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GEORGE FLETCHER AND COLLECTIVE GUILT: A  
CRITICAL COMMENTARY ON THE 2001  
*STORRS LECTURES*

*Herbert Morris\**

INTRODUCTION

Professor George Fletcher's writings over the many years of his exceptionally productive scholarly life have, to a remarkable degree, been marked by great daring and originality. They have significantly enriched our understanding of issues within the areas of criminal law, torts, comparative law, constitutional law, victims' rights, and loyalty, to name but a few.<sup>1</sup> Now, in the *Storrs Lectures*, delivered at the Yale Law School in November 2001 and published as *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*,<sup>2</sup> he focuses attention on the topic of guilt, primarily collective guilt. As we might have predicted given his other scholarly work, on display are his customary boldness, breadth of vision and concern for solidly mooring the abstract in the concrete. He also presents a novel and provocative thesis which, if adopted, might have considerable practical importance in a range of legal cases of great significance, including the ongoing prosecution of Slobodan Milošević.<sup>3</sup>

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1 See, e.g., GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993); GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* (2001); GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999); George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971).

2 George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

3 See *id.* at 1537.

Additionally, in these *Storrs Lectures* Fletcher draws upon a variety of sources—domestic criminal law, international law, philosophy, religious texts (the Bible), and literary works (Sophocles, Dostoyevsky, Philip Roth are discussed)—to provide illuminating examples and to move the argument forward. There is extensive consideration of Karl Jaspers's *The Question of German Guilt*,<sup>4</sup> a classic and important contribution to the topic of collective guilt published shortly after World War II. The *Storrs Lectures* are among Professor Fletcher's most richly textured and fascinating works. They also differ dramatically from what audiences of legal scholarship generally have placed before them for consideration, for their focus is on a topic calculated to engage the reader's emotions, and what Fletcher has to say is likely to stimulate a potentially distressing kind of self-reflection. Lectures with themes naturally leading to consideration of the concepts and phenomena of original sin, anti-Semitism, slavery within the United States, and the Holocaust make a claim on both our minds and on our moral sensibilities.

Professor Fletcher offers arguments, often in a tentative manner, for a number of claims, of which the following appear to be the most important. There is, first, his claim that "Romanticism" involves a mode of thinking more congenial to the idea of collective guilt than "Liberalism," a perspective that he views as focusing exclusively on the guilt of individuals.<sup>5</sup> These contrasting perspectives are the "war" referred to in the title of his *Lectures*. Second, Fletcher believes that guilt is appropriately attributable to nations, and, in particular, he argues for the guilt of the German nation during the Third Reich, contrasting his view with that of Karl Jaspers.<sup>6</sup> Third, he is sensitive to certain risks that arise once one thinks in terms of collective guilt—a risk of particular concern to him is that of anti-Semitism—and he proposes a formula for avoiding such risks while still remaining committed to the idea of collective guilt.<sup>7</sup> Finally, he believes that the idea of collective guilt—and this is the principal use to which he puts the concept—can serve to "humanize" our practice of punishment by using it in a way not currently recognized, as a ground for mitigation of punishment.<sup>8</sup> For example, evidence of the guilt of the German nation, in Professor Fletcher's judgment, ought to have been admitted in the

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4 See *id.* at 1530–37 (citing KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E.B. Ashton trans., Capricorn Books 1961) (1947)).

5 *Id.* at 1507.

6 *Id.* at 1529–37.

7 *Id.* at 1545–49.

8 *Id.* at 1537–44.

trial of Adolf Eichmann as relevant to the issue of possible mitigation of his sentence.<sup>9</sup>

In this review Essay I consider two major topics related to these claims, though only the second in detail. The first is the topic of “the war” between Romanticism and Liberalism and what relevance Fletcher views it having for the topic of collective guilt. The second is the relationship between the guilt that might attach to a group or collective—his principal example is the nation—and the guilt of a member of the collective, for example, a German national. This topic, in turn, involves two significantly different inquiries. What inference is permissible from the guilt that attaches to a collective (a government, political party, nation, club, etc.) to the guilt of individual members of the collective who appear for any number of reasons to be innocent of moral wrongdoing? And, second, are there circumstances in which the guilt attributable to the collective might serve to mitigate to some degree the guilt of an individual member of the collective who has in fact done wrong? It is this second inquiry to which I shall principally devote attention in this commentary.

#### I. LIBERALS AND ROMANTICS AT WAR

Professor Fletcher draws a distinction between what he labels a “Romantic” and a “Liberal” perspective on reality, and this distinction is intended to further our understanding of collective guilt.<sup>10</sup> A commitment to the Romantic perspective disposes one to think in terms of groups, of nations, of wholes; it is the disposition to view society as an organic whole. It is “expansionist” in its outlook and eschews an analysis of wholes or of complex units by reducing them to their component parts.<sup>11</sup> It approaches phenomena in what we might regard as a holistic manner. Professor Fletcher also elaborates upon another feature of the Romantic orientation. It is a feature that might strike one as dramatically at odds with the expansionist outlook, for it glorifies the inner self and values most highly, in Isaiah Berlin’s words, “[p]urity of heart, integrity, devotion, dedication.”<sup>12</sup> The relationship of this feature of Romanticism to the idea of collective guilt is an issue to which I give attention later when I turn to the role of collective guilt as a mitigating factor.<sup>13</sup>

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9 *Id.* at 1539–41.

