

**RIGHTS, BODIES AND
RECOGNITION**

**New Essays on Fichte's
*Foundations of Natural Right***

Edited by

**TOM ROCKMORE
DANIEL BREAZEALE**



Rights, Bodies and Recognition

New Essays on Fichte's *Foundations of Natural Right*

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List of Abbreviations

- APT *Annalen des philosophischen Tons* (1797)
- BWL *Ueber den Begriff der Wissenschaftslehre* (1794)
- EPW *Fichte: Early Philosophical Writings*, ed. and trans. Daniel Breazeale (Ithaca, NY: Cornell University Press, 1988)
- FNR *Foundations of Natural Right*, ed. Frederick Neuhouser, trans. Michael Baur (Cambridge: Cambridge University Press, 2000)
- FTP *Fichte: Foundations of Transcendental Philosophy (Wissenschaftslehre) nova methodo*, ed. and trans. Daniel Breazeale (Ithaca, NY: Cornell University Press, 1992)
- GA *J.G. Fichte-Gesamtausgabe der Bayerischen Akademie der Wissenschaften*, ed. Reinhard Lauth, Hans Gliwitzky, and Erich Fuchs (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1964ff.)
- GNR *Grundlage des Naturrechts* (1796/97)
- GWL *Grundlage der gesamten Wissenschaftslehre* (1794/95)
- IWL *Introductions to the Wissenschaftslehre and Other Writings*, ed. and trans. Daniel Breazeale (Indianapolis: Hackett, 1994)
- KA Friedrich Schlegel, *Kritische Ausgabe*, ed. von Ernst Behler et al., Paderborn, 1958 ff.
- NDN Friedrich Wilhelm Joseph Schelling, *Neue Deduktion des Naturrechts* (W, I: 247–80; UHK: 221–47).
- SS *System der Sittenlehre* (1798)
- SW *Johann Gottlieb Fichtes sämtliche Werke*, ed. I.H. Fichte, 8 vols (Berlin: Viet and Co., 1845–46); rpt, along with the three volumes of *Johann Gottlieb Fichtes nachgelassene Werke* (Bonn: Adolphus-Marcus, 1834–35), as *Fichtes Werke* (Berlin: de Gruyter, 1971)
- UHK Friedrich Wilhelm Joseph Schelling, *The Unconditional in Human Knowledge: Four Early Essays (1794–1796)*, trans. and ed. Fritz Marti (Lewisburg: Bucknell University Press, 1980).
- W Friedrich Wilhelm Joseph Schelling, *Sämtliche Werke*, ed. K.F.A. Schelling (Stuttgart/Augsburg: J.G. Cotta, 1856–61).
- WLn[m][H] *Wissenschaftslehre nova methodo* (“Halle Nachshrift,” 1796/97)
- WLn[m][K] *Wissenschaftslehre nova methodo* (“Krause Nachschrift,” 1798/99)

Chapter 2

Fichte's Impossible Contract

Michael Baur

1 The Pursuit of Normativity without an Antecedently-given "Nature" or Teleology

In the draft of a letter to Jens Baggesen from 1795, Fichte explains that there is an intrinsic, non-accidental link between pre-critical or dogmatic epistemology and metaphysics (on the one hand) and oppressive social-political thinking (on the other). Contrasting his own post-Kantian philosophy with the positions of pre-critical thinkers, Fichte writes:

My system is the first system of freedom. Just as France has freed man from external shackles, so my system frees him from the fetters of things in themselves, which is to say, from those external influences with which all previous systems – including the Kantian – have more or less fettered man. Indeed, the first principle of my system presents man as an independent being.¹

For Fichte, the task of a critical epistemology and metaphysics – i.e., a theory of knowledge and being that genuinely appreciates and respects human freedom and autonomy – will be to give an account of our knowledge of objects, yet without relying on the pre-critical or dogmatic assumption of an antecedently-given, causally-efficacious thing-in-itself *outside* the human knower. In a 1793 letter to F.I. Niethammer, Fichte explains the theoretical imperative in the following way:

Kant demonstrates that the causal principle is applicable merely to appearances, and nevertheless he assumes that there is a substrate underlying all appearances – an assumption undoubtedly based upon the law of causality (at least this is the way Kant's followers argue). Whoever shows us how Kant arrived at this substrate without extending the causal law beyond its limits will have understood Kant.²

