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Crime, Contract and Humanity: Fichte's Theory of Punishment

In *Discipline and Punish*, Michel Foucault speaks of the transition to a penal theory that respects the humanity of the criminal. At the same time penal reform is said to aim at a more systematic, efficient and universally applied form of punishment or 'new economy and ... new technology of the power to punish' (DP 89). This idea of penal reform can be seen to involve two potentially incompatible aims:

1. The moral aim of punishing the criminal in a way that respects his or her humanity.
2. The technical aim of developing a more efficient and universal system of punishment.

It cannot be assumed that pursuit of the technical aim will spontaneously align with pursuit of the moral aim, and so the following question arises: how can the moral aim be achieved within the 'new economy and ... new technology of the power to punish' demanded by the second aim? Foucault refers to how in the eighteenth century the idea of a contract provided an answer to this question, because the criminal can then be thought to undergo voluntarily the punishment to which he or she is subjected in the name of the other members of society, and thus to endorse the specific mode of punishment and the application of it. The criminal's 'humanity' is respected because at this historical stage freedom is considered to be the defining feature of humanity:¹

At the level of principles, this new strategy falls easily into the general theory of the contract. The citizen is presumed to have accepted once and for all, with the laws of society, the very law by which he may be punished. Thus the criminal appears as a juridically paradoxical being. He has broken the pact, he is therefore the enemy of society as a whole, but he participates in the punishment that is practised upon him. The least crime attacks the whole of

¹ See, for example, Rousseau's claim that 'to renounce your liberty is to renounce your character as a man ... Such a renunciation is incompatible with man's nature' (SC 1.4.6).

society; and the whole of society – including the criminal – is present in the least punishment. (DP 89-90).

According to this justification of punishment, a citizen may be legitimately punished because he or she becomes an enemy of society by breaking one or more of society's laws, whereas he or she had previously consented to obey these laws on entering into the social contract. The criminal's humanity is respected because his or her freedom is preserved, not only by how he or she voluntarily subjects him- or herself to the relevant laws but also because the terms of the contract are such as to guarantee his or her personal freedom, provided he or she continues to honour these terms. Freedom is here understood as the bare capacity for free choice and the exercise of this capacity governed by legal norms. Thus humanity pertains to an individual by virtue of his or her innate capacity for freedom. This humanity is, however, dependent on the capacity for freedom being exercised in a particular way, namely, consenting to the authority of legal norms that one is then obliged to obey. If an individual violates any of these norms, the protection of his or her freedom of choice within the bounds set by law will be replaced by punishment and specific penal measures, and this entails the loss of freedom. It is precisely in this way that Rousseau justifies the state's right to punish a criminal:

The proceedings, the judgement are the proofs and declaration that he has broken the social treaty, and consequently is no longer a member of the State. Now, since he recognized himself as one, at the very least by residence, he must be cut off from it either by exile as a violator of the treaty, or by death as a public enemy; for such an enemy is not a moral person, but a man, and in that case killing the vanquished is by right of war. (SC 2.5.4)

Once again we see how, despite the punishment that the individual undergoes, his or her humanity can be said to be respected because he or she voluntarily agrees to the terms of the social contract, and thus to the laws of society. Moreover, it is through this act that one gains the legal status of a 'moral person'. The individual loses this status by breaking the law, reducing him or her to a human being (*homme*). He or she is then no longer the artificial legal entity designated by the term 'person' but is instead reduced to the natural entity that he or she was prior to the social contract, albeit a natural entity that possesses the capacity for freedom, which is the defining feature of the human species. This individual falls outside the sphere of

law and rights constructed by the social contract, and he or she may then be treated as an enemy by the state in the name of all those who remain within this sphere.

Johann Gottlieb Fichte's theory of punishment, as developed in the second part of his *Foundations of Natural Right* published in 1797, also rests on the idea of a contract. This time the idea of a contract is employed not only to justify punishment but also to argue that, where possible, the state ought to give the criminal the opportunity to reform. This might be thought to imply respect for the criminal's humanity understood in terms of his or her capacity for freedom, even if Fichte does not speak of humanity (*Menschheit*) in connection with the legal and political concept of right (*Recht*). The idea of humanity figures more prominently in Fichte's ethical theory (*Sittenlehre*), in which it is associated with the nobility and sublimity that derives from the human being's capacity for freedom of a virtuous kind, that is to say, freedom exercised in obedience to rational moral norms (GA I/5: 186-87; SE 193). Although, as we shall see, right concerns an essentially non-moral notion of freedom, the capacity for freedom is a necessary condition of morality that already separates human beings from nature, so that we can still speak of humanity in connection with the concept of right, which seeks to explain how the right to freedom can be established and protected at the same time as legal limits are set to the exercise of this right. With regard to these limits on freedom, the state must guarantee public security in the face of the threat that the criminal poses to society so as to uphold the original contract. This will require employing the appropriate penal measures. The role of the state here concerns a technical aim rather than the moral aim of seeking to respect the criminal's humanity understood in terms of the capacity for freedom presupposed by the concept of the legal person.