10 *Id.* at 1507.

11 *Id.* at 1508.

12 *Id.* at 1550 (quoting ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 10 (1999)).

13 See discussion *infra* Part III.B.

Liberalism is characterized in a markedly different way. Its perspective is best represented in important features of our criminal law, where we encounter "the principles of voluntary choice, methodological individualism, and individual responsibility."<sup>14</sup> Liberalism is also associated with what Professor Fletcher regards as a "reductionist" approach.<sup>15</sup> The liberal, to take but one of several examples offered to illustrate the contrast between an expansionist and a reductionist perspective, "replaces the expansionist self with the causal language of incentives and drives. If Theodore Parker saw the Civil War as the acting out of great ideas on the stage of history, Richard Posner would presumably prefer to think about the respective economic advantages of abolition and slavery."<sup>16</sup>

With this characterization of the different perspectives in mind we can, without difficulty I think, see that the difference in perspectives might affect one's attitudes toward attributing guilt to a collective. Professor Fletcher writes, "My claim is only that a strong methodological and cultural affinity binds Romantic thought to imputations of collective guilt on the one hand, and liberal thought to the insistence that only individuals can be guilty on the other."<sup>17</sup> Fletcher is drawn to the Romantic perspective largely because of its inclination to attribute guilt to entities such as nations.<sup>18</sup> His *Storrs Lectures* are an attempt to derive some truths from this perspective while also seeking to avoid what he regards as its possible "distortions" or "perversions."<sup>19</sup>

In making out a case for the Romantic perspective, Professor Fletcher believes that he must navigate between a Romantic tendency that might lead, on one hand, to transmitting guilt by birth, giving rise to too much guilt, and an evil such as anti-Semitism. On the other hand, one cannot defeat guilt entirely through the idolization of sincerity, what Professor Fletcher labels "guiltless sincerity,"<sup>20</sup> where the sincerity of belief in doing right serves to defeat guilt. While he believes that guilt can attach to entities such as nations, he declines to draw the inference that each and every national is guilty, for this would be too flagrantly to flout his liberal convictions. I later discuss his ultimate resolution of the problem of guiltless sincerity.<sup>21</sup>

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14 Fletcher, *supra* note 2, at 1502.

15 *Id.* at 1508.

16 *Id.* at 1508–09.

17 *Id.* at 1507.

18 *See id.* at 1507–09.

19 *Id.* at 1512.

20 *Id.* at 1550.

21 *See infra* Part III.B.

Professor Fletcher acknowledges that long before anything appropriately thought of as Romanticism existed, many cultures—early Hebraic culture as represented in the Bible, for example—attributed responsibility and guilt to collectives and not just to individuals.<sup>22</sup> With regard to such attributions of guilt to a collective there are at least two importantly different issues raised. The first is whether or not it is meaningful to attribute guilt to a collective, guilt, that is, of what Professor Fletcher labels an “associative,” rather than “aggregative,” nature.<sup>23</sup> Aggregative guilt would simply total the guilt of individual members of the collective, while associative guilt attaches to the collective in its character as a group. In other words, associative guilt is not simply the sum of the individual members’ guilt. The Romantic perspective, as we have seen, is quite sympathetic to attribution of associative guilt.

A second issue, certainly raised by biblical texts, is the permissibility (from a moral and logical point of view) of drawing an inference from the guilt of an individual member of the collective to the guilt of the collective. There is nothing in Professor Fletcher’s characterization of Romanticism that would appear to countenance the legitimacy of such an inference without more being established—the more being, for example, the individual wrongdoer acting in his or her capacity as a representative of the collective in doing wrong.

But if we now turn our gaze upon Liberalism with its emphasis on individual responsibility, do we find a significant difference from the approach taken by those with a Romantic persuasion? I think not, for when an issue of corporate criminal liability arises, those of a liberal persuasion do not find it conceptually troubling. One need not be in the grip of a Romantic impulse, of an “expansionist” as opposed to a “reductive” perspective, to apply meaningfully a variety of predicates to collective entities such as the actions of law school faculties or one’s government. For it seems evident that law professors of liberal persuasion, for example, often think that the law faculty of which they are a member has acted stupidly or wrongly in an associative sense. Attributions of guilt do not appear to offer any particular obstacles either, for when a department or a government has done wrong, liberals, by virtue of their attachment to individual responsibility, do not appear precluded from finding reasonable—indeed obligatory—apologies, reparations, and other actions in accordance with a judgment of guilt.

Further, when the issue is whether one is entitled to infer the guilt of a collective from the wrongdoing of a member, it is not evi-

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22 Fletcher, *supra* note 2, at 1560–62.

