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Byron at Ground Zero by Peter Berkowitz

A review of *Romantics at War: Glory and Guilt in the Age of Terrorism* by George P. Fletcher. Princeton University Press . 240 pp. \$24.95.

As did the major wars that we waged in the past, so too does the war on terrorism that we wage today put our liberalism --- our fundamental devotion to the principle of the freedom and the equality of all --- to the test. Do we, heirs to an individual liberty that is unprecedented in human affairs, have the wherewithal to fight back, sacrifice if called upon, and see through to a successful result what is bound to be a long and wearying conflict? Do we have the rectitude and the fortitude to honor our principles at home and abroad? Do we have the steadiness and the breadth of vision to grasp the world as it actually is, understanding without partiality or sentimentality our own interests and ideals as well as those of our adversaries?

As before, today's naysayers and doom-tellers proclaim, often with a barely disguised glee, what they take to be incontrovertible truths about liberalism's fatal vulnerabilities. Our liberalism will prove our undoing, they declare, because it promotes decadence, indifference to principle, and blindness to the world's complexities. Lulled into complacency by the sweet rewards of freedom, liberals cannot rise to the multitude of harsh challenges that a dangerous world constantly poses, or even perceive them correctly. In their own defense, liberals can summon history to their side, pointing with pride to the heroism of those who prevailed in the fight for freedom and equality in the Revolutionary War and the Civil War and World War II. But thoughtful liberals and their loyal friends know that the naysayers and the doom-tellers, whatever their motives or their ideals, have a case. Indeed, it would be most unwise for those devoted to liberalism's well-being to turn a blind eye to liberalism's weaknesses.

The root of the problem is that the ideal of equality in freedom --- the good above all that liberalism seeks to promote --- may nurture a tyrannical tendency. Once it has a grip on our souls, freedom grows dissatisfied with being first among goods and sets out to become the one and only good, the good pure and simple. In its quest for unchallenged sway in our hearts and our heads, it can make us soft and selfish, averse to the constraints of that discipline whereby we defer the gratification of some desires for the sake of the satisfaction of higher and better desires, and whereby we show respect for others because it is in our enlightened self-interest to do so. Moreover, inclining us to experience all limits on what we want with equal distaste, the appetite for freedom can encourage impatience with, or

indifference to, the imperatives of principle, promiscuously granting us license to disregard the claims of others, whether at home or in distant lands, when we perceive them to pose a threat of any sort to our freedom. And by focusing our attention on our own preferences and choices (isn't choosing what we want what it's all about?), freedom's pull can lead us to see political life in our own distorted self-image, as entirely constituted by freely choosing agents, obscuring the formative role that associations--friendship, family, the nation, culture, religion--play in shaping our preferences, defining our choices, and constituting our goods.

Of course, one can no more take the measure of liberalism by dwelling on the pathologies to which lovers of freedom are prone than by confining one's gaze to the good of equality in freedom for which liberalism stands. For understanding liberalism --- and how well it has prepared us for the war we did not seek but now must wage and win --- involves taking account of both its pathologies and its glories, as well as of the moral preconditions of freedom, or the beliefs and practices and institutions that enable us to use our freedom wisely.

George p. Fletcher is convinced that our liberalism --- or, as he sometimes prefers, our "liberal individualism" --- has left us ill-equipped for the task of understanding and waging effectively or justly the war on terrorism. Owing to what he regards as liberalism's impoverished moral and intellectual resources, our efforts to comprehend "American policies in the wake of September 11" and to elaborate a "jurisprudence of war" for a new age are beset by a "conceptual morass." Fletcher's aim is to rescue us from it. By showing the extent of our hitherto unacknowledged dependence on, and the untapped insights and inspiration we have yet to draw from, the Romantic tradition --- the tradition of, among others, Blake and Wordsworth and Keats and Byron in England, and of Herder, the Schlegels, and Fichte in Germany --- Fletcher aims to liberate us from our liberalism. In Fletcher's view, "those sympathetic to war in our time are heirs to the Romantic tradition." It is an odd and rather professorial explanation of what is in the newspapers: our response to the war seems so readily explicable without the slightest recourse to the history of ideas. Yet Romanticism does much more, in Fletcher's view, than merely explain the substantial majority of Americans who supported President Bush's military response to the September 11 attacks. The "revival of Romantic sensibilities in the United States," when properly understood, also provides the opportunity for a far-reaching criticism of "the prevailing liberal orthodoxy in our liberal arts colleges, in schools, in the courts, and in the media." Indeed, according to Fletcher,