There is said to exist a tension in Fichte's theory of punishment between the technical aim of deterrence and the introduction of a 'progressive' element into this theory that consists in advocating reform of the criminal instead of harsher penalties that are nevertheless justifiable in terms of the aim of preventing crime.² This progressive element suggests a respect for the criminal's humanity in the shape of his or her capacity for freedom and one may therefore identify this tension with how Fichte's theory of punishment provides an eighteenth-century example of the two aims identified by Foucault. I intend to show that this tension can be traced back to the contractual terms in which Fichte seeks to justify both the state's right to punish individuals and any limits on the exercise of this right. Fichte's theory of punishment is in fact a consistent one, given the way in which its contractual basis entails that respect for the

² See Lazzari, "Eine Fessel, die nicht schmerzt und nicht sehr hindert".

criminal's humanity concerns only how he or she might once again become the kind of legal entity designated by the term 'person'. Although we might speak of a 'residual' humanity in that the criminal's capacity for freedom remains and helps explain why Fichte is committed to the idea of reform of the criminal whenever this is possible, he must be thought, like Rousseau, to hold the view that this capacity is a necessary but not sufficient condition of an individual's 'humanity' in so far as it has genuine legal standing. Rather, a 'civil contract' (*Staatsbürgervertrag*) into which individuals voluntarily enter is also required for a human being to become a legal person who possesses the rights that derive from this status. Thus the criminal's humanity, in so far as it has any legal standing, is precarious because the state has both the right and the power to deny it to him or her if he or she violates the terms of the social contract. This is not to say that Fichte is right to base his theory of punishment on the idea of a contract. It will nevertheless be shown that such theories of punishment are not self-evidently more humane viewed in terms of its implications merely because the criminal's humanity is respected by acknowledging his or her freedom understood as the capacity for free choice.

1. Fichte's self-deprivation of rights thesis

Fichte's legal and political philosophy as presented in the *Foundations of Natural Right* can be characterized as an attempt to resolve 'the antinomy of political right'. The two theses of this antinomy are as follows: (1) the 'liberal' thesis that the individual is free in relation to the state so long as he or she does not transgress the rights of others, and (2) the 'authoritarian' (anti)thesis that the same individual is not free in relation to the state because he or she has unreservedly renounced the right to judge what constitutes a transgression of the rights of others within the legal and political community of which he or she is a member. The solution to this antinomy is a 'republican synthesis' in which the law is viewed as the all-powerful sovereign and expression of a general will in which there is a perfect union of all individual wills.³

This idea of an antinomy and a synthesis of opposing terms is suggested in § 8 of the *Foundations of Natural Right*, where it is accepted that a person is free in that he or she possesses the right to act in any way that does not violate the bodily integrity and freedom of another person. Initially, a person is also free in that he or she possesses the right to judge whether or not he or she is obliged to obey the law of right, which commands that one respect the freedom of others as long as they respect one's own freedom. If one person judges that

³ See Renault, *Le système du droit*.

another person cannot be expected to respect his or her freedom, then he or she has the right to coerce this person in an attempt to get him or her to obey the law of right or punish him or her for having violated this law. Yet this 'right of coercion' presupposes that the judging person recognizes the law of right and will apply it only when he or she is justified in doing so. As it stands, however, there is simply no guarantee of this. The solution to this lack of mutual assurance is for all persons to agree to subject themselves to the authority of a third party, to which they unconditionally alienate the right to judge when the right of coercion should be exercised and the law of right applied. If this solution is to be compatible with each person's freedom, however, it must be possible to think that each person voluntarily alienates the right to judge matters of right. This requirement can be met only if each person voluntarily subjects him- or herself to the authority and power of the relevant third party and he or she is justified in believing that his or her rightful freedom will never be violated by an abuse of this authority and power. The second requirement presupposes that the right of coercion will be exercised in accordance with positive laws that a person who consistently respected the law of right would have legislated. The freedom of each person would then be secured in such a way that any danger of an unjustifiable, arbitrary exercise of the right of coercion is removed. Fichte summarizes the nature of this arrangement and its implications in the following way:

I am not subjecting myself to the changeable, arbitrary will of a human being, but rather to a will that is immutable and fixed. In fact, since the law is exactly as I myself would have to prescribe it, in accordance with the rule of right, I am subjecting myself to my own immutable will, a will I would necessarily have to possess if I am acting rightfully and therefore if I am to have any rights at all. I am subjecting myself to my will, a will that is the condition of my capacity for having rights at all. (GA I/3: 398; FNR 95-96)

Ultimately, this voluntary subjection to a law-governed, and thus non-arbitrary, exercise of the right of coercion requires that individuals combine their powers to form a single common will whose aim is to prevent and punish any violations of the law of right, which is a necessary condition of each person's freedom and rights. Since this union of wills is established by the rational voluntary agreement of each person who becomes subject to the law of right that guarantees his or her own personal freedom, punishment is justified in a way that respects the criminal's humanity understood in terms of his or her freedom. This does not entail, however, that the criminal's humanity thus understood will be respected after the crime, for by violating

the law of right the criminal exposes him- or herself to the consequences of his voluntary subjection to this law and the conditions of its application, which may include treating him or her in ways that are incompatible with his or her humanity understood in terms of his or her freedom. This brings me to what might be called Fichte's 'self-deprivation of rights' thesis.

This thesis claims that the act of committing a crime automatically deprives an individual of all rights, because he or she thereby breaks the contract that is a fundamental condition of all rights, including his or her own rights. This argument cannot be reduced to the claim that since an individual has consented to subject him- or herself to the law of right and the conditions of its effective application, he or she has also consented to any specific punishments that follow from the violation of this law. Rather, the argument involves the more radical claim that through his or her violation of the law of right, the criminal deprives him- or herself of all rights, so that there are no limits on what the state is entitled to do in order to counter the threat that the criminal poses to society. This more radical claim is expressed in the following two passages:

If a person violates any part of the civil contract, whether willfully or out of negligence (i.e. where the contract counted on him to act prudently), then, strictly speaking, he loses all his rights as a citizen [*Bürger*] and as a human being [*Mensch*], and becomes an outlaw with no rights at all. (GA I/4: 59; FNR 226; emphasis added).

Every offence results in the offender's exclusion from the state (the criminal is *outlawed and set free as a bird* [*wird Vogelfrei*]; i.e. his security is guaranteed as little as that of a bird [*Vogel*]; *ex lex, hors de la loi*). (GA I/4: 59; FNR 227)

Although Fichte mentions how the criminal who cannot be reformed must be banished for life and 'branded indelibly' so as to be easily identified if he or she should attempt to return (GA I/4: 75-76; FNR 244-45), the 'exclusion' licensed by the criminal's complete loss of rights need not be understood literally. We shall see, in fact, that banishment from the state would be a potentially milder form of punishment than some of the other forms of punishment that Fichte's self-deprivation of rights thesis justifies. Exclusion is instead primarily a matter of excluding oneself from the legal and political community within which one previously enjoyed the legal status of a rights-bearing person: 'The rightful relation established by the civil contract between him and the other citizens ceases to exist; and since, apart from this contract, there is no other

relation of right or possible ground for such a relation, it follows that there is no longer any relation of right at all between them' (GA I/4: 59; FNR 227). The criminal is not, therefore, deprived of rights in proportion to the seriousness of his or her crime. Instead, the criminal comes to lack any legal status and rights whatsoever and he or she may then be treated in any way that the state deems necessary in the circumstances. Thus the technical aim of ensuring public security assumes precedence in such a way that there is nothing *internal* to the legal and political sphere of right that demands moderation of the punishment inflicted on the criminal. This is not, however, Fichte's last word on the matter. This brings me to an additional contract that he introduces, namely, the expiation contract (*Abbüßungsvertrag*). With this contract it is no longer only a question of how to accommodate the criminal's freedom, and thus his or her humanity, within a theory of punishment. It is now also a matter of placing limits on the state's right to punish the criminal.

2. The expiation contract

Fichte's contractualism involves various stages. There is the civil contract in which individuals agree with one another to unite as members of the same legal and political community. The state itself is not party to this contract. Rather, each citizen enters into a separate contract with it. This contract stipulates that the state will protect their persons and their property so long as each citizen fulfils his or her obligations towards the state. Fichte introduces another contract when discussing punishment. This contract presupposes the civil contract as the foundation of the legal community whose norms the criminal violates. It consists in the following commitment that the citizens make to one another: 'All promise to all others not to exclude them from the state for their offenses (provided that this is consistent with public security), but rather to allow them to expiate their offenses by some other means' (GA I/4: 60; FNR 227). Yet why should the state recognize this contract when the self-deprivation of rights already justifies its right to punish the criminal? Fichte argues that the state has at least one good reason for recognizing this agreement, though only in so far as it is compatible with its task of guaranteeing public security. This reason is stated in the following passage:

The sole end of state authority [*Staatsgewalt*] is the mutual security of the rights of all in relation to all others; and the state is obligated only to employ those means that suffice for achieving this end. Now if it could achieve this end without completely excluding all offenders, then it would not necessarily be bound to impose this punishment for violations from which it can protect its

citizens by some other means ... But now it is just as much in the state's interest to preserve its citizens (provided only that doing so is consistent with the state's primary end), as it is in each individual's interest not to suffer the loss of all rights for every single offense. So from every perspective there is good reason, in all cases where there is no risk to public security, to impose alternative punishments for offenses that, strictly speaking, merit exclusion. (GA I/4: 59-60; FNR 227)

Fichte's argument can be reconstructed in the following way. The aim of punishment is to guarantee public security, either by threatening sanctions with the aim of preventing crime or by applying these sanctions in order to deter future crimes. Punishment is therefore 'not an absolute end' (GA I/4: 60; FNR 228). Determining the extent and severity of the punishment for a specific crime is a technical matter of matching means to ends: the aim must be to ensure that the costs associated with the sanction attached to the crime outweigh any potential benefits of committing this crime, and that anyone who is tempted to commit it believes that the chances of detection are sufficiently high. Since ensuring public security requires only that these conditions be satisfied, there is no need for the state to punish criminals beyond what is necessary in relation to this end, even if the self-deprivation of rights thesis entitles the state to treat the criminal more harshly, given the complete absence of any normative constraints on how it may treat him or her. There is, moreover, a good reason for limiting punishment in this way, for the state has an interest in preserving its citizens so that they continue to contribute towards its maintenance by fulfilling their civic and political obligations. This aligns with each individual's interest in not having to suffer a complete loss of rights if he or she commits a crime. Thus the expiation contract is 'useful' for all. Therefore, in those cases where the relevant conditions can be satisfied without totally 'excluding' individuals from the state, the state should adopt the milder form of punishment. Does this limitation on the state's right to punish imply a humane conception of punishment that remains compatible with the technical aim of punishment?

One alternative to exclusion proposed by Fichte might be viewed as an indirect expression of respect for the criminal's humanity, in that it acknowledges the possibility of reform. This presupposes that the criminal possesses distinctive human attributes that make it possible for him or her to change his or her ways and to re-enter the legal and political community from which his or her own criminal act has excluded him or her, and in particular the capacity for freedom. We would then have something like a re-enactment of the original

agreement whereby an individual voluntarily submits him- or herself to legal norms and to the authority of a state that enforces these norms. This time the criminal reforms him- or herself and the state then accepts that he or she now respects the legal norms that he or she had previously violated, allowing it to accord him or her once again the legal status of a rights-bearing person.

Fichte acknowledges the possibility of reform in connection with the type of crime presupposed by a *second* expiation contract. This type of crime is one for which there is no obvious way of compensating the victim by depriving the perpetrator of the right to something that he or she currently enjoys, as when some form of financial compensation can be provided. At the same time, the perpetrators of this type of crime pose a threat to society that requires that they be deprived of liberty. Fichte describes the content of this contract as follows:

[A]ll citizens promise to all others that they will give them the opportunity to make themselves fit to live in society once again, if in the present they are found to be unfit; and (what is also entailed by this contract) that they will accept them back into society, after they have reformed. – Such a contract is both optional and beneficial; but its benefits are available to everyone, and so through it the criminal acquires a *right* to attempt to reform himself. (GA I/4: 68; FNR 236).

This opens the way for a moral interpretation of the utility of the expiation contract, in that respect for the criminal's humanity no longer appears to depend on a legal status founded on acceptance of the terms of the civil contract and continued compliance with these terms. Rather, a type of respect is owed to individuals that can be explained in terms of a pre-legal and pre-political notion of justice. This respect entails moral limits on how the state may treat them even when they have committed a criminal act, in the sense of normative limits on the right to punish the criminal that derive from his or her humanity understood in terms of his or her capacity for freedom, despite how, as we shall see, Fichte does not think that the concept of right requires that individuals exercise this capacity in such a way that their motives are morally virtuous, as opposed to purely self-interested, ones.

