Book Comment

Romanticizing Guilt

Romantics at War: Glory and Guilt in the Age of Terrorism. By George P. Fletcher.* *Princeton: Princeton University Press*, 2002. Pp. 251. $24.95.

George P. Fletcher's *Romantics at War* begins by describing an ironic blindness. The threat of terrorism has forced Americans to consider questions of war and guilt with a new sense of immediacy and relevance, to disorienting effect. We remain unable to reconcile our instinctive view of the war on terror as a moral conflict, pitting good against evil, with our basic legal and moral commitments, rooted in notions of fairness and individual justice. Professor Fletcher proposes to clarify this "conceptual morass" (p. 5) by drawing our attention to what may be an irreducible contradiction between our liberal aspirations and our Romantic impulses.

The first step in Fletcher's argument is to reveal what he perceives as the shortcomings of a liberal tradition embraced by most American legal theorists. According to Fletcher, liberalism cannot fully explain the nature of our legal duties in the context of war, much less account for the feelings of solidarity that shape a nation's willingness or unwillingness to engage in war. What we need in order to think more clearly about these issues is an altogether different vantage point. Fletcher finds this alternative footing in Romanticism, from which he develops a concept of the nation as a collective agent and as a potential bearer of guilt.

Fletcher is by no means the first to criticize liberalism for its preoccupation with the individual and its tendency toward a universalism based on abstract principles of reason.[1] More unique is his intent to focus on the tension between liberalism and Romanticism without necessarily arguing for one over the other. In order to defend the Romantic perspective

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1. *See* STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM 4-5 (1993) (describing the common basis of critique among adherents to an "antiliberal tradition").

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against its own potential excesses, however, Fletcher adopts too narrow a view of the Romantic movement to make the tension productive. He is, paradoxically, forced to resort to liberal principles in order to vindicate a mode of thinking he characterizes as diametrically opposed to liberalism.

The aim of this Comment is to extend and modify Fletcher's account of the conflict between liberals and Romantics by examining an aspect of the Romantic tradition that he ignores. Specifically, it highlights a particular conception of *imagination* central to the English Romantics' understanding of national identity. At the same time, it argues that Fletcher's approach to the question of war's appeal and his argument for the principle of collective guilt are inconsistent with his own premises.

I

At a philosophical level, "the Romantic break with the Enlightenment was meant to be radical and irreconcilable" (p. 26).[2] Fletcher describes this break by contrasting the Romantics' commitment to a world of sensual impulse and inner feeling with a more detached, Kantian belief in transcendent reason as the path to truth (pp. 17-21). Privileging the subjective and partial over the objective and universal has a methodological significance as well: Only by entering the Romantic mindset, he argues, is it possible to understand phenomena that to liberals appear simply irrational, such as the concept of national honor or the necessary violence of war.[3]

One central part of Romantic thinking in Fletcher's analysis is a commitment to the ideas of nationhood and national identity. Whereas liberals define the nation according to its political and legal institutions, Romantics see the nation itself as an organic actor in history. While nations cannot partake of the essential human dignity that liberalism attributes to rational beings, they can, Fletcher asserts, "experience glory and grandeur as well as humiliation" (p. 21). In the Romantic conception, moreover, the identity of individuals is bound up tightly with that of their nations. The Romantic views national identification not in terms of the rights and duties of citizenship, but rather as a mode of self-expression.[4]

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2. Fletcher draws his description of Romanticism largely from Isaiah Berlin's account of the movement. *See* ISAIAH BERLIN, THE ROOTS OF ROMANTICISM (Henry Hardy ed., 1999). Berlin notes the difficulty of defining Romanticism as such, in light of both the quantity and variety of later commentary on the movement as well as internal differences among major figures of the period, which he identifies as spanning roughly 1760-1830 and extending across England, France, and Germany. *See id.* at 1-20. Fletcher himself discusses William Wordsworth, Johann Gottlieb Fichte, and Georg Hamann as representing Romanticism in different ways (pp. 17-19).