| liberal principles, drawn from Aristotle and Kant, support the commitment to abstract justice --- an idea that should prevail in our courts but arguably should have only an incidental role in our foreign policy. In the age of terrorism we are torn between our Romantic and liberal selves, and this explains why we fluctuate in our thinking about war and justice.

Yet this early statement of one of Fletcher's central claims weirdly denies another one of his central claims, inasmuch as a large portion of his book is devoted to showing that abstract justice should not prevail in our courts, because it is in need of limitation and correction by a

Romantic concern for the local and the particular and the contextual.

What is striking is how Fletcher's overreaching in the formulation of his thesis, and the confusion in the opening statement of one of his core claims, prefigure the overreaching and the confusion that pervade his book. Although the issues that he addresses --- our support for the war on terror, the law of war, collective guilt, military tribunals, treason, and the nature of punishment --- urgently call for illumination, and the analysis that he offers abounds in fertile observations, Fletcher's rescue mission exacerbates the conceptual morass from which he seeks to extricate us.

A good deal of the overreaching and confusion can be traced to Fletcher's stage-setting and ultimately tendentious rendition of Romanticism. To be sure, it is in many respects unexceptionable. Drawing on Isaiah Berlin's account in *The Roots of Romanticism*, a posthumously published collection of essays, Fletcher characterizes Romanticism as a movement arising in the last third or so of the eighteenth century and extending into the first third of the nineteenth century, a movement that rebelled against the Enlightenment glorification of reason and the intellect. The Romantics, Fletcher reminds us, celebrated emotions, passions, sentiments, and the heart. Whereas the Enlightenment strove for mastery over nature, for outward order, for inner calm and stability, the Romantics sought to submit themselves to "nature, sensual impulse, and the inner world of feeling as the lamp of truth." While the Enlightenment spirit is "reductionist," seeking to resolve the world --- moral and political as well as physical --- into its component parts and ultimately to explain it in terms of simple cause-and-effect relations, the Romantic sensibility is "expansionist," searching ordinary experience and everyday things for latent transcendent forms, harbingers of grand ideas, and intimations of eternity. Above all, the Romantics glorify self-realization through purifying one's passions and becoming true to one's self.

So far, so good. In one critical respect, however, Fletcher departs from Berlin's account of Romanticism. This concerns the centrality that Fletcher assigns to the idea of the nation in Romanticism: he asks it to do a substantial amount of work in his argument, explaining both our nation's coming together in the wake of September 11 and the need to incorporate an appreciation of collective guilt in our understanding of the legal issues arising out of the war on terror. According to Fletcher, there is a distinctive "Romantic perspective on collective action." In contrast to the Enlightenment, which emphasized abstract rights and universal laws, the Romantic movement stressed "partiality and solidarity," particularly with the nation. It is "a view of the world that tends to glorify the nation and war as an expression of patriotism." It places a premium on "the values of brotherhood, and courage, and honor." In Fletcher's view, the idea that individuals realize their true selves in and through the nation is one of Romanticism's constitutive teachings. Fletcher's insistence on the centrality to Romanticism of the idea of cultivating one's self through devotion to the glory of the nation is extremely misleading, in a variety of ways. Actually, the idea is neither peculiarly nor essentially Romantic. The Bible, Aristotle, the Romans, the civic republican tradition --- and, in twentieth-century Europe, fascism and communism --- all taught in one form or another

that the individual's good is intelligible only against the backdrop of the collective good. Worse for Fletcher's argument, not all Romantics believed that participation in the life of the nation was crucial to self-purification and self-realization. Most Romantics did not conceive of self-purification and self-realization in this way. Not even Byron, whom Fletcher cites as exemplary, believed that securing the glory of the nation was crucial to the good of the individual. Byron certainly took his Romanticism seriously, but not the version that Fletcher imputes to him. So little was he attached to the nation that produced him, nourished him, and in whose language he wrote and achieved acclaim that he lost his life on the way to joining the national struggle of another people.