An argument in favour of reform along these lines is as follows. The expiation contract is useful in that it contributes to the existence and maintenance of justice in the form of a legal system into which human beings have a prior duty to enter, because reform of the criminal facilitates the re-establishment of a law-governed society by making it possible for the criminal to fulfil this duty. The importance that Fichte accords to recognition in his theory of right entails

that individuals belong to this legal system *qua* rational beings and that this system concerns norms that ultimately derive from their status as such beings. Thus this status depends on law only in so far as the relevant norms must be codified and enforced. It is therefore not up to the state to determine who belongs to the community on which the legal system is grounded. Rather, any human being who recognizes other human beings as rational beings and treats them as such, thereby demonstrating his or her own rationality, belongs to this community. This includes those individuals who, through the crimes that they have committed, fail to recognize others in the required way but then reformed themselves, to the point at which they can be trusted to re-enter into relations of mutual recognition with others.⁴ This type of interpretation of Fichte's theory of punishment is compatible with the idea of a re-enactment of the original agreement, whereby an individual voluntarily submits him- or herself to legal norms and to the authority of the state. The possibility of reform and the grounds for it here recognize the criminal's humanity in a way that places moral limits on how the state may treat him or her and suggest that reform ought always to be the preferred option, thus obliging the state to pursue this option whenever it may safely do so. Some key elements of Fichte's theory of right support this type of interpretation.

A distinctive feature of this theory is its explicitly intersubjective character. Fichte describes the concept of right as 'the concept of the necessary relation of free beings to one another' (GA I/3: 319; FNR 9). In order for the rational agent to become conscious of itself as free, it must both think of itself as a being capable of engaging in purposive activity in accordance with ends that it has itself formed and think of something that stands opposed to this activity. The second requirement concerns the need for a determinate object of consciousness in which a rational agent encounters a representation of its free activity, while the independence of this object means that it cannot be reduced to this activity. Fichte locates the synthesis of these two elements in the thought of 'a summons' (*Aufforderung*) that meets these requirements because it consists in the demand (or request) to exercise the capacity for free choice. This demand or request presupposes that both the being which is its source and its addressee are capable of understanding what it means to act freely and thus the thought that both parties to the summons are free, rational beings who demonstrate to *each other* that they are such beings by mutually limiting their activity, leaving each of them with a personal sphere in which they may act freely. The 'community among free beings as such' whose rational necessity Fichte thinks he has demonstrated ultimately requires that each member adopt 'the

⁴ See Merle, *German Idealism and the Concept of Punishment*, 100.

rule of right', which consists in the demand to 'limit your freedom through the concept of the freedom of all other persons with whom you come in contact' (GA I/3: 320; FNR 10). Thus Fichte's theory of right presupposes the capacity of rational agents to subject themselves to norms and it requires the actual exercise of this capacity in the form of voluntarily subjection to legal norms and, by implication, the legal consequences of any violation to them.

It does not follow, however, that a moral community comprised of individuals who recognize one another's humanity in a thicker sense underpins the legal community in question, even if Fichte himself occasionally suggests that it does,⁵ nor that the state is under any unconditional obligation to respect this criminal's humanity defined in terms of the capacity for freedom presupposed by legal personality and the possibility of a re-enactment of the original agreement. Fichte himself stresses the conditional nature of the 'community among free beings as such' governed by 'the rule of right', despite the way in which membership of this community is a condition of the relevant form of self-consciousness.⁶ For although he claims in the corollary to his deduction of the concept of right that 'we are both *bound* and *obligated* to each other by our very existence', the consistency in question is said to relate only to the rules of thinking in general that are 'scientifically presented in general *logic*' (GA I/3: 354-55; FNR 45). If one were to renounce an end, however, one could not be accused of inconsistency if one renounced the means to it. Thus the kind of legal community that Fichte

⁵ As when he states that 'at the basis of all voluntarily chosen reciprocal interaction among free beings there lies an original and necessary reciprocal interaction among them, which is this: the free being, by his mere presence in the sensible world, compels every other free being, without qualification, to recognize him as a person' (GA I/3: 384; FNR 79).

⁶ Fichte suggests that legal recognition itself is made possible by recognition of another person as a human being or rational being as such: 'I become a rational being – *actually*, not merely *potentially* – only by being *made* into one; if the other rational being's action did not occur, I would never have become rational (GA I/3: 375; FNR 69). Viewed genetically, the ways of attaining the relevant form of self-consciousness include education (*Erziehung*), which Fichte mentions in connection with how a human being 'becomes a human being only among human beings' (GA I/3: 347-48; FNR 37). Once self-consciousness has been achieved, however, the individual concerned can decide whether or not he or she wishes to remain a member of the community in which he or she first encounters him- or herself as a rational being through the recognition accorded to him or her by at least one other human being. Moreover, a single instance of mutual recognition might be sufficient to achieve the relevant form of self-consciousness. Indeed, Fichte himself suggests that it could be a one-off matter: 'But that, even after self-consciousness has been posited, rational beings must continue to influence the subject of self-consciousness in a rational manner, is not thereby posited, and cannot be derived without using the very consistency that is to be proven as the ground of the proof (GA I/3: 385; FNR 81).