3. For example, Romantic sensibilities account for the acceptability of war, beyond any question of necessity or legal justification, when "[t]he values of brotherhood, courage, and honor overwhelm the prior sense that shooting at other human beings is irrational and barbaric" (p. 12).

4. Daniel Farber has remarked upon a similar position Fletcher advanced regarding the idea of American nationhood following the Civil War: "Rather than being based on the voluntary

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The internal cohesion of self and nation serves as the basis for Fletcher's argument that nations themselves can be meaningfully characterized as bearers of guilt. Sometimes—most notably during war—the nation not only demands certain actions of its citizens but also acts *through* individuals in a way that expresses their collective intentions. These actions manifest a unique form of agency, distinct from the agency of individuals (pp. 72-74, 82-83). If a nation can experience honor on the basis of its actions, it can also, he claims, bear guilt on that basis.

To grasp fully Fletcher's theory of collective guilt, it is important to recognize that he does not propose a new form of criminal liability, nor does he suggest that nations themselves be put on trial. Rather, the primary effect of collective guilt would be to mitigate the guilt of individuals. Fletcher's paradigm case is the trial of a war criminal like Slobodan Milosevic or Adolf Eichmann. Eichmann was rightly found guilty of the most serious offenses against international law, but, Fletcher insists, he was not guilty alone. Rather, he acted from within a national community whose norms permitted or even rewarded his crimes, and he could not have carried out such crimes without that community's collective intention to accomplish them (pp. 94-95, 166-67). As a result, a tribunal might have recognized the degree to which his own guilt was shared by the nation as a whole, and might even have spared him the death penalty (p. 163).

As Peter Berkowitz has observed, this does not imply "that Fletcher has a scintilla of sympathy for the likes of Milosevic" or Eichmann.[5] We might well ask, however, what sorts of sympathies do motivate Fletcher's argument, since the appeal of mitigating punishment for perpetrators of genocide or crimes against humanity is hardly obvious. The book suggests at least two alternative answers. The first would claim that in order to identify accurately the scope of agency in judging criminal behavior, it is necessary to consider the extent to which a defendant's acts may simultaneously reflect the intentions of a broader collective. This line of argument, on which doing justice to the individual demands an assessment of collective guilt, initially departs from liberal individualism, but ultimately vindicates liberal notions of culpability by purporting to hold individuals to account for their own actions and no one else's.[6]

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association of a social compact, nationhood involves a kind of organic solidarity based on the 'bonds of memory.' Nationalism [for Fletcher] is not merely a concept but a 'romantic surge.'" Daniel A. Farber, *"Nor Long Remember,"* 18 CONST. COMMENT. 423, 428 (2001) (reviewing GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001)) (citation omitted).

5. Peter Berkowitz, *Byron at Ground Zero*, NEW REPUBLIC, Nov. 4, 2002, at 31, 35 (reviewing Fletcher's *Romantics at War*).

6. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 462 (1978) (distinguishing culpability from wrongdoing to argue that "the maximum level of punishment is set by the degree of wrongdoing," while "punishment is mitigated . . . as the actor's culpability is reduced"). This point becomes especially significant in the context of accessory liability, where German criminal

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The second apparent motivation is somewhat less developed, yet arguably even more important to Fletcher's overall project. By applying collective guilt to crimes committed in the name of the nation itself, a society characterizes such crimes in a manner that has important implications for their victims. Recognizing collective guilt, Fletcher argues, is a means of producing an institutional memory or archive of the crime that, in turn, can pave the way toward reconciliation (p. 209). If a nation commits genocide, for example—a crime that Fletcher argues cannot, by definition, be undertaken by individuals acting alone[7]—punishing the individual killers is not sufficient, since it risks dispensing with all responsibility for, even all memory of, the dominant culture's role in the killing. In contrast, acknowledging collective guilt *in addition* to the guilt of individuals memorializes the crime and calls attention to the rift it has produced within society, thereby providing for the possibility of reintegration. In this respect, "collective guilt . . . fulfills an important social function" (p. 203). The mitigation of individual guilt can be seen as instrumental in achieving this broader social aim.