23 *Id.* at 1509.

dent that those of a Romantic and those of a Liberal persuasion need reach different conclusions. Both would seem to believe it essential to establish more than mere membership in a collective before one was entitled to draw an inference to the guilt of the collective, typically, for example, acting in one's capacity as a representative of the collective. If there is merit in these observations, it is unclear to me just how much of a contribution the Romantic-Liberal distinction makes to the issues raised by collective guilt. It might be thought to be significant when an issue arises concerning an entity of the kind that might have guilt appropriately attributed to it, say, a nation. But if one has doubts about the appropriateness of attributing guilt to a nation, it need not result from a disinclination to apply guilt to a collective, but instead from oddities associated with the concept of a nation. For example, it could result from one's doubts about just what constitutes a nation—how it resembles and differs from “the government,” “the people,” and “the culture,” how, if cultural traditions and ideals are essential to the idea of a nation, guilt is an appropriate concept to apply to such matters—and not doubts about the idea of collective guilt.

## II. COLLECTIVE GUILT AND THE GUILT OF INDIVIDUAL MEMBERS OF THE COLLECTIVE

The issue concerning the relationship of collective guilt to the guilt of individual members of the collective can arise in two fundamentally different ways. The first I have just discussed: what inferences, under what circumstances, are permissible from the guilt of an individual member of a collective to the guilt of the collective. The second issue arises once the guilt of the collective is acknowledged: what inferences are permissible from that guilt to the guilt of individual members of the collective? On this issue, too, the distinction between Romanticism and Liberalism does not prove, I believe, particularly helpful.

Professor Fletcher, throughout his essay, is troubled by what he believes might be a consequence—a possible “distortion” or “perversion” of Romanticism—of giving into the Romantic way of looking at the world, namely drawing an inference from the guilt of a collective to the guilt of individuals of the collective merely by virtue of their membership in the collective. In that way lies the vice of anti-Semitism. For example, he writes,

To ascribe irreducible, associative national guilt to the Germans is to repeat the intellectual indecency of anti-Semitism. Implicit in [that] charge, however, is an assumption that national guilt is necessarily passed by birth to the next generation. Might it not be possi-

ble, however, to think of all compatriots living in Germany at the time of the Nazis as collectively guilty, but of Germans born after the war as free from the taint?<sup>24</sup>

He concludes his essay by writing, "In the end I find a claim of associative, nontransitive guilt . . . over time leaves open the question whether particular individuals are to be stigmatized."<sup>25</sup>

First, let us grant that a collective entity appropriately has guilt attributed to it, or for that matter, stupidity or carelessness or innumerable other predicates. It seems evident that from the appropriateness of applying the predicate to the collective, the inference that the predicate applies to each and every member of the collective is not permissible. If we suppose that some Jews in the time of Jesus could fairly be said to speak in the name of the Jewish people, that in some manner they were authorized to do so, and if we suppose further that these Jews were guilty of having done serious wrong to Jesus in the name of the Jewish people as a whole, it might be appropriate to attribute collective guilt to the Jewish people. If we accepted this reasoning, what would follow about the guilt of any particular Jew living at the time of the wrong or living subsequently? Surely nothing.

The vice of anti-Semitism, then, might have, among its numerous sources, two different forms of inappropriate inference. The first would be to assume from the fact, and that fact alone, that someone who was Jewish committed a wrong that the Jewish people as a whole were guilty. And the second inappropriate inference would be occasioned if the Jewish people were as a whole appropriately thought guilty, it was thought to follow that each and every Jewish person was individually guilty.

I am confident that Professor Fletcher would agree with these points. What is unclear to me is the emphasis he places, in his framing the issue and in the conclusion he reaches, on transmission of guilt across generations. The factor that makes impermissible the inference from collective guilt to individual guilt does not turn on whether one was alive at the time of the wrong. We need only consider the example of Germany during Hitler's time in power. Professor Fletcher believes that the German nation can appropriately be regarded as guilty in his associative sense.<sup>26</sup> But numerous Germans living during the period of the Third Reich and the commission of horrible crimes cannot be said to be guilty of these wrongs as individuals. There were Germans who were innocent infants at the time,

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24 *Id.* at 1533.

25 *Id.* at 1572.

26 *Id.* at 1539-41.



Germans who risked their lives in opposing the wrongs and, to take an extreme case, there were Jews who were being persecuted, tortured, and killed who were also German nationals.

It seems to me that what does transfer across generations, the "taint" as Professor Fletcher refers to it,<sup>27</sup> is the collective guilt if and when it is appropriately attributable to the collective. *That* guilt does not require that any member of the collective at the time of the wrong giving rise to the guilt is still alive. Such collective guilt explains and justifies the United States offering an apology to those of Japanese ancestry whose liberty was unjustifiably infringed, and it would seem also to justify providing reparations to them. It justifies the reparative actions taken by the German nation subsequent to the period in which the wrongs were committed. Similarly, it would clearly make plausible the suggestion, whatever the difficulties in implementing it, that the United States owes reparations as a consequence of the guilt arising from the institution of slavery.