In other words, Fichte is claiming here that whoever gives an account of the finite or limited character of human knowing – yet without appealing to the pre-critical or dogmatic metaphysical premise of an antecedently given, independent thing-in-itself – will have truly understood Kant. This same set of issues can be transposed from their epistemological and metaphysical context into a practical and political context. Recall that Kant initiated a “Copernican revolution” in the realm of practical and political thought as well as in the realm of epistemology and metaphysics.³ As Kant explains the matter in his *Critique of Practical Reason*, it is our own free agency and the principles of our own autonomous willing that provide the criterion for determining what is good, and not the other way around.⁴ Thus it is *not* the case that the rightness of our willing is to be determined or judged on the basis of some antecedently-given, teleologically-ordained good. Just as it is our own knowing that determines what properly counts as an object (and not the other way around), so too it is our own free willing that determines what counts as good or worthy from a moral point of view (and not the other way around). So in the realm of practical and political philosophy, one can say on Fichte’s behalf (and borrowing the language that Fichte himself uses in his letter to Niethammer):

Whoever can give an account of the norms or obligations to which we are committed in the realm of practice – yet without relying on the pre-critical, dogmatic premise of an antecedently-given, teleologically-ordained order of things or notion of the good – will have truly understood Kant.

For Fichte, the task is to give an account of practical normativity, yet without appealing to any antecedently-given teleology. Stated differently, the task is to give an account of the normative constraints by which we are properly bound in our practical activity, yet without relying in any way on some notion of nature, or the good, or “ends *an sich*,” which are allegedly given independent of or antecedent to our own self-legislative willing. To complete the French Revolution’s project of emancipatory politics, Fichte implicitly argues, one must complete the Copernican revolution’s project of overcoming the residual dogmatism of all naturalism and teleology.

As I hope to show later in this paper, Fichte’s rejection of traditional social contractarian accounts of human social relations is related to his rejection of the search for a criterion, or external standard, by which we might measure our knowledge in epistemology. More specifically, Fichte’s account of the impossibility of a normative social contract (as traditionally construed) is related to his account of the impossibility of our knowing things as they might be “in themselves,” separate from and independent of our own activity in

knowing them. Addressing the question of whether we finite human knowers can ever transcend the limits of our own consciousness, Fichte argues that Hume was not sufficiently critical:

... the Humean system holds open the possibility that we might someday be able to go beyond the boundary of the human mind, whereas the Critical system proves that such progress is absolutely impossible, and it shows that the thought of a thing possessing existence and specific properties *in itself* and apart from any faculty of representation is a piece of whimsy, a pipe dream, a nonthought.⁵

In a very real sense, then, Fichte aims to “out-Hume” Hume on the question of whether we can ever know “things-in-themselves” or an external criterion for testing our knowledge. That is, Fichte goes beyond Hume and insists on the *necessary* – and not merely contingent – character of our ignorance of so-called things-in-themselves (i.e., things that supposedly exist antecedent to and independent of our consciousness of them). But unlike Hume, Fichte argues that radical skepticism regarding all possible knowledge of things-in-themselves does not undermine – but actually confirms and sustains – our belief in the emancipatory power of reason.

In a similar vein, Fichte can be said to “out-Rousseau” Rousseau on the issue of the social contract that allegedly grounds society and all social relations. Fichte’s theory of right aims to show that it is simply wrong to think of the original “social contract” that grounds relations of “right” among human beings as any kind of representable or imaginable hypothetical “agreement” at all (even if one is willing to admit, as Rousseau does, that such an agreement may not have taken place as a real event⁶). Fichte’s argument entails that the original “social contract” is itself the non-imaginable, non-representable condition of there being any conscious, genuinely human relations among human beings in the first place. Thus, it is simply *impossible* for human beings to agree – or even to imagine themselves agreeing – to terms upon which they are to treat each other as free and rational beings. The conscious and deliberate making of any such agreement (whether real, imagined, or represented in any way) must always presuppose that the parties have always already “agreed” to treat each other as free and rational beings, as beings worthy of entering into agreements in the first place (otherwise, there would be no point in seeking agreement in a social contract situation). In other words, we human beings must see ourselves as subject to an original “contract” that we freely entered into, even though we never were actually conscious of having done so, and even though it is utterly impossible for us even to imagine ourselves

as consciously and freely doing so. This is because the “contract” itself is the condition of the possibility of our being conscious and free in the first place. But for Fichte, the impossibility of our ever imagining or representing to ourselves any such hypothetical social contract does not undermine our belief in the critical, liberating power of reason. Properly understood, the impossibility of an imaginable or representable social contract (the impossibility of imagining a contract which binds humans to one another on the basis of antecedently-given “natural” needs about which the parties allegedly bargain and reach agreement) confirms all the more fully our radical freedom and capacity to transcend the limits seemingly imposed on us by “nature” or an antecedently-given teleological order of things.

