# BOOK REVIEW

# BONDING JUSTICE

THE BOND. By George Fletcher. Hart Publishing. 2009. Pp. 295. $17.95 (cloth).

*Reviewed by Robert Steinbuch*[*]

## INTRODUCTION

George Fletcher is a preeminent law professor at an Ivy-League law school.[1] His scholarly writings have garnered significant acclaim among academics and practitioners in the legal field.[2] But outside of the often mis-labeled "academy," Fletcher's writings are likely not as broadly known. That might change with his first foray into fiction.

Fletcher has written an exciting and entertaining novel—*The Bond* (Hart Publishing 2009)—along the lines of popular legal fiction pieces such as *One L: The Turbulent True Story of a First Year at Harvard Law School* (1977)[3] and *The Firm* (1993). But *The Bond* is indeed quite more, as well.

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[1] *See* http://www.law.columbia.edu/fac/George_Fletcher (last visited May 16, 2010).

[2] *Id.*

[3] I realize that Turow claims that ONE L is a memoir, but its level of hyperbole belies that claim.

While *The Bond* overall is fiction, the themes undoubtedly are real—as are some of the specific events themselves. Fletcher has wonderfully and seamlessly woven together a love story, an analysis of the theoretical and intellectual complexities of law (far too often overlooked by lawyers, judges, and academics alike), an exploration of academic politics, and a brief history of select nineteenth century radical reformers. All four of these themes are interesting and exciting in their own right.

## GROSSLY OPTIMISTIC

Fletcher tells his story through Adam Gross, an idealistic, yet slightly jaundiced, law professor who far more accurately depicts law professors than Turow's exaggerated and one-dimensional Kingsfield. Gross loves teaching, has a genuine admiration for his students (albeit in a marginally avuncular fashion), and struggles with, well, everything. He is a complex character, who is torn by his own strongly-held beliefs—and, ultimately, his own identity. This personal conflict drives Gross to seek both truth and justice in his own limited way through the process of teaching itself.

Here Fletcher particularly distinguishes *The Bond* from *One L*. *One L* was written from the perspective of a law student. The professors, therefore, were all but forced to become caricatures given the prism though which they were viewed. The opposite is true in *The Bond*. And, in fact, here Fletcher also separates himself from Gross. If Fletcher ever had the naive optimism of Gross, it has since matured into a realism inevitable with age and experience.

The context of the book—law school—presents a particularly opportune pallet for compelling story development, as it, like the law that it analyzes, is rife with drama, conflict, and resolution. This setting allows Fletcher to present the most enlightening aspect of *The Bond* to the lay reader—how legal academics develop legal analysis in the classroom and beyond. *The Bond* offers the core concepts of law school in a fashion both accessible and interesting to the intelligent non-lawyer and lawyer alike. This is no easy task. Legal novels too often rely on curiosities in the law that on the surface appear enlightening, but in reality are insignificant. Other books in this ge-

nre focus mostly on the emotional conflicts of the legal or law-school process (recall Turow) rather than substance—on the apparent belief that the latter does not provide for an interesting narrative. Fletcher debunks this approach in *The Bond*, focusing exactly on truly difficult questions in the law in the context of an engaging personal story.

## ONE KILLING OR TWO

In *The Bond* Fletcher delves head on into the question of how the law should and hesitantly does address abortion when viewed alongside of pre-natal infanticide. Fletcher himself often has encouraged this discourse in his own classes. In *The Bond*, to the chagrin of his politically-correct colleagues more concerned with pursuing personal and political agendas than enlightenment and edification, Gross initiates a discussion of the legal consequences of killing a pregnant woman and what she is carrying in her womb (obscuring language intended). The conversation in Gross's legal philosophy class resulted in one student asserting that what a pregnant mother carries is equivalent to a tumor or an appendix in the student's superficial attempt to by-pass the philosophical challenge that Gross presented. But Gross sees this for the sleight-of-hand that it is.