While inferences drawn to the guilt of any particular individual of the collective from the guilt of the collective seem evidently fallacious, it is an entirely different matter, of course, when one focuses on particular individuals and the variety of ways in which they might individually be guilty for the evils perpetrated, for example, by being complicitous in wrongdoing or by failing to protest when possible without serious risk or failing, when no risk was involved, to offer assistance or a word of comfort to the victims of Nazi brutality or, even, as a consequence of being gratified by what was taking place or in some manner, often subtle and difficult to detect, of benefiting from the evil being perpetrated. Several of these sources of guilt clearly do not require one's having been alive at the time of the initial wrong—economically benefiting from the wrongs committed before one's birth, for example. When collective guilt attaches to the actions of one's government or to a nation, and where the guilt relates to a monumental wrong such as slavery or any other crimes against large groups of people, it is not difficult to imagine that substantial numbers of individuals are in some manner guilty, and not simply those who were alive at the time of the wrongs.

If we turn our attention from being guilty to feeling guilty, we can also, I think, understand that someone not implicated in any manner in wrongdoing—someone an infant at the time, someone risking their life to protest, someone born subsequent to the events—might feel guilty, a feeling not grounded in acknowledgement of some fault, but entirely through identification with the collective that bears the guilt.

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27 *Id.* at 1546–49.

We might even mark it to individuals' credit that in identifying themselves as, say, German or American, they personally feel guilty and personally feel an obligation to make amends in some way for the wrongs that those speaking or acting for Germany or America have done.

### III. COLLECTIVE GUILT AND THE MITIGATION OF GUILT

It is in the section of the *Storrs Lectures* titled, "The Distribution of Guilt: An Argument for Mitigation,"<sup>28</sup> that Professor Fletcher offers his most provocative thesis. If his views were adopted, they would have an important practical implication: the appropriateness of introducing evidence at trials that might lead to a judgment of lesser guilt because of the presence of a mitigating factor. Introducing his discussion he writes, "The great challenge in the area is to develop a humanistic approach to collective guilt that would lead to mitigation of punishment for those whom liberals would regard as guilty rather than to the sanctioning of those treated as innocent bystanders."<sup>29</sup> Professor Fletcher continues,

I am very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime. . . . [I]n cases of genocide and other collective offenses, there are in fact two perpetrators—the individual and the nation. Considering the guilt of the nation in the sentencing process would provide a concrete and practical way to recognize collective guilt in criminal trials. Recognizing the mitigating effect of the nation's guilt would mitigate the responsibility of the offender, though perhaps in many cases this guilt would remain sufficiently grave to justify severe punishment.<sup>30</sup>

What arguments surface in the course of the *Storrs Lectures* in support of this view? There are, as I read the *Lectures*, four possibilities, three of which can, I believe, be quickly dismissed, but one deserves particular attention because he seems clearly to subscribe to it. The first possible argument is suggested by some of Professor Fletcher's language that may lead one to think that he believes mitigation may be justifiable *simply* because guilt is distributed among, say, the group as a whole and individual members of the group.<sup>31</sup> On this view what we may label "shared guilt" justifies some mitigation. The second ar-

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28 *Id.* at 1537.

29 *Id.*

30 *Id.* at 1539.

31 *Id.* at 1537.

gument is that "guiltless sincerity" warrants mitigation.<sup>32</sup> The third argument is that a collective that is guilty forfeits the right to exact from one of its members who has done wrong the full measure of punishment.<sup>33</sup> And the final argument, the one to which I believe Professor Fletcher subscribes and which is developed in the greatest detail, is that mitigation is in order when a group's collective guilt prevents members of the group from exercising their second-order moral capacity for revision of their moral beliefs.<sup>34</sup> I want to consider each of the first three arguments in turn, indicating what language in the *Lectures* might lead a reader astray into thinking Professor Fletcher subscribes to it and then proceed to a more extensive discussion of the argument he appears principally to rely upon.

### A. *The Argument from Shared Guilt*

Professor Fletcher writes,

If the dominant systems of beliefs encourage actions like *Kristallnacht*, lynchings, gay bashings, or domestic violence, those who succumb to violence are certainly to blame, but one has to wonder whether they alone are to blame and whether they must bear the guilt alone.

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I want to suggest that those who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby endorsed.<sup>35</sup>

Because Professor Fletcher on a number of occasions writes of a wrongdoer not bearing all of the guilt involved in some wrongdoing, for example, the German nation for him bears some guilt and Eichmann bears some, for him Milošević bears some but the Serbs do as well, one might infer that he adopts the view that because there are several responsible guilty wrongdoers whose conduct accounts for wrongdoing that this, by itself, reduces the guilt of each of the wrongdoers. This is not, I believe, the position to which he would wish to subscribe, for his argument for mitigation ultimately rests upon a relationship of a certain kind holding between the several guilty wrongdoers. This is surely the view he must take, for, from the acknowledged fact that several are responsible for some wrong, and that fact alone, it seems apparent that no inference can be drawn that the guilt of each wrongdoer is thereby lessened.

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32 *Id.* at 1550.

33 *Id.* at 1512.

34 *Id.* at 1553.

35 *Id.* at 1541-42.