2 Clarification by Contrast: The Problem with Rawls’s Social Contractarian Account

In order to articulate the grounds of Fichte’s rejection of traditional social contractarian accounts of human social relations, it will be helpful if we refer briefly to the thought of John Rawls, one of this century’s most famous and influential social contractarian thinkers. In his criticism of Kant, Rawls explicitly states that it is impossible to give a sufficiently determinate account of moral obligation or normativity if one refuses to begin with at least some minimal (or “thin”) theory of the good. Thus in *A Theory of Justice*, Rawls criticizes Kant for failing to provide sufficiently determinate normative content in his moral theory:

Kant never explains why the scoundrel does not express in a bad life his characteristic and freely chosen selfhood in the same way that a saint expresses his characteristic and freely chosen selfhood in a good one.⁷

For Rawls, in other words, it is impossible to give a sufficiently determinate account of moral obligation or normativity if one does not begin with at least some minimal account of the antecedently-given set of “primary goods” that all persons (within a properly-constituted hypothetical contract situation) would identify as worthy of having, regardless of whatever else happens to be the case.

Now in the most general terms, Fichte can be understood as arguing (against Rawls and against other, similar social contractarian thinkers) that it is not necessary to appeal to any antecedently-given, heteronomously-derived content in order to “fill out” an otherwise empty, formalistic, and self-enclosed

account of Kantian autonomy. Fichte holds that one *can* complete the Kantian Copernican revolution in practical philosophy – yet without relying on any antecedently-given, allegedly normative content – if we only understand more deeply what autonomy, or self-conscious selfhood means *on its own terms*. In fact, Fichte argues that we *must* complete the Copernican revolution in this way, since any retreat in the direction of naturalism or teleology – even if it involves only a very “thin” theory of the good – is equally a reversion into dogmatic, pre-critical epistemology and metaphysics and potentially restrictive, oppressive politics (a politics that does not sufficiently appreciate the radical freedom and plasticity of finite rational selfhood).

On the face of it, Rawls might well seem to escape the charge that his social contractarian account of the principles of justice is pre-critical, or teleological, or metaphysical (in the pejorative sense of this term). In what follows, I shall try to show (however briefly) that the Rawlsian account *does*, in fact, fall prey to this charge, and does not sufficiently appreciate the radical freedom or autonomy of the finite rational human being. Furthermore, I shall try to show that – in spite of appearances – it is possible (following Fichte) to arrive at a sufficiently determinate account of practical normativity or obligation without relying – as Rawls does – on any empirically-given and heteronomously-derived set of “primary goods” or human interests. The key, for Fichte, will be to see that freedom on its own terms and in abstraction from all empirical content, is not empty and self-enclosed, but is necessarily constrained and related to what is other than it. But before considering the Fichtean account, let us first consider Rawls in a bit more detail.

In *A Theory of Justice*, Rawls argues that there is no need for an explicit epistemological, metaphysical, or teleological justification of the principles of justice, since the immediate source or ground of the principles of justice needs no ground outside of itself, but rather is *self-determining or self-grounding in the relevant respects*. This is because, for Rawls, the immediate source or ground of the principles of justice is nothing other than the very personhood or selfhood whose rights and duties are to be distributed in accordance with those principles of justice; and thus the immediate source or ground is this personhood simply insofar as it chooses *its own* principles of justice for itself. This why Rawls holds that his particular brand of liberalism is “political, not metaphysical.”⁸

Now the reason why the Rawlsian project is a *political* project (and not an epistemological or metaphysical one) is also the reason why it is a *social contractarian* project. Like other social contractarians before him, Rawls begins with the intuitively appealing idea that the principles of justice are supposed to have their ultimate source in personhood or selfhood insofar as

such personhood or selfhood chooses principles *for itself* (the ground or source of the principles of justice is not supposed to be any antecedently-constituted human nature). Thus for Rawlsian social contractarianism, the fundamental question concerning the principles of justice is essentially a *practical* and *political* question of acceptability or consent, and not one of metaphysics, epistemology, or theoretical standards that are given independently of or antecedently to self-determining selfhood. That is, the principles of justice are supposed to be grounded non-teleologically and non-metaphysically. This is Rawls's way of expressing what is an essentially Kantian theme, namely the theme of "the primacy of the practical."