Indeed, Gross focuses on the most difficult question in the abortion/life debate—and one that I witnessed first-hand when I worked on the Judiciary Committee in the U.S. Senate—whether when somebody kills a pregnant woman, he is guilty of two murders or just one. In 2004, Congress criminalized as homicide the killing of an unborn child when a pregnant woman is attacked.[4] While opponents of this bill wanted to prevent assaults on the fetus, they refused to recognize any kill-

[4] Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 & 10 U.S.C. § 919a (2006)). For a broader discussion of these issues, see Robert Steinbuch, *The Butterfly Effect of Politics over Principle: The Debate over the Unborn Victims of Violence Act and the Motherhood Protection Act*, 12 QUINNIPIAC HEALTH L.J. 223 (2009).

ing/death of the baby/fetus whatsoever.[5] That is, like the self-assured law student in *The Bond*, these groups argued essentially that what a pregnant mother carries is equivalent to a tumor or an appendix. But, as the Hasidic student in Gross's class recognized, the issue is far more complicated. According to his dogma, "[although a]ccording to the Talmud, the fetus becomes a person when the head crowns, . . . the fetus is worth something, *even if it is not yet a full person*" (pp. 214-15). A contrasting position was offered by Gross's student Jaime Sullivan, the secularized former Catholic Priest, who continues to struggle with his identity and convictions. He presented a view that life begins only at the "quickening" (p. 49). He recognizes that this is perhaps an arbitrary line, but one that created the same consequences for actions toward the fetus regardless of the actor. While Fletcher's characters engage in a nuanced evaluation of the complexities of this legal, political, moral, and religious issue, most of this analysis was ignored in the actual debate in Congress. For sure, there were moments when the complexities of the issue were broached, but for the most part, the essential questions were left unaddressed.

In fact, Fletcher delves into the nuances of the issue by having Gross discuss with his class an exam question in which an expectant mother is attacked by a cult member intent on killing the woman's unborn fetus. The twist is that the mother was on her way to have an abortion and winds up thanking her attacker. So the question is whether the attacker is guilty of a crime when he not only did what the mother wanted, but, in fact, had his actions ratified by her.

Unlike the Congressional debate, Fletcher—through Gross—begins to tackle the vexing problem of how we need to conceptualize this legal conundrum. Indeed, he addresses this challenge not with linguistic legerdemain or political prattle, but through real, thoughtful, and reasoned analysis. And he does so through the Socratic method characteristic of law-school education. As such, Gross pushes his class—and ulti-

[5] *See* NATIONAL ORGANIZATION FOR WOMEN, "UNBORN VICTIMS" ACT DOES NOTHING TO DETER VIOLENCE AGAINST WOMEN, http://www.now.org/issues/legislat/200305.html#unborn (last visited May 16, 2010).

mately *The Bond*'s readers—toward self-enlightenment. That is not to say that Fletcher thrusts any one position on his readers. *The Bond* is neither Pro-Life nor Pro-Choice. It does, however, cause readers to analyze their beliefs with more rigor than I suspect many have done in the past.

## WE DON'T DO "DUE PROCESS"

For Gross this process of illumination comes with a high cost. Gross is assaulted by so-called colleagues with a differing political and social agenda for engaging in this intriguing examination of abortion and infanticide that contradicts the accepted dogma of legal academia. They happily trample Gross's individual rights, in a blatant power grab, during a process designed to topple the Dean and marginalize Gross. As they attack him with anonymous accusations, without affording him any opportunity to confront his accusers, Gross's opponents readily admit that the law that they teach and preach does not apply to their own actions: "Anyway, here within our [law school] community we do not operate like the courts. We prefer informal procedures. There's no need for the guarantees of due process" (p. 169).

Indeed, this lack of fidelity to established principles of equity is a growing problem in higher education. For example, the American Association of University Professors (AAUP) thoughtfully describes this phenomenon in the context of the abating of objective criteria for promotion and tenure and the concomitant rise of the illegitimate requirement of political and social conformity with entrenched institutional power brokers:

> In evaluating faculty members for promotion, renewal, tenure, and other purposes . . . universities have customarily examined faculty performance in the three areas of teaching, scholarship, and service . . . . [T]he[se] terms are themselves generally understood to describe the key functions performed by faculty members.
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> In recent years, [the AAUP] has become aware of an increasing tendency on the part not only of administrations and governing boards but also of faculty members serving in such roles as department chairs or as members of promotion and

> tenure committees to add a fourth criterion in faculty evaluation: "collegiality."
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> . . . [This] poses several dangers. . . . [This] exclude[s] persons on the basis of their difference from a perceived norm. . . . [C]ollegiality may be confused with the expectation that a faculty member . . . display an excessive deference to administrative or faculty decisions . . . .
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> . . . [It also] chill[s] faculty debate and discussion. Criticism and opposition do not necessarily conflict with collegiality. Gadflies, critics of institutional practices or collegial norms, even the occasional malcontent, have all been known to play an invaluable and constructive role in the life of academic departments and institutions. They have sometimes proved collegial in the deepest and truest sense. Certainly a college or university replete with genial Babbitts is not the place to which society is likely to look for leadership. . . . The very real potential for a distinct criterion of "collegiality" to cast a pall of stale uniformity places it in direct tension with the value of faculty diversity in all its contemporary manifestations.[6]

As such, the AAUP well recognizes the importance of intellectual diversity amongst faculty rather than its flaccid substitute—identity politics.