B. *The Argument from "Guiltless Sincerity"*

Another possible basis suggested, and I believe ultimately rejected by Professor Fletcher for mitigation, derives from wrongdoers' sincere belief that they are acting rightly. Because of the amount of attention given to the topic of "guiltless sincerity" in the *Lectures*, we may think that it serves for Professor Fletcher as a reason for some mitigation. He writes, "We should have more doubts than we do about whether ideological offenders are really guilty and whether the sanctions they suffer are really punishment rather than measures imposed for the sake of social protection."<sup>36</sup>

The reasons, I believe, that Professor Fletcher urges some doubt on this matter—though he appears to regard the doctrine of "guiltless sincerity" as a "perversion"<sup>37</sup> of the Romantic veneration for sincerity—are that, first, he thinks that some moral dogmatism might be implicated in preferring our values to those of the offender and, second, that punishing them appears to serve the aims of social protection rather than aims of punishment that he sees as more morally grounded. So, Professor Fletcher writes, "They are guilty for failing to grasp and to act in conformity with moral truth. This might be right, but I cannot escape the feeling that this attribution of guilt for ignorance of universal truths carries the ring of moral dogmatism."<sup>38</sup> Even Hitler, he suggests, might have believed that it was wrong to kill innocent people and been motivated by an erroneous belief that those he killed posed a threat to the German nation.<sup>39</sup> His error might have been "factual" and not an error with regard to a general moral principle.<sup>40</sup>

Fletcher's ultimate conclusion on this issue makes clear, however, that sincerity of moral conviction is not, by itself, to be viewed as a mitigating factor:

There is no doubt that those who kill because they believe it is their religious duty to do so are still murderers and deserve to be punished. But it remains too difficult to explain their punishment to ourselves when the offenders are impervious to our reasons. We do not communicate condemnation when they are firmly convinced that they did the right thing. The challenge is to find the proper middle way that mitigates punishment on the basis of society's deny-

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36 *Id.* at 1552.

37 *Id.* at 1553.

38 *Id.*

39 *Id.* at 1554 ("Their ideology was never simply to kill innocents but rather to eliminate what they perceived, correctly or incorrectly, to be some kind of threat. Hitler and his followers thought that Jews were strangling the nation.").

40 *Id.*

ing offenders their second-order capacity for self-criticism and yet stops short of excusing offenders because they are sincere in their actions.<sup>41</sup>

This conclusion needs, I believe, some unraveling. First, it appears that sincerity alone, without society also “denying [a person’s] second order capacity for self-criticism,” constitutes neither a basis for complete excuse nor for mitigation. Professor Fletcher might be troubled that one aim of punishment as he sees it—an effective communication of condemnation to wrongdoers—is not being served when offenders believe they have acted rightly, and he might perhaps even believe that we are morally dogmatic in substituting our values for those of the offender, but he also believes that retributive justice warrants the full measure of punishment. He also, I imagine, believes this retributivism is morally grounded. But if this is so, an issue arises that is not addressed, namely, what has allayed his concerns over the moral dogmatism presupposed by his retributivist convictions?

Second, when offenders are sincere in believing that they have acted rightly, and when this fact is combined with “society’s” responsibility for denying the second-order capacity to revise one’s belief in the rightness of one’s offending action, in Professor Fletcher’s view mitigation is justifiable. Finally, though the topic of “guiltless sincerity” might be thought intrinsically interesting, its connection with the topic of collective guilt seems entirely accidental, for there are clearly cases in which no issue of collective guilt is raised but in which an issue of sincerity might be. For example, we need only imagine the phenomenon of euthanasia and the number of instances in which the person responsible for the killing believes his or her action entirely justifiable.

### C. *The Argument from State Forfeiture*

At several points in the *Lectures*, forfeiture is raised to justify mitigation. The collective might have forfeited its right, through its own guilt, to exact the full measure of the penalty. The “middle way” that Professor Fletcher has adopted on the issue of “guiltless sincerity” places an emphasis on *society’s* depriving the wrongdoer of the capacity for self-criticism.<sup>42</sup> But why, we may wonder, does it make any difference to one’s guilt that the source of the deprivation is society? If there were another source, say the effect of one’s peer group, should the guilt not be lessened if the capacity is acknowledged to have been destroyed?

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41 *Id.* at 1572.

42 *See supra* note 41 and accompanying text.

Focusing on society suggests, then, that society, speaking through its authoritative organs, is in a lesser position to exact the full measure of punishment because it is implicated in the guilt of the wrongdoer. This interpretation of Professor Fletcher's views is somewhat corroborated by another passage:

The theory is not simply an argument of state forfeiture—namely that the state has misbehaved and therefore cannot punish the crime fully. The argument is based rather on the distribution of guilt between the offender and society, between the offender and the nation in which his life is expressed.<sup>43</sup>

The phrase “not simply” suggests that Professor Fletcher views forfeiture as a relevant factor when mitigation is at issue. But it seems evident that, while he might think this true in some cases, it cannot be true in the cases that most occupy his attention. Specifically, Fletcher focuses, for the most part, on crimes against humanity and genocide. Eichmann and Milošević are two of his principal examples of when evidence of collective guilt might lead to mitigation, but in neither case is the entity prosecuting the charged wrongdoer<sup>44</sup> itself guilty with respect to the wrongs in question. It is clear that, despite some suggestions about forfeiture as a basis for mitigation, Professor Fletcher cannot rely on this as his principal argument for mitigation.