Contrary to Fletcher, the Romantics' core values had no necessary connection with the affirmation of the value of nationhood, and in many ways they were irreconcilable with it. This is certainly the view of Isaiah Berlin, Fletcher's own acknowledged authority on the question. As Berlin observed,

| The values to which the Romantics attached the highest importance were such values as integrity, sincerity, readiness to sacrifice one's life to some inner light, dedication to some ideal for which it is worth sacrificing all that one is, for which it is worth both living and dying. You would have found that they were not primarily interested in knowledge or the advance of science, not interested in political power, not interested in happiness, not interested, above all, in adjustment to life, in finding your place in society, in living at peace with your government, even in loyalty to your king, or to your republic. You would have found that common sense, moderation, was very far from their thoughts. You would have found that they believed in the necessity of fighting for your beliefs to the last breath in your body, and you would have found that they believed in the value of martyrdom as such, no matter what the martyrdom was martyrdom for. You would have found that they believed that minorities were more holy than majorities, that failure was nobler than success, which had something shoddy and something vulgar about it. The very notion of idealism not in its philosophical sense, but in the ordinary sense in which we use it, that is to say the state of mind of a man who is prepared to sacrifice a great deal for principles or for some conviction, who is not prepared to sell out, who is prepared to go to the stake for something which he believes, because he believes in it --- this attitude was relatively new. What people admired was wholeheartedness, sincerity, purity of soul, the ability and readiness to dedicate yourself to your ideal, no matter what it was.

The nation was at most one ideal among many to which an individual infused with the Romantic sensibility might dedicate himself, heart and soul. For Herder and Fichte, the nation occupied a place of honor. But taking the tradition as a whole, devotion to the nation certainly had no priority. And compared to the lure of giving oneself wholly and purely to the love of a woman, or to the creation of art, or to the union with nature, or to the worship of God, the nation was for most Romantics a decidedly less worthy object of devotion. Most Romantics were too lofty or too snobbish for such participation in the dreams of the masses.

As peripheral as the glorification of the nation is to the core values of Romanticism, it is even more peripheral to the explanation of our response to the terrorism of September 11. Fletcher's efforts to conjure one notwithstanding, there is hardly any puzzle to speak of here. Fletcher observes that our response to the war on terror reflects a sea change from the nation's response to the war in Vietnam. That is true; but the sea change is perfectly understandable in light of the nature of the two wars, or at least in light of the nature of popular perceptions of them. When, in 1966, Muhammad Ali proclaimed his reason for refusing to be drafted --- "I ain't got no quarrel with them Viet Cong. No Viet Cong ever called me nigger" --- his geopolitical wisdom could certainly be questioned, but his sense that his government wished to ship him around the world to fight somebody else's misguided war spoke for a substantial portion of the population.

By contrast, few Americans suffer doubts about the nature of our quarrel with the Al Qaeda terrorists and with regimes that harbor them, or feel confusion about our reasons for sending the military to Afghanistan to search out and destroy them. Yet Fletcher's argument makes it necessary to re-state the obvious. We support the war on terror not because there is a recrudescence of the Romantic spirit in America, but because there is anger and grief over the loss of more than three thousand fellow citizens in the World Trade Center, in the Pentagon, and in the hijacked commercial airliners turned into weapons of mass murder; out of self-interest in defending our shores and our selves from future attacks by adversaries who have shown in word and deed their contempt for human life, their hatred for us, and their willingness to use against us weapons of mass destruction; and out of a principled desire to stand up for our way of life, self-government based on equality in freedom. With the images of the Twin Towers crashing to the earth and a great black smoldering gash in the Pentagon indelibly engraved in our minds; with the memories of the innocent men, women, and children who suffered horrific deaths still vivid; with knowledge of the forever scarred lives of the victims' friends and family members weighing upon us; and with the fear of attacks with biological and chemical and nuclear weapons looming over us, few Americans doubt that the war on terror is their war. On reflection, it is not our support for the war that has something Romantic about it, it is Fletcher's fanciful interpretation of our response.