has in mind depends on ‘the free, arbitrary [*willkürlichen*] decision to live in community with others’, and so with regard to someone who ‘does not at all want to limit his free choice [*Willkür*] ... within the field of the doctrine of right, one can say nothing further against him, other than that he must then remove himself from all human community’ (GA I/3: 322; FNR 11-12; see also GA I/3: 387; FNR 82). Even the person who wants to be a member of such a community need not be directly motivated by his or her recognition of the humanity of others, though he or she must at least recognize others persons as possessors of the distinctive human attributes presupposed by the civil contract, for right does not presuppose the morality of human beings. It is instead based on ‘the assumption of universal egoism’ (GA I/3: 433-34; FNR 134), and it must accordingly concern itself only with the legality of actions, which requires nothing more than that individuals behave *as if* they possessed a good will (GA I/3: 425; FNR 125). Given this assumption, I shall now argue that Fichte’s contractualism implies that there are, in fact, limits to the idea of humanity in so far as it has any legal standing because it is the state that ultimately determines whether or not the criminal’s ‘humanity’ is to be respected.

3. The criminal’s humanity vs. public security

In Fichte’s theory of punishment, the violation of legal norms presupposes the civil contract because it is the foundation of the juridical and political community that is the source and guarantor of these norms. In this respect, the criminal’s ‘humanity’, in so far as it has any legal standing, must be seen as constituted by the original contract through which he or she becomes a rights-bearing legal person to whom the relevant legal norms and penal measures apply. As we have seen, Fichte justifies the state’s right to punish in terms of how breaking the terms of the civil contract deprives the criminal of this acquired legal status and the rights that derive from it. Although the state has at least one good reason for granting a criminal the opportunity to reform him- or herself with a view to re-entering the legal and political community from which he or she has excluded him- or herself, namely the overall utility of this arrangement, it must be the judge of whether or not this chance to reform should be granted to the criminal. The main criterion here is guaranteeing public security and ensuring the existence of the means to this end, for otherwise the civil contract into which individuals agreed to enter on the condition that their bodily integrity, property and freedom are guaranteed might be undermined. Although the deprivation of liberty would enable this condition to be satisfied until such time as the state is convinced that the criminal no longer poses a threat to society, I shall now identify an example provided by Fichte himself that implies that the task of guaranteeing public security

will in fact make it difficult for the state to judge in favour of a deprivation of liberty accompanied by the opportunity to reform oneself, instead of opting for the total exclusion of the criminal from the legal and political community of which he or she was previously a member. This example concerns an individual with a ‘formally bad’ will. Although it may be considered an extreme case, this example is especially relevant because an individual with this type of will may be someone who commits a crime (e.g. minor theft or criminal damage) that does not itself undermine public security enough to warrant total exclusion, and yet exclusion, as opposed to deprivation of liberty accompanied by the opportunity to reform oneself, is implied by Fichte’s account of the ends of punishment and his justification of the state’s right to punish the criminal.

An individual with a formally bad will is someone who intends to cause harm for its own sake, rather than causing harm in order to gain some kind of advantage. This poses a particular problem because this individual would not then be responsive to the deterrent effect of sanctions whose costs outweigh any potential benefits that might be gained by committing a crime. Indeed, an individual is here willing to suffer these costs because the satisfaction gained by causing harm sufficiently compensates them. The intention with which a criminal acted must therefore be taken into account when determining the punishment for a crime, in so far as a distinction can be drawn between the intention of causing harm for its own sake and the intention of causing harm so as to gain some kind of advantage. The state is therefore faced with the task of determining the grounds on which the criminal acted. Fichte claims that this task can be fulfilled by considering whether an individual’s past actions manifest a similar intent or whether it is possible to identify some other end or reason, such as personal enmity, that would explain the harm that he or she has caused another person (GA I/4: 63; FNR 230-31).