#### *D. The Argument from Deprivation of Capacity for Second-Order Moral Reflection*

Having now put aside some false leads as to the basis for mitigation, we can turn to the argument upon which Professor Fletcher most clearly relies. He writes,

[W]e must refine our notion of guilt by adding a second-level decision—namely, reflecting upon the intended action and deciding to go ahead with the criminal deed despite the opposition of others. The potential criminal in a normally diverse society has an opportunity for self-correction, to revise his criminal impulses in light of generally prevailing moral norms of the society. Now what happens in a society in which all the external signals point in favor of the criminal action? This is the moral condition that generates “the banality of evil,” as Hannah Arendt so powerfully describes the climate of the Third Reich.<sup>45</sup>

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<sup>43</sup> Fletcher, *supra* note 2, at 1542–43.

<sup>44</sup> In Eichmann's case, the state of Israel acted as prosecutor; for Milošević, the prosecuting entity is the international community through the International Criminal Tribunal for Yugoslavia.

<sup>45</sup> *Id.* at 1541.

In such a society where “all the external signals point in favor of criminal action,” the state or society “deprives its citizens of a critical asset in their moral lives, namely the possibility of critical moral self-assessment.”<sup>46</sup> The state or society bears guilt because of this and, as we have seen, this guilt is viewed as possibly justifying the mitigation of punishment of a wrongdoer such as Eichmann. Professor Fletcher continues,

The argument is based . . . on the distribution of guilt between offender and society, between the offender and the nation in which his life is expressed. It should apply in foreign courts as well as in domestic courts. It should have had a bearing on the sentencing of Eichmann; it should have influenced our perception of the crime committed by Timothy McVeigh. . . . The crime expresses not only the guilt of the offender but also the collective guilt of those who deprive offenders of their second-order critical sensibilities.

The argument is not causal in any narrow sense. The claim is not that the climate of opinion causes the crime, but rather that creating an orthodoxy of hate deprives people of their second-order capacity to rein in their criminal impulses.<sup>47</sup>

Professor Fletcher, as evident from these quotations, is proposing what appears to be a new ground for mitigation that bears upon the degree of guilt if one’s capacity to assess the morality of one’s actions has been affected by the guilt attributable to the actor’s society. So, in his view, the concept of collective guilt can operate in a humanizing fashion—humanizing because it can operate to mitigate the severity of punishment. We currently have, of course, the defense of legal insanity in which a quite common element in defining the defense is one’s knowledge that what one is doing is wrong. Here, however, we have a proposal that focuses, not on a psychotic condition, but upon the general societal environment in which one is acting and which influences one’s capacity to appreciate the wrongfulness of one’s conduct.

Professor Fletcher’s views with respect to this novel defense raise two sets of important issues. First, there is a group of questions related to his emphasis upon associative collective guilt as the factor operating upon one’s second-order capacities. Associative guilt, it will be recalled, is a guilt that attaches to the collective and which is not reducible to the sum or aggregate guilt of members of the collective.<sup>48</sup> I want to ask, first, whether it is required that it be a collective that is

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46 *Id.* at 1542.

47 *Id.* at 1542–43.

48 *See supra* notes 22–23 and accompanying text.

operative upon the wrongdoer for the defense to arise? Second, why, if it is indeed a collective operative, that the collective need be guilty? Third, if it is the collective that is operative and it is indeed guilty, whether it is the collective *guilt* that justifies the mitigation. The second group of issues foster questions such as just what effect on one's second-order capacities is required for mitigation, and what practical questions arise once we hit upon precisely what the standard for mitigation is to be.

As the factor upon which mitigation turns is an effect on one's capacity for moral self-evaluation, it is, I believe, apparent that it need not be a collective of any kind operating upon the wrongdoer. If a collective can be said to be operative, it need not be guilty, and if in fact the collective has guilt fairly attributable to it, it is not the *guilt* of the collective accounting for the mitigation but the fact that one's moral capacities have been affected in the requisite manner. So, to take Eichmann as our example, we have only to imagine that it was a brain tumor that affected his capacity or that he was totally mesmerized by Hitler. Given Professor Fletcher's broad conception of culpability, should Eichmann's moral capacities have been affected in the requisite manner, mitigation should still be available to him. And so it is with guilt as well, for the tumor might have occasioned the loss of capacity or, if it is a collective that is operating on Eichmann, mitigation might still be justified even if we should believe the collective to be collectively psychotic and not itself, therefore, guilty. Professor Fletcher would not, I believe, wish to take exception to the foregoing points. He wants, rather, to suggest another independent ground for mitigation, one acknowledging that it is a collective that is operative and that the collective is, in fact, guilty.