II

If the purpose of collective guilt is primarily to serve a social function, then it becomes necessary to examine how the principle is not only informed by, but itself informs, a certain notion of collectivity. In posing the question of collective guilt, Fletcher urges us to consider the presence of a "nonrational" element in our system of laws (p. ix). This consideration is crucial to the understanding of war's appeal, and also lets us see the conflict between liberal claims to the universality of reason and the reality of linguistic difference and cultural specificity. Fletcher's model of Romanticism is, however, too reductive, insofar as it relies on a simple opposition between rationality and nonreason. This opposition conditions his treatment of the concept of nationhood and obscures the complexity of the connection that binds individuals to a particular nation.

While an individual's attachment to the nation is not impelled by strictly rational motives, Fletcher elides any further explanation of exactly how that bond is formed. An "easy transition in Romantic thinking from the individual self to the nation" (p. 36) seems to tie together Fletcher's

law, for example, recognizes a principle of categorical mitigation that is not officially recognized in the Anglo-American system. *See id.* at 636.

7. Fletcher describes both genocide and hate crimes as "expression[s] of collective conflict" (p. 68) and argues that, under the jurisdiction of the International Criminal Court, genocide—along with war crimes, aggression, and crimes against humanity—is punishable only insofar as it reflects the hostility of one group of people toward another group. The Court would hold individuals accountable for such crimes, but, Fletcher contends, "the formal structure of liability should not camouflage the collective personality inherent in the crime" (p. 70).

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reflections on the impulse to wage war for national honor with his development of the notion of collective guilt. A key feature of the "individual self" in Fletcher's portrayal of Romanticism is what he refers to as its expansiveness (pp. 22-24). The expansionist self encounters the nation not as a limit on its individuality but as a way of transcending its own situation and achieving solidarity with others. In fact, however, it is possible to locate a rather different account of the construction of national identity within Romanticism itself. The unique Romantic insight centers on the imagination, which, as it figures in the movement, stands for more than just the activity of an individual mind. For at least one important branch of Romanticism, the imagination served not just as a means of aesthetic self-expression, but as an instrument of ethical relations and social change.

For Romantic poets like Wordsworth and Coleridge, cultivating the imagination did not mean a withdrawal of the individual into the inner world of personal feelings, much less a simple projection of such feelings onto the outside world.[8] Rather, these writers viewed their artistic project as a reaction to "the great national events . . . daily taking place" in England at the inception of the Industrial Revolution,[9] and ultimately aimed to reorient the ethical sensibilities of their readers to bring them into contact with others whose experiences did not resemble their own.[10] If these thinkers believed in the possibility of the nation as a unified, organic community, that nation would, ironically, have to be constructed against the fragmentation of the polity that industrialization and urbanization were bringing about. Hence the task they assigned to the imagination can also be understood in terms of its ideological function, where ideology signifies "the necessity for a society to 'forg[e] a representation of its unity.'"[11] This necessity arises precisely because a unifying conception of the nation does not present itself unmediated.

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8. Compare Fletcher: "For [Romantic] poets, musicians, theologians . . . [t]he world outside is understood as a reflection of the world within" (p. 18).

9. WILLIAM WORDSWORTH, *Preface to the Second Edition of* Lyrical Ballads (1800), *reprinted in* SELECTED POEMS AND PREFACES 445, 449 (Jack Stillinger ed., 1965).