Now for Rawls, the initial choice situation (within which free, self-determining personhood is said to choose principles of justice for itself) is called the "original position."⁹ But why does Rawls need to think in terms of a hypothetical "original position" at all? For Rawls, *our own, actual personhood* (the personhood that you and I factually and concretely *are*) cannot be understood as conceptually identical to the personhood in the original position, because of *the problem of bias*. As Rawls notes, "persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share."¹⁰ Now in addition to being self-interested in this way, we as individual persons are differently situated vis-à-vis others in our social world: we have different natural endowments, we occupy different social positions, and we adhere to different conceptions of what is "good" for us. If left to ourselves to deliberate about the principles of justice, these differentiating characteristics would bias us and prevent us from reaching unanimous agreement. For Rawls, then, it is necessary to construct the fiction of an appropriate choice situation (an "original position") within which personhood is *not influenced* by the particularizing characteristics that make us different as individuals and that bias us in our thinking about justice.

Now, contrary to Rawls's own self-understanding, Fichte would argue that this very act of separating personhood into two types – our own personhood versus personhood in the hypothetical original position (or in a natural, unbiased state) – implicitly contradicts his assertion of the primacy of the practical, and ensures that the personhood that is the source of the principles of justice is *not* self-determining in the sense that Rawls requires. With the Rawlsian separation, personhood that is the source of the principles of justice (personhood in the original position) is *not* self-determining in the relevant respects, because its putative interests, tasks, goals, self-understanding, and common nature are *given* to it by a source that is different from it, and given to it in accordance with a prior order of things that antecedently sets

the terms of its deliberations (from “behind its back,” as it were). This is the antecedent order of things that *we ourselves* set up in advance as we construct the original position and decide what types of information should or should not be filtered out of it. In other words, by constructing the original position, we construct a hypothetical, imagined kind of personhood, with a pre-existing (antecedently-given) common nature. This common nature pre-determines what personhood in the original position may or may not take into consideration when deliberating about justice. Insofar as *we* construct such an original position for *our own* political purposes, we might be said to be self-determining in the relevant respects. However, insofar as personhood in the original position must *find itself* already constituted with certain interests, tasks, goals, self-understandings, and a common nature *given* to it in accordance with an antecedent order (i.e., the order that *we* have established), then *it* cannot be said to be *self-determining in the relevant respects*.

From Fichte’s point of view, the fundamental problem with any such contractarian account resides in the attempt to imagine *in advance* what *particular positive content* (i.e., what particular claims or rules) free persons would agree upon for the purpose of organizing themselves into a self-sufficient social system. The problem with this approach is twofold:

- 1) any personhood that can be represented or imagined by us in advance as being committed to any particular positive content is necessarily *not self-determining*; instead, it is always already constituted *by us* as being committed to some particular content that *we* have chosen for it;
- 2) any personhood that can be imagined by us in advance as being committed to any particular positive content is necessarily *not our own personhood*; this is because it is impossible for us to give an account of such imagined personhood while simultaneously giving an account of our own imagining and account-giving. Stated differently, anything that subjectivity represents to itself is – strictly speaking – *other than* the subjectivity that does the representing. Thus by thinking in terms of an imagined social contract situation within which allegedly free selves bargain *on our behalf* about the principles of justice, and do so on the basis of a set of interests or primary goods that they find as antecedently given and normatively binding on them, Rawls slips back into a teleological, metaphysical, and ultimately dogmatic view of human agency; and thus Rawls fails to do justice to the full meaning and scope of human freedom.¹¹ Or to put the matter somewhat differently: Rawls seeks to provide an account of the norms that are binding on subjectivity, but – unfortunately – he does so from a point of view that is *external* to the subjectivity that is allegedly being bound;

and thus he provides an account that ultimately regards subjectivity as an instance of objectivity.