Still, if the collective is guilty, and if it is the collective that affects Eichmann's moral capacity in the requisite way, what accounts for mitigation is not the *guilt* of the collective but the effect on capacity. This becomes apparent when we compare how guilt functions on the capacity rationale and on the forfeiture rationale. On a forfeiture theory it is, indeed, both the collective and its guilt that account for mitigation. This view has its precursor in "let him who is without sin cast the first stone!"<sup>49</sup> But with the deprivation of capacity view now under consideration, it is evident that neither the fact that it is a collective, nor that this collective is guilty, accounts for mitigation.

It follows, I think, that one might accept the plausibility of Professor Fletcher's plea for the desirability of considering mitigation in the case of Eichmann without at all subscribing either to his view that the

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49 John 8:7.



German nation was a collective to which guilt was properly attributable or, if subscribing to that view, that this fact of guilt was relevant to the issue of mitigation. Professor Fletcher gives the impression, because of the attention he gives to the issue and the importance he appears to attach to it, that the German nation's being judged guilty is relevant to his argument for mitigation. But if he believes this, I think he is mistaken. The idea, then, of collective guilt does not, at least in the manner in which Professor Fletcher discusses it, serve as a humanizing factor in criminal punishment.

What precisely must be shown (leaving aside the important issue of who would bear the burden of proof on the issue) about the effect on second-order moral capacities for there to be any relevance to one's guilt? Professor Fletcher is not, on this issue, consistent in his description of the degree of effect on one's second-order critical capacities. He most frequently writes of offenders being deprived of this capacity, thereby suggesting that the mitigating defense requires proof that offenders are unable to use their critical capacities to assess the wrongfulness of their conduct. Two other formulations indicate that the deprivation need not be complete, for Professor Fletcher writes at one point of "partially depriving the offender of the possibility of self-correction"<sup>50</sup> and, again, of "the [increased] difficulty of choosing the moral order over the immediate demands of the senses."<sup>51</sup>

Should we adopt the first, and most commonly invoked, standard of the effect there must be on one's critical capacities, many questions naturally present themselves. First, if in fact one has been totally deprived of one's capacity, and if it is true that "all the external signals"<sup>52</sup> point in the direction of one doing the right thing when the person has done the wrong thing, the issue arises why there is any guilt at all rather than, as in Professor Fletcher's proposal, lessened guilt. Consider the use of the insanity defense—a defense that might naturally come to mind because of the relevance commonly attaching to knowledge by the defendant that he or she has done something wrong—where once it is established that the offender did not know what he or she was doing was wrong, exculpation follows, not mitigation. Should one be shown to lack the capacity to know that what one was doing was wrong, it would seem even more evident that exculpation rather than mere mitigation was in order.

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50 Fletcher, *supra* note 2, at 1544.

51 *Id.* at 1543.

52 *Id.* at 1541.

Second, whenever it is suggested that lack of capacity be made relevant within the criminal law, we are confronted with this fundamental issue: what relevant evidence bears on the issue and how reliable is that evidence? As one moves farther away from paradigmatic cases such as the uncontrolled movements of one's limbs to more troubling cases of addictions and then, on Professor Fletcher's proposal, to the effects of one's society or culture upon one's critical capacities, progressively more serious doubts arise as to the reliability of the evidence of absence of capacity. We have only to consider Eichmann once again—or, for that matter, any case that might arise where the charge is a crime against humanity or genocide—and ask ourselves what circumstances within the society of the wrongdoer might warrant a claim of total deprivation of capacity for moral self-criticism. Whenever one has taken the life of a human being or been complicitous in doing so—particularly when the lives of many human beings have been taken—can we imagine that “all the external signals” in a nation would clearly justify what one is doing? Is it plausible to think that this was the situation in which Adolf Eichmann found himself? Primo Levi's words on this issue are worth, I think, bearing in mind:

Never has some form of reaction, a corrective of the total tyranny, been lacking, not even in the Third Reich or Stalin's Soviet Union: in both cases public opinion, the magistrature, the foreign press, the churches, the feeling for justice and humanity that ten or twenty years of tyranny were not enough to eradicate, have to a greater or lesser extent acted as a brake.<sup>53</sup>

Where we might feel some modest degree of assurance on this issue of total lack of capacity, say, with a very young child or a clinically assessed sociopath, the evidence would not be of the person believing that what he or she was doing was right so much as his or her lack of capacity to give weight appropriately to moral concepts at all. Once a person begins justifying some wrongdoing, certainly the process of energetic rationalization in evidence with Eichmann or McVeigh, it is, I believe, reasonable to assume that the person possesses the capacity to recognize the evil he or she has perpetrated.<sup>54</sup>

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<sup>53</sup> PRIMO LEVI, *THE DROWNED AND THE SAVED* 47 (Raymond Rosenthal trans., Vintage Books 1988) (1986).

<sup>54</sup> It is, I think, unfortunate that Professor Fletcher mentions Timothy McVeigh in the context, perhaps fitting for Eichmann, of a nation's guilt. In saying “all the external signals,” I believe he has in mind that McVeigh was in some way incapacitated through the influence of a more narrowly defined group than the United States as a whole, but to this extent it becomes even more problematic that McVeigh did not have available to him the resources to determine that what he was set upon was wrong. See Fletcher, *supra* note 2, at 1541.