For Fletcher appears bent on finding in our support for the war something transcendent, grand, eternal. Indeed, for Fletcher the war on terror throws into sharp relief a "fundamental and enduring conflict" in our moral and intellectual life, an unbridgeable divide between the claims on us of Enlightenment rationalism and the claims on us of Romanticism, between abstract liberal rights and the bonds of collective solidarity, between the life guided by universal reason and the life guided by particular passion. But Fletcher cannot make up his mind about the nature of the choice that we confront, as evidenced by his telling us that it does not matter whether the Rationalists or the Romantics are right and also that it matters very much; that we cannot reasonably choose among the fundamental alternatives and also that we might be able to choose reasonably if we give both alternatives fair consideration;

that the very fact of the fundamental and enduring conflict implies the truth of Romanticism and also that the truth of Romanticism is still very much an open question. Conveniently, he tells us all this in a single paragraph

| Our concern is not whether the Enlightened or the Romantic thinker should gain the upper hand, whether one of the positions is right or wrong. There is no neutral way to choose between the cerebral appeal of universal rationality and the siren of passionate subjectivity. We are caught, as the Romantics would say, in an ongoing struggle between two conflicting world views. Whether we can resolve this struggle depends ultimately on whether we come down in favor of the Rationalists or the Romantics. Without prejudging that question, we have much to learn by opening our minds to the Romantic alternative. At stake is appreciating the way in which Romantic views percolate through our culture, and influence our attitudes toward nationhood, honor, and war.

Still, for all the conflicting indications packed into a few sentences, one implication of Fletcher's undertaking is tolerably clear, though he himself cannot see it or state it clearly, and it is the primacy of its liberalism. By insisting that the choice between rationalism and Romanticism should be governed by reason and not by passion, by careful and systematic study and not by impetuous sentiment, by "opening our minds" and not by going with our hearts, Fletcher sides with liberalism against Romanticism. For, as he openly and correctly affirms, Romanticism denigrates systematic rational inquiry and instead glorifies the wisdom of the heart. The problem is that Fletcher's either/or is an artifice of his own. To reject the Romantic exaltation of the wisdom of the heart, as Fletcher does implicitly, is not necessarily to opt for the intellect as opposed to emotion, reason against passion, books rather than the wonders of nature. For prior to inquiry it is mere dogmatism to deny that reason, as the liberal tradition teaches, is capable of providing a reasonable account of the place of emotion and passion and sensuous experience in a good life.

The examination of legal issues that occupies much of Fletcher's book suffers from a similar misunderstanding about the roles of, and the relations between, liberalism and Romanticism. Although Fletcher's central claim is that recourse to the spirit of Romanticism, in particular its supposed focus on the collective action and the nation as an agent, is necessary to clarify the legal challenges thrust upon us by the war on terror, the cases of "conceptual confusion" that he seeks to dispel invariably involve affronts to the dignity of individuals. Certainly the alternative approaches that he favors in regard to the two most important legal topics that he considers --- the prosecution of individuals by international bodies for crimes in violation of international criminal law and the constitutionality of the Bush military tribunals --- involve an enhancement or a refinement of the legal system's respect for individual dignity. Indeed, far from effecting a liberation from liberalism, Fletcher's legal analysis betrays a kind of hyper-liberalism.

Consider Fletcher's discussion of the post-Nuremberg regime of international criminal justice. He worries about the new focus on the responsibility of individuals rather than the traditional concentration on the responsibility of states. Why should the International

Criminal Court, Fletcher wonders, prosecute Slobodan Milosevic, a legitimate head of state, for crimes against humanity committed under his leadership but impossible without the involvement of the Yugoslav military and the vital support of at least substantial segments of the Yugoslav people? One commonsense answer is that leaders, as representatives of their people, assume a special position of responsibility, which entitles them to praise and honor when things go well and exposes them to blame and guilt when things go awry. According to Fletcher, however, holding individual persons criminally responsible for violations of the laws of war reflects the biases of liberal individualism. And it conflicts with what, but for those biases, should be evident about the collective nature of those crimes:

| The facade of individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. The four crimes over which the court has jurisdiction --- aggression, crimes of war, crimes against humanity, and genocide --- are deeds that by their very nature are committed by groups and typically against individuals as members of groups. Whatever the pretense of liberal international lawyers, the crimes of concern to the international community are collective crimes. It is true that as a formal matter only individuals are prosecuted, but they are prosecuted for crimes committed by and in the name of the groups they represent. Once the collective nature of these crimes comes into proper focus, once we overcome the liberal bias that has prevailed since Nuremberg, we should be able to see the influence of collective action in domestic criminal law as well.