10. *See* Gayatri Chakravorty Spivak, *A Moral Dilemma*, *in* WHAT HAPPENS TO HISTORY: THE RENEWAL OF ETHICS IN CONTEMPORARY THOUGHT 215, 229-30 (Howard Marchitello ed., 2000). Spivak reads the English Romantics "as wanting to say . . . that the imagination, which is our inbuilt capacity to other ourselves, can lead perhaps to understanding other people from the inside." *Id.* at 229. Martha Nussbaum echoes this language in speaking of the role of imagination in the thought process of an ideal "literary" judge. *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 110-11 (1993). Spivak, however, has distinguished her own "Wordsworthian model" of the imagination from Nussbaum's idea of it as "a sympathetic identification, a bringing of the other into the self"—a view that Spivak identifies, moreover, as characteristic of "liberal academics." Gayatri Chakravorty Spivak, *Righting Wrongs*, *in* HUMAN RIGHTS AND HUMAN WRONGS (Nicholas Owens ed., forthcoming 2003) (manuscript at 32 n.14, on file with author), *available at* http://www.law.columbia.edu/law_culture/Spivak%20Paper.pdf.

11. FOREST PYLE, THE IDEOLOGY OF IMAGINATION: SUBJECT AND SOCIETY IN THE DISCOURSE OF ROMANTICISM 3 (1995) (quoting JOHN B. THOMPSON, STUDIES IN THE THEORY OF IDEOLOGY 25 (1984)) (alteration in original).

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Fletcher's portrayal leaves out the role of ideology in establishing a national identity but does not present an adequate alternative account. Rather, Fletcher assumes his own conclusion by starting from the notion that "[t]he one truth for the Romantic is the coherence of the self" (p. 148), and proceeding to describe the nation as just a collective manifestation of the internally unified self. One result of this approach would be the Romantic spirit's finding natural solidarity with fellow citizens. But it would also seem to imply that those outside one's own national community must be viewed as irreducibly different—either a threatening enemy to be resisted, or an "exotic" curiosity to be admired (p. 43). By conceiving of national identity as a merely natural or organic formation, the differences between nations are easy to assimilate either to a crude and dangerous opposition between friend and enemy, or to an empty, and possibly just as dangerous, cultural relativism.

More recent interpretations of the Romantic movement have called this organic presupposition into question. Specifically, it has been argued that the Romantics developed a "theory of the imagination . . . that . . . does not *presume* the unity of either subject or nation," but rather "takes the divisions of both as the starting point of its ideological work."[12] In this view, "[c]oherence is not . . . a condition of the process but an imaginary outcome."[13] Thus, the Romantic imagination provides the basis for constructing a unity that would not otherwise exist. The nation can be represented or imagined as singular, but its boundaries remain porous and subject to reconfiguration.

III

Having emphasized the ideological dimension of the bond between self and nation, it is useful to reconsider the analytical function of the contrast Fletcher draws between liberals and Romantics. While this contrast may shed light on collective guilt by highlighting aspects of national identity that a traditional liberal account excludes, it cannot supply an independent basis for making a normative assessment of those questions. Romantic sentiment, in other words, might give us a vocabulary for describing the principle of collective guilt but is insufficient to justify incorporating such a principle into our system of laws. Nonetheless, at important points in his argument, Fletcher equivocates as to whether Romantic sensibilities serve as an explanatory tool or as an implicit justification.

As suggested in Part I, the idea of collective guilt as a mitigating principle in criminal justice appears to have two possible motivations—one

12. *Id.* at 57.
13. *Id.*

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related to doing justice for individual defendants, the other to serving a broader purpose of social cohesion. The first argument is based on a principle of distributing guilt, which Fletcher reaches by analogy to the notion of comparative negligence in tort law. Much as liability can be distributed among several tortfeasors to the degree to which they are each responsible for an accident, he urges us to imagine a similar system for distributing guilt in criminal cases (p. 158). The crucial difference is that comparative negligence is based on relative causation, whereas the theory of collective guilt, Fletcher insists, must be noncausal but "expressive" (p. 164).[14] In other words, collective guilt only applies to actions that express the intentions of the collective itself, which has created the conditions of possibility for the crime to occur and gives it a particular social meaning.