Finally, because of these considerations, should the burden of proof on the issue be placed on the prosecution, it would seem easily satisfied, because the person, having reached a conclusion on a moral matter, thereby would seem to demonstrate the possibility of reaching an alternative conclusion. And, if the burden of persuasion were placed on the defendant, it would appear quite impossible to establish the requisite absence of capacity. These considerations strongly suggest that the standard for this proposed mitigating defense should not be total deprivation of capacity for moral self-evaluation.

If, however, the requisite effect on capacity for moral assessment is made less stringent, if the standard triggering potential mitigation is partial deprivation or increased difficulty in bringing one's moral critical capacities to bear on an issue, other serious problems present themselves. The principal of these is, I believe, the familiar concern that there would be an enormously large group of offenders who would plausibly be in a position to claim that they, for any number of reasons—poverty, peer pressure, familial influences, etc.—had greater difficulty in comporting their conduct to the dictates of morality, or in reflecting on the morality of their conduct, than would have been the case without such influence. The law operates, because of these concerns, in an understandably conservative manner, asking for relatively well-defined categories—whether they be duress, necessity, provocation or mental illness—before opening itself up to the task of adjudicating claims about which reliable evidence is so difficult to come by. Professor Fletcher's proposal that we focus on "the increased difficulty" of choosing the moral order is a defense whose boundaries go well beyond collective guilt of a nation and, logically, I believe should go beyond difficulties related to one's critical capacities. For ability to do other than what one does is also a culpability condition, and someone might judge what they do to be wrong and yet argue that they have more difficulty than the "normal" person in forbearing from such action. Once set upon this path, we risk serious erosion of the concept of responsibility.

We have here the problem that "influence" does seem clearly to play a role in our overall assessment of an individual's moral blameworthiness. We are drawn to give influence weight, if not in formulating a defense that might provide for exculpation or, like provocation, to mitigation, then in the sentencing stage where mitigating and aggravating factors might be taken into account. But once we give into this understandable pull, I believe we may find ourselves losing moral traction. In our moral assessment of human beings and the wrongs they have done, we do approach, it is to be hoped, any final conclusions we may reach appreciative of the uniqueness of each individual's

life and the innumerable factors, carrying different and largely unknown weight, all of which might be regarded as relevant to fully comprehending and assessing any particular wrong.

We have to know that all that is relevant cannot be before us and that we cannot know with certitude the full significance of what is before us. Even a remotely full assessment of any wrong and the blameworthiness of its perpetrator must be sensitive and marked by tentativeness and humility. It is understandable that one might be inclined to leave such assessments to God. To be sure, sometimes the wrongs are so horrendous that such finely tuned moral assessments seem quite beside the point. We really do not much care how the parenting of Hitler, the Versailles Treaty, the prevalence of anti-Semitism in the culture in which he was raised, or the innumerable other factors that might have had an effect on the man he became were connected with the crimes Hitler committed. We think him fully responsible, and, if we are religious believers, we are unlikely to believe that God would find sufficiently extenuating circumstances to lessen his guilt.

When we turn to the law, we are in a somewhat similar position, for wrongs have been done and call for final, not tentative, decisions. While moral considerations obviously enter into our assessments of legal guilt, we are not disposed to assess the whole of an individual's life and what may have influenced the wrongful act. When a legal response is at issue, we understandably focus on more easily graspable categories, ones relatively more easily ascertainable than many of those factors we regard as relevant in our overall moral assessment of an individual in relation to a wrong that has been committed. In assessing the degrees of guilt of those involved in a particular crime, we shy away from influences, be they one's parents or economic status or the atmosphere in a society, and focus on such questions as, who came up with the idea? How significant was one's role in carrying out the idea? Was the person fearful of the consequences of not acting wrongfully? Was the person more or less identified with the criminal project? Certainly, these pose troubling issues, and our own criminal law of complicity largely ignores them, but I believe their difficulty pales in comparison with what we should face were we to attempt to determine the effects upon one's moral capacities as a consequence of the society in which a wrongdoer lived or the groups of which one was a member.

Professor Fletcher's proposal has brought to my mind a surreal scene that appears in Dürrenmatt's novella, *Traps*,<sup>55</sup> when the defense attorney, to the great distress of Traps, the man he is defending and who takes great pride in his ingenious crime, argues:

Taken all in all, we cannot detect more than an unethical taint, a slight spoilage, such as occurs and must occur in so many average lives. But for that very reason, on the other hand, he is not capable of a culpability that is great and pure and proud; he is not capable of a resolute deed, an unequivocal crime. He is not a criminal, but a victim of the age, of our Western civilization, which, alas, has fallen farther and farther away from Faith, from Christianity, from universals, succumbing more and more to the rule of chaos, so that the individual no longer may look up to a guiding star, and in place of order and true morality disorder and immorality reign, the law of the jungle prevails.<sup>56</sup>

Traps gratefully and proudly accepts the verdict "Guilty!" and seeks the maximum penalty for his beautiful crime.

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55 FRIEDRICH DÜRRENMATT, *TRAPS* (Richard & Clara Winston trans., Alfred A. Knopf 1960) (1956).

56 *Id.* at 100-01.