Individual criminal responsibility obscures other forms of responsibility. No doubt many liberal international lawyers have energetically deluded themselves and self-righteously crusaded around the world to persuade others that the charges they level, the trials they participate in, the guilty verdicts they secure, and the punishments they urge upon international tribunals flow from universal rule-of-law principles when in fact they represent a kind of rough --- and often justified --- victor's justice. And yet Fletcher is wrong to mistake the biases and narrowness of vision typical of some contemporary liberals as intrinsic to the liberal perspective.

The fact is that one can reject every critical tenet of Romanticism and embrace every critical tenet of liberalism and still affirm with Fletcher that in cases of violation of international criminal law the formal structure of liability should not camouflage the collective personality inherent in the crime. The individual offenders are liable because they are members of the hostile groups that engage in unlawful aggression, commit "widespread or systematic" cruelty, and perpetuate harms with a design to eliminate opposing cultures.

Indeed, one can affirm the place of the collectivity in violations of international criminal law without abandoning the idea of individual liability. For the "collective personality" of the crime, the membership in a hostile group, in no way obviates the special moral and political responsibility of leaders and high-ranking government officials for channeling collective energy, making critical decisions, and issuing orders that result in criminal violations.

Moreover, Fletcher misunderstands the real provenance and the underlying principle of his criticism of international criminal law, both of which are not Romantic but liberal. Typically, those who invoke ideas of "collective guilt" and "collective responsibility" do so in order to justify punishments directed against a nation as a whole or to absolve individuals altogether. Fletcher, by contrast, wishes to reject the "excesses of Romanticism," according to which either the nation as a whole is punished or all individuals are viewed as innocent since they were merely authentically carrying out their nation's particular ideals. Yet it is on liberal grounds, not on Romantic grounds, that he rejects these excesses. Fletcher rejects the idea of collective punishment for the standard liberal reason that such punishments fall upon the innocent along with the guilty, and he rejects the idea of absolving all individuals because his liberalism teaches him that respect for individuals requires that they be held accountable for their deeds.

In a surprise move, Fletcher invokes the idea of collective guilt as a "mitigating factor" to justify tempering the punishments that the international criminal courts mete out to individual heads of state. It is a "way of thinking about collective guilt ... that is compatible with and indeed enhances the principle of individual responsibility." It draws on the practice of distributing liability in the law of torts on the basis of relative fault and the defense of provocation against the charge of murder:

| My plea is that we begin to think, in general, about criminal guilt in line with this principle of distribution according to relative fault. If a nation bears guilt for the homicidal tendencies of its people, then individual perpetrators should arguably be less guilty and their punishment should be mitigated. As the provoked killer is guilty only of manslaughter, the killers who act in the name of the nation should --- if the analogy holds --- be liable for a mitigated offense.

What Fletcher calls "a humanistic defense of collective guilt" is an appeal to background conditions and the context of action designed to protect individuals against conviction for crimes for which they cannot rightly be held responsible, or rather fully responsible. Despite his confusing introduction of the term "humanistic," Fletcher's moral intention has a distinctly liberal lineage, though of course the conviction that one better respects the individual by seeing his actions as the result of impersonal social forces beyond his control may be an illicit extension or abuse of the liberal idea.

Not that Fletcher has a scintilla of sympathy for the likes of Milosevic. It is just that punishing him as if he were solely responsible for crimes perpetrated with the support of his nation (or substantial portions of it) ascribes to him, in Fletcher's view, an autonomy that he did not possess. And it might give the world an excuse "to convict and move on," to "blame the primary figures and ignore the guilt of collectives for generating the crime, thereby deceiving ourselves that we have solved the problem." In other words, Fletcher wants us to be Rationalists and not Romantics, to think with our heads and not run with our hearts.