Since a crime is not motivated by the prospect of some advantage that outweighs the potential costs of causing harm in the case of a criminal with a formally bad will, ‘the sole criterion’ for determining the punishment for the crime, that is, ‘the possibility of public security’ (GA I/4: 62-63; FNR 230), appears to demand that the criminal be excluded from the state. Yet Fichte does not regard exclusion as the only possible outcome even when a person is judged to have acted with a formally bad will. Even the criminal who acted with a formally bad will is to be given the opportunity to reform him- or herself. Fichte assumes that this opportunity will be welcomed by the criminal because ‘exclusion from the state is the most terrible fate a human being can encounter’ (GA I/4: 68; FNR 237). The threat to public security posed by this type of criminal means, however, that he or she must be confined in an institution

separated from society. In order to provide the criminal with the opportunity to reform him-or herself, this institution must nevertheless be organized in an appropriate way. The inmates should, for example, be granted some freedom within necessary limits and be allowed to associate with one another. They must also work to support themselves (GA I/4: 70; FNR 239). The following question then arises: how can the state be sure that an individual who has previously acted criminally with a formally bad will is sufficiently reformed and may, therefore, re-enter society? To understand what is at stake, we need to consider the type of reform that the criminal must undergo with the state's help.

Fichte stipulates that 'the sole issue here is political and not moral reform; only deeds, not words, can determine whether such reform has taken place' (GA I/4: 71; FNR 240). This accords with the self-interest that is assumed to motivate the civil contract and how right concerns mutual recognition only in so far as it manifests itself in external actions. Reform of the criminal then becomes a matter of bringing him or her back within the sphere of punishments predicated on the potential costs of committing a crime outweighing the potential benefits of committing it. In this sphere of penal law, 'love of oneself above all else becomes the very means by which the citizen is forced to leave the rights of others undisturbed, for any harm he does to another is harm he does to himself' (GA I/4: 69; FNR 237). Yet the problem presented by the person with a formally bad will is precisely that he or she falls outside this sphere, because the desire to cause harm for its own sake cannot be countered in this way, whereas 'if the guilty party would just start caring about his own security (to which lengthy punishment and its various evils will probably drive him), then he could be allowed back into society' (GA I/4: 69; FNR 238). This problem concerns the type of intention with which the criminal acts and how the state is faced with the task judging if a criminal who acted with a formally bad will has been sufficiently reformed purely on the basis of perceivable actions and behaviour from which the required dispositional change is to be inferred. Fichte himself implies that the state must be able to infer from external actions and behaviour the subjective principle according to which the criminal who claims to have been reformed acts, when he states that although it is not a matter of 'the *moral* reform of one's inner disposition', it is a matter of 'the reform of the manners and maxims of a person's actual behavior' (GA I/4: 68-69; FNR 237). Yet how can the state be sure that it has correctly identified this subjective principle of action, which would presumably take the form of the maxim to avoid performing criminal acts whose likely costs significantly outweigh any potential benefits? Could the individual whose previous criminal act was the result of a formally bad will not instead adopt something like the following maxim: I shall act in such a way as to give the impression that I no longer have a formally bad

will, and that I am instead now sufficiently motivated by self-interest to want to avoid the potential costs involved in causing harm either to other persons or to the state itself, but only in order to regain my freedom to cause harm for its own sake?

The threat that an individual who committed a crime with a formally bad will and has not been genuinely reformed poses to citizens whose allegiance to the state is founded on self-interest means that the state risks its own authority if it does not exercise extreme caution when judging whether or not such an individual has in fact undergone the required dispositional change. This would be true even when the initial crime did not undermine public security significantly enough to warrant exclusion and may indeed have been a relatively minor one. For too many repeat offences of a similar kind committed by individuals who had been given the chance to reform themselves and were judged to have undergone the required dispositional change could undermine trust in the legal system and in the agents entrusted with the enforcement of legal norms, leading people to take matters into their own hands, or someone could seek to give expression to his or her formally bad will by committing a much worse crime on his or her release. Thus too much is at stake to justify any presumption in favour of the claim that an individual who committed a crime with a formally bad will has been, and so it would arguably be safer for the state to assume that such an individual cannot be reformed and that his or her exclusion from the state is therefore necessary.

From what has been said above, Fichte's theory of right and his theory of punishment in particular imply that any individual who has either (1) not entered into the civil contract that first constitutes him- or herself as a legal person or, as is more relevant here, (2) entered into this contract but has violated one or more of its terms in such a way that the state judges exclusion to be the only viable option will lack rights. He or she may then be treated inhumanely in so far as his or her humanity is defined in terms of freedom understood as the capacity for free choice and the exercise of this capacity involved in voluntarily subjecting oneself to legal norms. For the violation of one or more of legal norms entails the loss of the status of a rights-bearing person. It is then in the state's power to grant or to deny the criminal the possibility of regaining his or her humanity by reforming him- or herself re-enacting the civil contract. Ultimately, therefore, the criminal's humanity or lack of it in the relevant sense depends on the judgement and the actions of the state. There are other ways of understanding the concept of humanity, such as in terms of some kind of ethical vocation which confers on human beings a unique kind of dignity or in terms of the claim that human beings are capable of enhanced suffering because punishment is for them not only a physical evil but also a moral one, given the humiliating character that it has for them. Yet considerations of this kind do not

figure in Fichte's account of humanity in so far as it has any legal significance. Rather, his theory of right relies on a pared-down notion of humanity that identifies it with the capacities required by the concept of right and the civil contract in particular.