This formulation may limit the application of collective guilt, but it fails to explain why it should serve as a *mitigating* factor for the guilt of the individual. Indeed, Fletcher appears to work backward from mitigation in order to derive an understanding of the nation's collective unity (p. 165). In a way, this reinforcement of the idea of the nation as a unified whole through the principle of collective guilt is just the point. The recognition of collective guilt becomes troubling, however, insofar as it obscures the ideological construction of the individual's attachment to the nation and limits the possibility for its reform. Such attachment must be viewed as itself excusable, if not simply natural; otherwise, it would be impossible for collective guilt to function effectively as a basis for mitigation.

Having made this connection explicit, one should at least question whether it is desirable for the ideological dimension of national identity to play such a significant role in criminal trials under domestic or international tribunals. To an extent, Fletcher's second argument in favor of collective guilt addresses this consideration. Acknowledging collective guilt, he argues, is a way of inscribing certain crimes in the cultural memory of a nation so as to provide the opportunity for reconciliation between the dominant society and its victims. But the expressive ambivalence of a model of national belonging that relies on an organic link between individuals and the nation would seem to weaken this account as well.

A nation's dominant ideology can be judged blameworthy after the fact for crimes it has sanctioned, but in relation to the individual who acts contemporaneously with it, collective guilt would have it function only as an excuse. Under a theory of Romanticism in which the guilt of a nation is

14. Fletcher's insistence that the relationship between an individual's acts and the collective action of the nation is not causal likewise leads him to reject an analogy to the criminal law idea of complicity (pp. 163-64). Even if the individual and the nation could be characterized as co-perpetrators of a collective crime, the element of "hegemony" or control over the act that would be necessary to lower the individual's status to that of accessory (and thereby justify mitigation) is missing from the offenses that Fletcher considers (pp. 163-64). *See also* FLETCHER, *supra* note 6, at 654-57 (discussing the rationale for categorical mitigation of an accessory's punishment).

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just the flip side of its glory, and in which an organic bond between self and society underwrites both, the very possibility of collective guilt would seem to undermine the responsibility of individuals in the present. Fletcher recognizes this aspect of his account as a potential "excess" of Romanticism. Yet, ironically, his only response is to reaffirm the principles of liberalism: "In the end, the Romantic quest for honor and glory—for the realization of the self in national assertion—brings us back to the universality of the human condition. . . . Our capacity for feeling guilt underscores our humanity more than its [sic] affirms our allegiance to a particular nation" (p. 212). This answer is unsatisfying in the context of Fletcher's broader argument, since there is no legal or even moral imperative that would seem to constrain nations as such from acting in pursuit of glory at the expense of individual human beings. Even if we accept that nations exercise collective agency, there is no reason to assume that such agency would be responsive to the same sorts of humanistic sympathies that Fletcher affirms on the part of individuals. International law, of course, may function as a constraint on individual decisionmakers in their official capacities, but where the risk of abuse is greatest, collective guilt would lead to mitigation.

IV

The most significant insight of *Romantics at War* is Professor Fletcher's revelation of the tension between liberalism and a set of impulses and commitments that belongs to an altogether different, and mostly unacknowledged, tradition. Romanticism, moreover, provides a critical template for identifying aspects of national identity that liberalism simply excludes. Fletcher's argument, however, reduces the differences between Romantics and liberals to a simple opposition, and relies too extensively on an uncritical conception of nationhood. As a result, the normative significance of collective guilt and the impulse to wage war for national honor are rendered equivocal. This Comment suggests that a different understanding of Romanticism may provide a basis to critique the ideological underpinnings of national identity without ignoring the importance of such identity to Fletcher's questions of war and guilt. At the same time, Romantic imagination suggests a way of understanding collectivity that neither reproduces the universalism of liberals nor reinforces the exclusionary boundaries of an organic conception of the nation. In the context of a war that itself is not restricted to conflict between individual nations, this perspective might inform an evolving conception of the boundaries of national community and call attention to how ideological constructions can shape and be shaped by a system of criminal liability.

—William B. Michael

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