3 Fichte's Normative Social Theory: A 'Backwards' Social Contract

Unlike Rawls, Fichte does not seek to imagine *in advance* what *particular positive content* (i.e., what particular claims or rules) free persons would agree upon for the purpose of organizing themselves into a social whole. Rather, the starting point for Fichte is the exact opposite: insofar as personhood or selfhood is genuinely free and self-determining, it simply *cannot* be imagined in advance as being committed to *any* particular positive content whatsoever. Accordingly, it is not possible to specify in advance what kinds of claims one should accept or be skeptical about; in principle, personhood that is genuinely free and self-determining can and should be skeptical about any and all positive content whatsoever. Indeed, to be fully free for Fichte means to be radically skeptical; it means to be aware that no given content whatsoever is necessarily determinative for one's thinking and/or acting.

But now the following question arises: how is it possible to derive a normative social theory without relying in any way on the antecedent givenness of any particular, determinate content whatsoever? How can one arrive at normatively valid "content" for a critical social theory on the basis of nothing other than simple freedom or skepticism, or the bare activity of being aware that no particular content whatsoever is determinative for one's thinking and/or acting? As indicated earlier, Fichte's approach is somewhat counterintuitive. And the key will be to see (with Fichte) how a radically free, self-related self (the pure I = I) can *on its own terms* never be purely self-related and self-enclosed, but must be constrained by and related to what is other than it. Fichte's full argument for this position is rather complex, but it can be presented in rough outline as follows.

As self-conscious of its radical freedom, the Fichtean self knows that no given content is necessarily determinative for itself, that no given content necessarily imposes itself on the self. However, one "thing" that (for lack of a better way of putting it) *does* "impose" itself on the self is the fact that the self must always *come-to-be* aware of itself as radically free. The self's coming-to-be as a self-consciously free self always "happens" to the self, apart from any deliberate or free choosing by the self. The self cannot deliberately and self-consciously choose its own coming-to-be-aware of itself as radically free (and thus cannot deliberately choose to come-to-be the self that it is), since – "prior" to this coming-to-be – the self is "not yet" a self-consciously

free self at all. The self-consciously free self is what it is only to the extent that it seemingly emerges, or awakens, *out of* a “prior” state of *not* being a self-consciously free self. Since the self was not *always* the radically free and self-conscious self that it is, the self cannot be the totality of all that is, for coming-to-be necessarily implies some otherness. Thus there must be some “other” to the self, or a not-self (a not-I).¹²

The same point can be made in slightly more Fichtean terms. To be a self is to be for oneself, and to be for oneself is to be given to oneself and thus passive with respect to oneself. And one cannot be passive with respect to oneself (or in any respect at all), if the self were a pure, infinite, activity. Conversely, a pure, unconstrained, infinite activity – if it really were unconstrained and infinite – would never have the occasion to reflect *back* on itself or to be *for* itself (as a self always is), but would extend its activity without restriction or constraint into infinity – in which case it would be a blind, unreflected activity, and would not be an activity that is aware of itself, or for itself. Thus the very definition of the self as an activity that is purely for itself also implies some element of impurity, passivity, and otherness. In order to be a self at all, the self needs an “other” in relation to which the self is the being-for-self that it is. In other words, the self-positing self cannot be the totality of all that is, and there must be some *other* to the self, or a not-self.¹³

Now in addition to arguing for the necessity of a not-self for the self, Fichte further argues (in his *Foundations of Natural Right*) that this not-self must ultimately be understood as another free self. This, then, is Fichte’s argument for the necessity of intersubjectivity, or what we might call a “backwards” or “retrospective” social contact, one that is not in any way imaginable or representable, but one that must nevertheless be understood as binding free selves to other free selves. So what is the Fichtean argument?

In the present context, the most important thing to note about Fichte’s argument for intersubjectivity is that it does not involve any argument about what kinds of needs or interests free persons (allegedly) all share, or what kinds of claims free persons (allegedly) can all agree upon. The argument is not grounded on any kind of givenness or positivity at all; rather, it is based on the opposite kind of claim: no given content whatsoever is necessarily determinative for the thinking and/or acting of a free self. Thus Fichte’s argument for intersubjectivity implies what we might call a “backwards social contract” – a social contract into which I must understand myself as having entered, but one into which I could not have possibly entered deliberately and self-consciously. Let us now begin to unpack the argument.

We have already seen that, for Fichte, no particular content or claim is necessarily determinative for the self’s thinking and/or acting; the self is

radically free. We have also seen that – precisely because a free self is aware and must have come to be aware of its own radical freedom – there must be a not-self for the self. Now Fichte argues that this not-self must necessarily be *another free self*. Significantly, the argument is not about real, empirical selves or actual relations among persons or between persons and nature. It is an argument about the non-empirical conditions of the possibility of the self’s ability to relate itself freely to any empirical objects whatsoever. The point of the argument is simply this: the self could not be the self-consciously free self that it is, if there were no other free selfhood outside of itself. The argument for the necessity of free reciprocity (or mutual *Aufforderung*) among free selves can be summarized – at least preliminarily – in the following proto-Hegelian terms.

