the word there is no *natural right* — that is, no rightful relation between human beings is possible except in a commonwealth and under positive laws" (III: 149). The law as it is (rather than the law as it ought to be by any normative standard, including those articulated in the *Foundations*) is what determines people's rights and others' corresponding obligations of right.

43. This is not to say that the bargaining power of each must be equal to that of all others. It is simply to say that if it is indeed a process of negotiation they are engaged in, each must derive some at least perceived benefit from the agreement, and this benefit must be derived from the other's voluntary compliance with its terms.

We would expect someone holding such a position to recognize the existence of human beings who, because they are not cooperating members of existing commonwealths, are not rights-bearers. In fact Fichte describes six classes of such individuals in the *Foundations* and the *System of Ethics*. We have been introduced to three of them already: hermits (who refuse to have rights), lawbreakers (who, in the absence of some expiation contract, forfeit their rights in breaking the law), and those unfortunate individuals for whom a solution to the problem of right is impossible because their conditions are too desperate or their characters too corrupt.

In discussing the requirement that any two individuals who are to stand in the relation of right with one another must be able to interact causally, Fichte describes a fourth class: the dead (III: 56).⁴⁴ A fifth class is discussed in the section on cosmopolitan law: those seeking to enter an established commonwealth from the outside. Migrants have only the sole right that can properly be described as a “natural” one: the right to acquire rights by entering into contracts with willing others (III: 383–84).⁴⁵

The sixth class is by far the most problematic for a reading on which the summons argument seeks to show that political rights are a condition of possibility of self-consciousness. Fichte uses the terms “summons” and “upbringing” interchangeably throughout the text,⁴⁶ and this is because the paradigm case of summoning occurs in the context of child-rearing. Typical summoners are parents, and typical recipients

of the summons are children. But as we learn in the first appendix, “the child, insofar as it is being brought up [i.e. summoned], is not at all free, and so not at all a possible subject of rights or duties” (III: 359). Children have no political rights at all, not even the right not to be killed by their parents (III: 361–62). Although the state may assign parents legal duties to sustain and raise their children, these are grounded in the arrangement parents maintain with other adults, not in any rights claims that might be made by the children themselves or by others on their behalf.

If the paradigm case of the summons is that of a parent summoning a (non-rights-bearing) child, not that of one adult making a demand on another adult (still less a demand of respect for some right that pre-exists the interaction), it seems very implausible to think that Fichte means, in arguing that self-consciousness depends on a summons, to argue that it depends in any way on political rights or the institutions that make them possible.⁴⁷ The relation of dependence is instead the opposite: beings who have not (yet) been summoned are, in virtue of that fact, not (yet) capable of co-citizenship, not (yet) capable of having rights.

In each of these six cases, as we should expect on the account I have given, although Fichte describes moral duties that concern these individuals, none of those duties are duties of right, and all of them are importantly qualified by the fact that the individuals concerned are not rights-bearers. Parents are morally obliged to bring up their children, making them into rational beings and potential fellow-citizens, while constraining their behavior in extralegal ways for their own and others’ wellbeing until they reach that point (IV: 335–41). Hermits must, as we have seen, be avoided if they refuse to be integrated, since there is

44. One could add on the same grounds — though Fichte does not — future generations.

45. This is best understood as an extra-political entitlement to demand a hearing, to enter into a process of negotiation (that may, legally, result in either their citizenship or their expulsion), which a migrant can claim by issuing a summons.

46. He writes in §3, “The summons to free self-activity is what one calls upbringing” (III: 39); and he writes in §43 that parents “will summon their child to free activity” (III: 358). There is no terminological shift that might signal a change in his conception of the summons; and it is implausible to suppose that his position on the citizenship of children has shifted over the course of the text.

47. I do not intend to rule out, here, the thesis (which Fichte clearly endorsed) that certain *forms* of agency are impossible in the absence of certain sorts of political institutions. The question is whether the argument in the deduction aims to establish that *any* form of self-conscious rational agency is impossible in the absence of political institutions, and these examples show that the answer to that question must be “no”. Thanks to an anonymous referee for prompting me to clarify this.

by hypothesis no rightful way of interacting with them (IV: 237–38). There can be no moral justification for allowing migrants to exist in political limbo: morally, they must be integrated, or, if this is genuinely impossible, deported (III: 383–85). Lawbreakers, insofar as they are in the act of breaking the law, and insofar as one is acting as a proxy for a state whose actual officers cannot effectively intervene, should be regarded as rightless (and this status explains the fact, noted in §1, that there is no moral prohibition on violating an attacker's property or bodily integrity in the act of defending his victim against him). Still, they should be protected from unnecessary harm on the grounds that they may yet be reintegrated later on.