Given *this* notion of humanity, Fichte must avoid the application of norms that apply to the moral domain with its thicker notion of humanity to the legal domain and the penal measures associated with it. This demarcation of domains demanded by his theory of right can be illustrated with reference to Robespierre's 'natural illusion' argument offered in support of the extrajudicial killing of Louis XVI and against the proposal to put the king on trial, though this time the danger concerns failing to maintain a distinction between the legal domain and the law of nations:

Citizens take care: you are here being misled by false notions. You are confusing the rules of civil law and positive law with the principles of the law of nations ... We refer to ideas familiar to us in order to understand an extraordinary case that functions according to principles we have never applied. Thus, because we are accustomed to seeing crimes of which we are the witnesses judged according to uniform rules, we are naturally led to believe that under no circumstances can nations equitably take action against a man who has violated their rights, and that where we do not see a jury, a bench, proceedings, we do not find justice. These very terms, when we apply them to ideas different from those that they normally express, end up misleading us.⁷

Similarly, the state's right to judge whether an individual is or is not a public enemy who must be completely excluded from the legal sphere that would otherwise protect him or her should not be confused with a duty on the part of the state to respect all human beings on account of their humanity in a thicker sense than Fichte intends. Punishment may nevertheless aim at the reform of the criminal, so that he or she may eventually re-enter the legal community from which he or she has excluded himself by violating one or more of its norms. Yet the state can pursue this aim only if it is compatible with the technical aim of punishment, which consists in guaranteeing public security so as to uphold the terms of the civil contract. Thus it is the very device that might be thought to provide the basis of a more humane theory of punishment by

⁷ Robespierre, 'Sur le jugement du roi', 122.

accommodating the criminal's freedom, the idea of a contract, that makes the criminal's humanity ultimately dependent on the state and those in whose name it claims to act.

Fichte nevertheless clearly wants to reserve exclusion for the most extreme cases. It is therefore not surprising that its most radical expression, the act killing of the criminal, appears to be performed with a bad conscience. The criminal is then treated as 'a harmful animal that is shot dead, a raging torrent that is dammed up; he is, in short, a force of nature that is overcome by the natural force of the state' (GA I/4: 74; FNR 243). The legal sphere of right is here completely abandoned, since the criminal is now an outlaw without rights and the state acts from necessity, not as one legal entity in relation to another one but as one brute natural force in relation to another, weaker natural force. In fact, all the state itself does is symbolically cancel the contract whose terms the criminal has violated. The criminal then becomes the responsibility of the police:

As far as legislation is concerned, the person judged is annihilated; he is delivered over to the police. This takes place, not in consequence of any positive right, but out of necessity. That which can be excused only on the basis of necessity is not honorable; thus, like everything that is dishonorable yet necessary, it must be done with shame and in secret. Let the wrongdoer be strangled or beheaded in prison! Because the contract has been broken (which is very fittingly portrayed by the breaking of the staff), he is already dead as a citizen and obliterated from the memory of the other citizens. What is physically done to the wrongdoer is no longer of concern to the citizens. (GA I/4: 74; FNR 243).

This 'dishonourable' situation is expressive of the tension that exists between an attempt to justify the state's right to punish in terms of the idea of a contract so as to 'respect' the criminal's 'humanity' and the technical aim of punishment, which is to ensure public security. This tension is generated by Fichte's consistent development of the implications of his justification of the state's right to punish and the restricted notion of humanity demanded by his theory of right.

Abbreviations

DP = Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (London: Penguin, 1991).

FNR = Johann Gottlieb Fichte, *Foundations of Natural Right*, ed. Frederick Neuhouser, trans.

Michael Baur (Cambridge: Cambridge University Press, 2000).

GA = *J. G. Fichte - Gesamtausgabe der Bayerischen Akademie der Wissenschaften*, eds. Reinhard Lauth, Erich Fuchs and Hans Gliwitzky (Stuttgart and Bad Canstatt: Frommann-Holzboog, 1962-2012), cited by series, volume and page number.

SC = Jean-Jacques Rousseau, *Of the Social Contract*, in *The Social Contract and other later political writings*, ed. and trans. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), cited by book, chapter and paragraph number.

SE = Johann Gottlieb Fichte, *The System of Ethics*, trans. Daniel Breazeale and Günter Zöller (Cambridge: Cambridge University Press, 2005).

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