There must be a not-self for the self, but this not-self cannot consist simply of “nature.” Why not? Nature is that which sets no ends for itself, but rather has ends imposed on it externally, i.e., by free and purposive selfhood such as my own. Nature is simply the realm of the not-self insofar as it is given as an object to be controlled, consumed, dominated, and transformed by me for my own purposes; that is, nature is that which is given to me from the outside, only to have its apparent independence canceled by me and integrated into my own purposive activity. Indeed, this very ability to cancel the “independent” natural object as given is a sign of my radical freedom. But such cannot yet be a sign *for me* of my own radical freedom. After all, to the extent that I merely consume nature or manipulate it to satisfy myself, I am also a slave to my passions or desires, and thus determined as something that is *not* free. Thus, to the extent that I am *only* a consumer in relation to what is other than me (i.e., in relation to the not-self), I am only a slave to my own desires and thus not genuinely free, and cannot be aware of my own freedom.

In order to be genuinely, self-consciously free, I must not be a slave to my passions. I must not merely dominate what is other than me (the not-self) in order to satisfy my desires, but I must *let the other be*; I must not simply *impose* my ends on it. But if the other that I “let be” were itself purely nature and nothing else, and if I refrained from imposing my own ends on it, then the other would cancel my very existence *as a free being*. Such cancellation does not mean that the other would destroy me physically. But it does mean that the other would destroy me *as free*. After all, if the other were a merely natural, causally-determined and causally-determining being, and if I refrained from asserting my own purposiveness in relation to it, then my only relation to the other would be a relation of *being-causally-effected* by it. Thus the other’s existence in relation to me would cancel my existence *qua free being*. Therefore, if I am to be capable of refraining from merely *imposing* my own

ends on the other (as I must be, in order not to be a slave to my passions), and if I am still to remain in existence *qua free being*, then the other must be capable of *preventing itself* from relating to me in a purely causal manner. That is, the other must (by virtue of its *own agency*) be capable of canceling its *own* merely natural existence.¹⁴ The other (i.e., the not-self) must be another free self.¹⁵

Fichte expresses this movement of mutual summons (or *Aufforderung*) in terms of the paradoxical character of *finding oneself as free*. The problem is that the fundamental imperative that I have as a self is to *be* a self, or to be *for* myself, which means to *find myself as free*. But that means that my imperative is to find my own free efficacy as an *object*, and thus as finite, constrained, and determined – and that means as determined *by* something. But how can *free agency* find or see itself as *determined*? It cannot just find itself directly as determined by its *own* self, for it is precisely this *self-intuition* of the self that we are trying to explain – and to appeal to the self's seeing itself in the very act of determining itself, in order to explain how it sees itself as determined, is to argue in a circle. But furthermore, the self cannot find itself or see itself as determined by a *mere object*; for in that case, the self would not be finding itself *as free*, and thus would not be finding *itself* at all. Fichte's claim is that the self can find itself as an object (as determined), only by finding itself as being-determined (summoned, or called) to be self-determining by another self, and – more importantly – as *having already freely accepted* the call by the other self to be free and self-determining. And thus the self can find itself as free only by finding itself as having always already agreed to or accepted a call or summons from another free self, even though – in a very real sense – the self was not deliberately and consciously present to itself or aware of itself in its acceptance of this call. After all, it is the self's acceptance of the summons or call (from the other free self) that serves to explain how the self comes to be aware of itself (or find itself) as a deliberate, conscious, free self in the first place.¹⁶

Now without going further into the complexities and subtleties of Fichte's derivation of intersubjectivity, it is possible to make some basic points about it and its relevance to any pre-critical social contractarian project (such as the Rawlsian one). Fichte's derivation of intersubjectivity implies that "before" a self can be a self-conscious free self at all, it must always already stand in relation to another free self that allows it – and is allowed by it – to be free. Thus, even "before" any free self can overtly begin reflecting on itself at all (and thus "before" it can deliberately choose to enter into any particular contract), it must have always already "agreed" to stand in a relation of reciprocity with another free self. "Before" either self can be conscious of

itself as free, both must have always already agreed to be free and to let the other be free. Thus it is possible to speak of something like a “social contract” – or a “backwards social contract” – based simply on the self’s radical freedom, i.e., the fact that truly free selves cannot be determined in advance to agree about any particular content or claim at all.