It would go too far to say that Fletcher's argument in effect brings the "abuse excuse" to bear on defendants in the international criminal justice system: it was the culture that made them do it. Still, in wishing to diminish individual criminal liability because of the impersonal social and cultural forces that inform and perhaps even impel it, it is Fletcher's hyper-liberal individualism and not his Romanticism speaking: his exalted sense of what autonomy requires, and not his rejection of autonomy, is what leads him to conclude that Milosevic lacked it.

Similarly, in regard to President Bush's executive order of November 13, 2001, authorizing the use of military tribunals to try non-citizen terrorists connected to the September 11 attacks, Fletcher's uncompromising condemnation has little to do with Romanticism and everything to do with a certain interpretation of the imperatives of liberal individualism. Fletcher's liberalism knows no half-measures or departures from principle. He is adamant that civil liberties must not be compromised for the sake of security, that the Constitution must not be suspended even in times of war and national emergency. But these principles --- which will find few opponents when stated so abstractly --- are really where the hard constitutional question arises: what provisions does the Constitution make for balancing civil liberties against security in wartime?

Fletcher's analysis of the constitutional question is at best strained, and at moments it is incendiary. His view, developed in an article in *The American Prospect* last January, and in subsequent exchanges in that magazine with Cass R. Sunstein and Laurence Tribe, and now elaborated in his book, is that the Bush military tribunals are entirely without foundation in the Constitution, and represent a harm to the nation as grave, if not more so, than the mass murder perpetrated by Al Qaeda. "For ordinary citizens the critical day was September 11," Fletcher ominously observes. "For lawyers and civil libertarians the missiles fell again on November 13." The crux of the problem, according to Fletcher, is "the clear language of the Constitution (Article III, section 2, and the Sixth Amendment), which guarantees a jury trial in every criminal prosecution." Since the Al Qaeda terrorists are accused of crimes, they should receive regular jury trials, with all of the protections federal law guarantees to criminal defendants. In Fletcher's view, *Ex parte Quirin*, the Supreme Court decision of 1942 unanimously upholding President Roosevelt's use of military tribunals to try eight German saboteurs captured in the United States, provides no valid precedent for the Bush military tribunals. This is because that decision, according to Fletcher, should be seen as restricted to spies in times of war. Fletcher can scarcely contain his scorn for those who disagree: "To me personally, it is shocking that any serious thinker about American law would even consider arguing that the Bush order is compatible with the basic principles of the U.S. Constitution." And in a book that trumpets its ambition to rescue us from liberalism, Fletcher cannot restrain himself from mocking, as he did in *The American Prospect*, the supposed failure of Sunstein and Tribe to uphold the liberalism embodied in the Constitution: "we find two of our leading and supposedly liberal professors of Constitutional law making precisely these

kinds of arguments." Yet Fletcher's scorn notwithstanding, the argument for the constitutionality of Bush's military tribunals to try Al Qaeda terrorists is relatively straightforward.

Against Fletcher's contention that *Quirin* covers only the use of military tribunals to try spies in times of war, Sunstein pointed out that Fletcher misunderstands the holding of *Quirin*: "Fletcher suggests that the *Quirin* Court allowed the defendants to be convicted for spying, not for violations of the laws of war. This is wrong. The Court refused to assess the spying charges and ruled only on the charges involving violations of the laws of war." And as Tribe observed, Fletcher "wrongly asserts that the Court confined its notion of 'unlawful combatants' to those whose sabotage was limited to spying. We must surely be cautious in extending *Quirin*'s reach, and I continue to regard the decision itself as dubious. But trying terrorists by commission falls within *Quirin*'s logic not because their crimes are 'worse than spying' but because they similarly aim to kill by stealth in what is effectively a time of war."

Justice Harlan Stone's opinion in *Quirin* bears out Sunstein's and Tribe's interpretation. The German spies were charged with violating the international common law of war and with specific violations of the congressionally enacted Articles of War. The Court noted that Congress had authorized the president to use military tribunals in cases involving violations of the laws of war. And by waging war as "unlawful combatants," the German saboteurs had, the Court held, violated the law of war:

| By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Under *Quirin*, Bush's military tribunals are constitutional to the extent that the Al Qaeda terrorists violated the law of war by fighting as "unlawful combatants": certainly the military tribunals would be applicable to terrorists who passed without uniform into the United States and waged war by attacking civilian and military populations and property.