In each of these cases there is a moral obligation to try to integrate (or reintegrate) the individual in question into a commonwealth that would provide them with legal rights (where this is possible), and to protect and promote their rational agency in whatever other ways available until this can be done. But in none of these cases does Fichte describe any extra-legal, moral or "natural" rights that individuals might claim in the absence of such integration.

6.3 *Political obligation*

We are now in a position to re-examine the worry about Fichte's claim that willingness to collaborate in creating, or to enter into or remain within, a political community is a matter of "arbitrary" choice.

Fichte thinks he has offered powerful instrumental reasons, from both a prudential and a moral point of view, that would suffice to motivate such willingness in most cases. Other rational beings are uniquely placed to facilitate, or undermine, my plans; and I am likely to be harmed if I ignore them, if only because they see that I am also uniquely placed to facilitate or undermine their plans (III: 115–18). Even if I do not expect to call on others' help, but seek only to pursue my own projects unmolested, I am better off, from a narrowly prudential perspective, as a member of a commonwealth. From a moral perspective, the interest that motivates cooperation is just the agent-

neutral moral concern with the material freedom of rational agents generally. Since moral progress requires interaction, I must interact with (willing) others (IV: 235). Since my aim is the independence of rational agency wherever it exists, I must do my best to ensure that the interaction be such as to allow all of its participants to coexist as free (IV: 238–39). Since individuals can coexist as free only in a state (III: 9–10, 92–93; IV: 230, 300), part of the moral end is the existence of a state.

Still, the nature of existing and proposed future institutions can never be entirely up to me. They also depend on what others are willing to concede and on what mechanisms for coordination are available and what conventions are already in place. This means that entering into or remaining within them could in principle be worse for me (from a prudential perspective) than life as a hermit or on the edges of society, or even than violent uprising, depending on my interests and bargaining position. This was presumably the case for the French working classes in 1789, whose overthrow of their existing regime Fichte defended.⁴⁸ It is the case for those believing their government sufficiently corrupt (III: 182–84; cf. VI: 13), and for those for whom no right to property is acknowledged or who lack property sufficient to support themselves independently (III: 195; IV: 296). The moral obligation to enter or sustain a given particular political entity is likewise not absolute. Fichte explains that it is contrary to morality to try to overthrow the state unless I am firmly convinced that doing so is the will of the entire community (IV: 238–39), and absent such conviction it is my duty to work to improve the state within the confines of the law (IV: 239; 296–97). It is a clear implicature of these remarks that there *can be cases* in which I morally ought to take direct action aimed at overthrowing the government. In the *Foundations* as well, the only

48. Fichte was a supporter of the revolution, for reasons outlined in *Contributions to the Correction of the Public's Judgment Concerning the Revolution in France* (published 1793, reprinted 1795, VI: 39–288).

criterion of political legitimacy Fichte admits is the ongoing support of the governed (III: 14, 107, 152, 164–65, 174, 182–85).

This is, I submit, what he means when he describes the principle of right as hypothetical, membership in a commonwealth a matter of *Willkür*. It is also exactly the view we should expect Fichte to hold, according to the picture developed in §3.

7. Conclusion

My primary aim in this paper has been to explain the status of political duties in Fichte's moral philosophy. The central question (§1) was: What reason has an individual motivated exclusively by moral concerns to be a member of a political community and to abide by its laws? The answer (§3) is that such an individual has a set of very strong (though not indefeasible) instrumental reasons to belong to a political community that assigns and enforces individual rights. That is because such a community both makes possible rational individual planning and provides the basis for more complex forms of social coordination, both of which facilitate progress toward the moral end. A political community with the basic features Fichte describes (§4) serves this purpose even for perfectly rationally benevolent agents, so long as they are not in complete agreement about every morally relevant question (§5).

This account has repercussions for the interpretation of the *Foundations* that are surprisingly profound. Interpretive options that seem open when that text is looked at in isolation can be seen to be closed when we understand its place in Fichte's practical philosophy as a whole — a place mapped out only in the *System of Ethics*. My secondary aim in the paper has been to spell out two of these repercussions. First, the answer to the central question entails an interpretation of Fichte's independence thesis different from any that has been proposed before (§3). Given the difficulties with existing interpretations (§2), this is an important advance. Second, the answer provides new and to my mind decisive evidence in favor of the interpretation of Fichte's hypotheticality thesis that is best supported by the text (§6).

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