For Fichte, the problem for normative political theory is not that we need to articulate grounds for reasonable agreement. The problem is that we have always already “agreed” on relating to each other as free beings, but without having been deliberately conscious of such agreement and thus without knowing the “terms” upon which such agreement was made. For how would one go about imagining the terms of such an agreement? Any attempt to imagine specific “terms” about this primordial “agreement” between free beings must already presuppose that the persons are at least *aware* of themselves as free beings. Thus any attempt to *imagine* the primordial reciprocity or agreement at the basis of all relations between free beings is futile; any such attempt must already presuppose *as having already occurred* that which one is trying to explain – namely, the persons’ *awareness* of themselves as *free*.

This account also indicates why the traditional social contractarian accounts necessarily fail to explain what they seek to explain. All such accounts seek to imagine persons agreeing to the *basic terms under which they are to relate to each other as free persons per se*. But insofar as such persons are imagined to be *bargaining* or *contracting* with each other at all, the imagined construct necessarily presupposes that the persons have *always already “agreed” to something*, i.e., they have always already agreed to regard each other as free beings, capable and worthy of entering into agreements. While it is possible to imagine the terms under which persons might agree to relate to one another with regard to this or that particular matter, it is altogether impossible to imagine the terms under which persons might agree to relate to each other as *free beings per se*. For the very idea of imagined contracting or bargaining presupposes that the persons have always already agreed to treat each other as *free beings per se*.¹⁷

Furthermore, we can now see that the normative and critical force of Fichtean social theory is not and cannot be based on any imagined story about the terms under which persons might have agreed to regard each other as free beings. For as we have seen, Fichte’s starting point is the proposition that free persons – insofar as they are conscious of their freedom at all – must have always already reached “agreement” with other free beings. Such (non-empirical, non-imaginable, and non-representable) agreement manifests itself only *indirectly* in already-existing social and legal institutions, such as property, contracts, and criminal law.¹⁸ And it is possible to criticize these institutions,

but not because they allegedly fail to live up to the “standard” of an imagined, hypothetical social contract. Rather, it is possible to criticize these institutions to the extent that the human self-understanding that they embody and foster as institutions fails to accord with the “true” account of persons as radically free and self-determining and *intrinsically* related to other free beings.¹⁹

Finally, the Fichtean account of free selfhood and mutual recognition can be developed to underwrite a fairly robust, critical theory regarding the concrete requirements of justice in actual social practice. Recall that, for Fichte, the equilibrium of *Aufforderung* and mutual recognition cannot be brought about by force, but must be understood as resulting from the free, uncoerced activity of the selves involved. Now since such mutual recognition cannot be forced, or based on fear or oppression, it would seem to follow that there cannot be gross material inequalities between individuals within a given society. After all, the existence of gross material inequalities makes it possible for citizens to understand the existing social equilibrium as the result of force or fear, rather than free, mutual recognition. And for Fichte’s social theory (based as it is on the premise of radically free selfhood), what is crucial is not just that the social equilibrium be unforced or uncoerced, but that it *be recognized* by the parties *themselves* as unforced or uncoerced. But the existence of gross material inequalities within a particular society undermines the citizens’ ability to recognize the existing institutions (such as property) as the products of their own free, intersubjectively-mediated selfhood. With the Fichtean account, then, we have the beginnings of a normative, critical, progressive, non-teleological theory of society, based not on any questionable, quasi-metaphysical claims regarding what all free and reasonable persons would agree to, but based rather on the seemingly empty and skeptical premise that it is actually *impossible* to imagine in advance what all free persons would agree to. For precisely insofar as they are free – and not determined in advance by any antecedently given set of interests or teleologically-oriented drives – it is simply impossible to represent or to imagine in advance how such beings will act or what they will do. But this acknowledged impossibility – far from casting doubt on the emancipatory power of finite human reason – actually confirms it and sanctions it all the more fully.

Notes

- 1 This draft is from April or May of 1795. See *EPW*: 385.
- 2 This letter is dated 6 December 1793. See *EPW*: 369.
- 3 For a useful article on this topic, see John R. Silber, “The Copernican Revolution in Ethics: The Good Re-examined,” *Kant Studien*, 51 (1959/60): 85–101.