## THE STAIN OF IDENTITY POLITICS

In *The Bond*, Fletcher takes on identity politics, ridiculing the paternalistic claim by the two antagonist feminist faculty members at the fictional Regina Law School that female students in Gross's class comparing pre-natal homicide with legal abortion were in particular need of a grade adjustment due to their gender—to compensate them for the "difficulty" they might have had in handling the exam question reflecting the

[6] *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON COLLEGIALITY AS A CRITERION FOR FACULTY EVALUATIONS, http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm (last visited May 16, 2010).

violent murder of a mother's unborn fetus/child. The notion that such an exam question would engender the ire of the politically correct *Gedankenpolizei* might seem the absurd province of exaggerated, and perhaps trite, fiction. Not so. Fletcher himself suffered similar indignation when the then-Dean of Columbia Law School, David Leebron, threatened Fletcher due to his inclusion of an almost identical question on his own criminal law exam.[7]

As law professors, both Gross and Fletcher eschew inconsistent positions. Indeed, law professors routinely distinguish law from its baser cousin politics on the ground that the former must have unifying and overriding principles. Conflicting positions in the law, therefore, chip away at its legitimacy and undermine the stature of those who teach and practice in it. Thus, Gross revels when his attackers do exactly that. *The Bond*'s antagonists suffer from the incompatible beliefs that while women are undoubtedly entitled to equal rights, those in Gross's class singularly should be viewed as inherently too delicate to be able to rationally handle his (and Fletcher's) written exam question. Thus, as Fletcher puts it, when the two attacking professors present their indictment of Gross, he "began to glimpse the twilight zone between reason and slapstick" (p. 33). I suspect Fletcher felt the same, notwithstanding that he was forced to endure this maelstrom of political correctness. Gross fares well enough also.

In this regard, *The Bond* is reminiscent of Philip Roth's *The Human Stain* (2003). Roth's story itself is a reflection of the life of Anatole Broyard, who, like the protagonist Coleman Silk, was a light-skinned African American who years prior passed himself off as white in order to avoid racism. Ironically, Silk, a classics professor, is falsely accused of being a racist, but

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[7] *See* Foundation for Individual Rights in Education, *Academic Freedom under Assault at Columbia Law School; Dean Threatens Criminal Law Professor*, Oct. 4, 2000, http://www.thefire.org/article/130.html (last visited May 16, 2010). Leebron has gone on to become President of Rice University. *See* http://www.professor.rice.edu/professor/President's_Bio.asp?SnID=1387887652 (last visited May 16, 2010). Leebron later readily endorsed the application of notions of "openness and rigid adherence to academic freedom" to *others*. Scott Jaschik, *A Pentagon Olive Branch to Academe*, INSIDE HIGHER ED., Apr. 16, 2008, http://www.insidehighered.com/news/2008/04/16/minerva.

is precluded by the past that he never disclosed from using his own story to demonstrate the folly of the charges. Although Fletcher's narrative is far different than Roth's, the reader is left with very much the same sense of despair regarding this aspect of contemporary academia (and perhaps society) after having read (and lived through) both stories.[8]

Indeed, *The Bond* has some broader similarity to Roth's parable in that both focus on this persistent issue in the context of a love story (albeit the details of each could not be any more dissimilar), both have a recurring reflection on historical events outside the scope of the characters, and both employ feminist professors as the antagonists. In *The Bond*, however, the love interest is a sophisticated and intelligent colleague (the Dean's wife, in fact) who engages in her affair at the expense of her sometimes horn-adorning, slightly-superior (in credentials and attitude) cuckold. In *The Human Stain*, the paramour, Faunia Farley, is of a different age, status and intelligence than Silk, although similarly statured to her continually-jealous ex-husband, Lester.

## NOT SO SIGNIFICANT OTHERS AND OTHER INDIGNITIES

Fletcher further insightfully criticizes legal academia's lack of consistent fidelity to due process when he describes the hiring by Regina Law School of what is not-so-euphemistically referred to in the academy as the "trailing spouse" of a faculty applicant. In *The Bond*, Regina hired the Dean's less significant other—that is, his trailing spouse—in order to secure the more qualified former. I never fully understood the import of this not-so-uncommon practice until one dean, in response to my inquiry about whether a trailing spouse of a particular candidate was of the same quality as the "principal," exclaimed rhetorically: "Are they ever?" Could you imagine suggesting in corporate America that accepting a position would be contingent on the contemporaneous hiring of a spouse or other com-