Now, one may think that *Quirin* is a poorly reasoned decision. One may quarrel with the historical and theoretical grounds of the Court's distinction between unlawful and lawful combatants. One may argue that the case law cited in *Quirin* does not support the holding. One may favor reversing *Quirin*. One may believe that the Bush administration would be

making a tactical blunder by exercising the constitutional option to use military tribunals. One may even deplore a supposed violation of cardinal tenets of liberalism that military tribunals always and everywhere embody. But what one cannot plausibly argue is Fletcher's position, that the logic of Quirin fails to cover the Bush military tribunals.

So what is really driving Fletcher? In effect, he seeks to legalize or to constitutionalize a dispute about morality and prudent politics. The moral intention that he is bent on upholding through this gambit seems to be the general extension of the rule of law and fundamental procedural protections to all criminal defendants regardless of their crime. Yet again, this reflects not a Romantic requirement but an aspiration to honor a liberal promise. Or, rather, a certain radicalization of the liberal promise of equality in freedom. Or, better still, a romanticization of the liberal promise that all individuals are equal before the law. Recoiling at what he regards as an impurity in the liberal promise embodied in our Constitution --- its failure of complete universalization --- Fletcher rewrites it. He is a Romantic for a universalized liberal individualism.

But as his account of Romanticism was lopsided, so too is the liberalism that he romanticizes and seeks to universalize parochial and truncated. Early in his book, commenting on the need to go to school with the Romantics, Fletcher asserted that "the great moral philosophers of our time have all been liberal individualists. The list includes John Rawls, Ronald Dworkin, Amartya Sen, Joseph Raz, Thomas Nagel, and Bruce Ackerman." With all due respect to Fletcher's friends and colleagues and conference buddies, all of whom are leaders in their field, it is nonsense and not a tad illiberal to restrict the great moral philosophers of our time to the leading liberal individualists. Over the last fifty years, the criticism of liberalism has a long and distinguished lineage. What of Hannah Arendt, Alasdair MacIntyre, Pierre Manent, Michael Oakeshott, Leo Strauss, Charles Taylor? Indeed, what of Isaiah Berlin himself, whose appreciation of the richness and the limits of liberalism was itself informed by the Romantic criticism of liberalism?

Fletcher's parochial and truncated version of liberalism prevents him from seeing either the full range of the resources of the liberal tradition or the liberal roots of Romanticism. For the liberal tradition is not just about procedural justice. In fact, it is rich --- from Locke on education, to Montesquieu on the spirit of the laws, to Smith on the division of labor, to Mill on representative government --- in explorations of the moral and material preconditions of self-government. And Romanticism is not a simple or radical alternative to liberalism. In its focus on the individual's need to make and to re-make the world, to step around and over convention, to defy rules and reason for the sake of the heart, it reveals itself to be a particular interpretation of what it means to be by nature free, and so it reveals itself to be a child of liberalism.

As always, it is incumbent upon us to recognize and take precautions against the vulnerabilities to which we are exposed by the very freedom that we seek to defend. One properly turns to Romanticism to understand certain limits of liberalism --- its tendency to

suggest that problems of moral and political life can be solved by the application of abstract or procedural reason; its proclivity to forget that autonomy is an achievement and that individuality depends on discipline; its propensity to overlook that individuals become stronger and freer in association with other individuals. Yet Romanticism properly understood is not an alternative to, or an enemy of, liberalism. It is a powerful predisposition, especially in a world defined by liberalism's fundamental moral premise: equality in freedom. It is an expression of our longing for wholeness in an age in which the very notion of authoritative ideals has become questionable, and in which individuals are therefore compelled to choose the ends by which they will live and die.

Finally Romanticism must be understood in light of the liberalism that gives it life. In war, as in virtually every aspect of moral and political life worth discussing, both the head and the heart must be honored. Recognizing its power to give the head its due and the heart its due is crucial to giving liberalism its due, which is to our advantage in the altogether worthy effort to use and to protect our freedom wisely.