- 4 Kant refers to this as “the paradox of method” in practical philosophy. He writes: “This is the place to explain the paradox of method in a *Critique of Practical Reason*, namely, that the concept of good and evil must not be determined before the moral law (for which, as it would seem, this concept would have to be made the basis) but only (as was done here) after it and by means of it.” See Immanuel Kant, *Critique of Practical Reason*, in *Immanuel Kant: Practical Philosophy*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1999): 190. This passage can be found in volume 5 of the critical edition (or Akademie-edition) of Kant’s works, at 62–3.
- 5 Fichte, *EPW*: 71.
- 6 Thus Rousseau writes: “For it is no light undertaking to separate what is original from what is artificial in the present nature of man, and to have a proper understanding of a state [of nature] which no longer exists, which perhaps never existed, which probably never will exist, and yet about which it is necessary to have accurate notions in order to judge properly our own present state.” See Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, trans. Donald A. Cress (Indianapolis: Hackett Publishing Company, 1992): 11–12. A bit later in the *Discourse* (17), Rousseau makes a related observation: “Let us therefore begin by putting aside all the facts, for they have no bearing on the question. The investigations that may be undertaken concerning this subject should not be taken for historical truths, but only for hypothetical and conditional reasonings, better suited to shedding light on the nature of things than on pointing out their true origin.”
- 7 John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), section 40: 254–5.
- 8 See, for example, “Justice as Fairness: Political, Not Metaphysical,” in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999): 388–414.
- 9 See Rawls, *A Theory of Justice*, section 4: 17–22.
- 10 Rawls, *A Theory of Justice*: 4.
- 11 Elsewhere and at greater length I have examined the problematic character of Rawls’s social contractarian thought. See Michael Baur, “Reversing Rawls: Criteriology, Contractualism, and the Primacy of the Practical,” in *Philosophy and Social Criticism*, 28:3 (2002): 251–96.
- 12 This proposition represents the second principle of Fichte’s *Foundation of the Entire Wissenschaftslehre*, namely the principle that the I is not equal to the not-I. See J.G. Fichte, *The Science of Knowledge*, ed. and trans. by Peter Heath and John Lachs (Cambridge: Cambridge University Press, 1982): 102. See also J.G. Fichte, *FTP*: 121–33.
- 13 Elsewhere and at greater length I have examined the Fichtean argument for the necessity of a not-self. See Michael Baur, “Self-measure and Self-moderation in Fichte’s *Wissenschaftslehre*,” in *New Essays in Fichte’s Foundation of the Entire Doctrine of Scientific Knowledge*, ed. Daniel Breazeale and Tom Rockmore (Amherst, NY: Humanity Books, 2001): 81–102.
- 14 Of course, this argument implies a necessary *reciprocity*. I cannot be a free self (i.e., I cannot overcome mere servitude to my passions) unless the other is also a free self (i.e., unless it is capable of canceling its own merely natural existence). And the converse is also the case: the other cannot be a free self (i.e., it cannot overcome its servitude to its passions and cancel its own merely natural existence), unless I, too, am a free self (i.e., unless I, too, cancel my merely natural existence and overcome mere servitude to my passions).
- 15 This argument roughly foreshadows Hegel’s “deduction” of intersubjectivity in the *Phenomenology*. Hegel’s conclusion to his own presentation is as follows: “Since the

object is in its own self negation, and in being so is at the same time independent, it is consciousness ... *Self-consciousness achieves its satisfaction only in another self-consciousness.*" See *Hegel's Phenomenology of Spirit*, trans. A.V. Miller (New York: Oxford University Press, 1977): 109–10.

- 16 Fichte's argument appears in Section 3 (Second Theorem) of his *FNR*: 29–39.
- 17 Thus Hume was right to argue that traditional social contractarian approaches necessarily come on the scene too late to explain what they seek to explain. See David Hume, "Of the Original Contract," in *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: The Liberty Fund, 1985): 465–87.
- 18 See also Hegel, who – in the *Philosophy of Right* – takes the institutions of property and contract law as his starting point, and critically examines them as forms (or failed forms) of mediated, mutual, intersubjective recognition. See *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1995): 73 ff.
- 19 For example, property regimes can be criticized to the extent that they are based on and foster the notion that private property exists primarily for the purpose of satisfying our more-or-less animalistic "natural" desires, without also – and more importantly – mediating our mutual recognition of each other as radically free beings.