[8] For a further discussion of these issues see Robert Steinbuch, *Racist*, 25 HARV. BLACKLETTER L.J. 199 (2009), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=625512.

panion? But in legal academia, this is just one of several examples of unprincipled hiring practices: political ideologies have colored employment decisions; objective criteria of quality have been discounted due to favoritism, cronyism, nepotism, and hiring someone with whom an official is sleeping; and accepted notions of conflict-of-interest recusal have been abused or completely ignored by critical players in the hiring process, to name a few.[9]

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[9] For further discussion of identity and academic politics in actual practice see Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to De-Identified Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 185 n.23 (2009) (discussing a "Memorandum from Professor[, and Acting Associate Dean,] Lynn C. Foster, William H. Bowen School of Law, University of Arkansas at Little Rock, to Acting Dean John M.A. DiPippa, William H. Bowen School of Law, University of Arkansas at Little Rock (undated)," which stated that individuals with a certain political/philosophical preference should be excluded from a committee assignment). The committee-assignment memorandum also focused on demographic status of faculty under consideration for committee assignments: "there is only one person [from a particular demographic], although [name redacted] is a [member of a particular demographic] . . . [Also, i]t would be nice to have a [member of a particular demographic]." (Committee-Assignment Memorandum, on file with author). The brazenly exchanged notion that political/philosophical preference should be the basis for administrators to unilaterally exclude faculty from membership on important decision-making bodies is particularly troubling and hypocritical given that academics and others routinely proclaim that the personal views of judicial nominees on issues such as abortion should not be disqualifying. *See, e.g.*, Michael Saul, *Supreme Court Nominee Sonia Sotomayor 'Open,' Will Follow Law on Abortion Issue, Says Friend*, N.Y. DAILY NEWS, May 29, 2009, http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29_supreme_court.html ("[Supreme Court Nominee Sonya Sotomayor] will follow what she thinks is the law on that, and her personal beliefs will not interfere with that analysis because my view of her is that she does not allow her personal beliefs to interfere with her analysis of legal issues."). Similarly, the Missouri Chief Justice, Michael A. Wolff, writes on the Court's official webpage:

> Court opinions are not personal beliefs. Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge's personal views about the subject matter, nor are they pronouncements of political policy. A review of the Court's opinions would show that decisions are based on laws enacted by the General Assembly, previous court decisions, court rules, constitutional provisions or other guiding legal authority. Different judges may differ on what a legal provision means or what legal principle controls a case. An individual judge may write a separate opinion dissenting or concurring with the opinion of the Court; there you may find an expression of one judge's individual views about what a legal provision means or what legal principle should control.
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> . . .

Perhaps Fletcher and I naively single out hiring in legal academia for scolding in the context of broader unfair employment practices still found elsewhere in society, but such behavior in law schools (even though, thankfully, far from universal) puts these actions in painful contradiction to the catechism from which we as educators (of law, no less) preach, i.e., that decisions will be made primarily based upon considerations of merit. I nonetheless still hold onto the belief that for the most part faculty hiring is a merit-based system. Indeed, Fletcher and I have been fortunate enough to secure wonderful positions through the existing system. But, like the antiquated approach to collegiate admissions of "legacy" credit (read: favoritism) still employed at some institutions, it is time to bury certain faculty-hiring practices that unfortunately still crowd out considerations of excellence.

## CONCLUSION

Lawyers tend more than most to veer into attempts at literature. They do so, I believe, because the nature of the vocation calls for a facility with language. Regrettably, these attempts produce mixed results. But when one abled advocate is able to combine this skill with a unique and compelling story, the result is refreshing. Fletcher offers us exactly that stimulation in *The Bond*. His behind-the-scenes look into the operation of law schools in the greater context of political and moral struggles takes complex issues and presents them in accessible prose.

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> Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons [sic] beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.

Michael A. Wolff, *Law Matters: What Do Judges Believe . . . Really?*, Feb. 27, 2006, http://www.courts.mo.gov/page.jsp?id=1080. All this is not to say that personal beliefs don't shape the evaluative process. They do. *See generally, e.g.,* Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007); Robert Steinbuch, *An Empirical Analysis of the Influence of Political Party Affiliation on Reversal Rates in the Eighth Circuit for 2008*, 43 LOY. L.A. L. REV. 51, 64-65 (2009). However, as McKee indicates, this is something to be embraced, not used as a basis for exclusion. *Cf.* McKee, *supra*, at 1723-24.

*The Bond* is a must read for anyone interested in law and justice. It is a singular piece of literature deserving of both academic and popular attention.