

With Justice for Whom? The Presumption of Moral Innuence in Rape Trials

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George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Addison-Wesley Publishing Co. 1995). 304 pp.; \$24.00.

The O.J. Simpson case is but a recent example of the high profile criminal trials that have garnered unprecedented public attention and scrutiny. In March, 1991, for example, no one could ignore the brutal beating of Rodney King, captured on videotape and broadcast innumerable times before and after the trials of the police officers accused in the case. And certainly few will forget the aftermath of the state's prosecution in Simi Valley, California, when an all-white jury acquitted the police officers.

The upsurge of rage culminating in the Los Angeles rebellion demonstrated the politicized nature of the criminal trial: The police officers' acquittals epitomized for many the larger political reality that African-Americans continue to be uniquely victimized by police power in a nation that has historically refused to do anything about it.¹ To witness a continued disregard for racism evokes profound despair in communities like South Central Los Angeles. If, after all of this time, not even the objective proof of a videotape could convince a jury that white police officers had brutalized a Black² man, what could?

For many African-Americans, the real source of rage stemmed not from the videotape, but from the trial's removal from the racially diverse city of Los Angeles to a white middle-class enclave in Simi Valley, which produced a jury that included no African-Americans.³ The acquittal in the King case illustrated vividly that this case was not simply about one man's experience. Rather, African-Americans viewed it as an indictment of the racism that remains deeply entrenched in this country. Rodney King could have been any African-American, and therein lies the foundation for fear, anger, and hopelessness.

It is this identification with the victim in the context of high-profile criminal trials that Professor George Fletcher describes in his book, *With Justice for Some*.⁴ Fletcher expresses anger that the criminal justice system subjects victims to further victimization and characterizes the reaction and riots following the King acquittal as an example of victims engaging in the "political trial." The victims of whom he speaks—homosexuals,

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1. See generally DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992) (reviewing the history of the American criminal justice system's treatment of Black defendants).

2. I use "Black" and "African-American" interchangeably throughout this Review. I capitalize "Black" because, as Kimberle Crenshaw puts it, "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982)).

3. See Tanya E. Coke, Comment, *Lady Justice May Be Blind, But Is She a Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994); see also David Margolick, *As Venues Are Changed, Many Ask How Important a Role Race Should Play*, N.Y. TIMES, May 23, 1992, at 7.

4. GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995).

Blacks, Jews, and women—have taken to the streets to protest the wrongs wrought by indefensible jury verdicts.⁵ They identify with the actual victims, sharing “their disempowerment, their neglected voices, their disadvantaged position in American society.”⁶ Seeking to express his own sense of outrage, Fletcher has taken to the pen to articulate what he perceives to be the foundational causes of these groups’ injustice. Angry at his fellow lawyers for refusing to rethink the foundation of our legal system following the King trial, his book attempts to do just that.⁷

Warning that lawyers “love to blame imaginary targets[,]” Fletcher cautions against blaming juries for indefensible verdicts.⁸ The jurors are, he explains, merely the “messengers of a defective legal system.”⁹ Instead of blaming jurors for harboring racist or homophobic views, Fletcher maintains that defense lawyers are largely to blame when those views contaminate jury deliberations and verdicts. He remains committed to excoriating defense attorneys until his discussion turns to rape trials. In that context, his empathy for the victims pales in comparison to his distress over the possibility that “morally innocent” defendants will be convicted of rape. He shifts gears abruptly, admonishing that “defending the interests of victims need not derogate from the rights of criminal defendants. When the supporters of a victim-based cause are willing to make an example of a morally innocent man, we encounter the downside of politics.”¹⁰

Fletcher’s shift in the context of rape cases is the primary focus of this Review. The Review first examines his discussion of other criminal trials in order to situate and contextualize his approach to “reforming” rape law. In his analysis of these cases, Fletcher resists recognizing how the forces of institutional racism, homophobia, class bias, and misogyny shape the dynamics of the trials and verdicts in criminal cases. The Review then focuses on his transition into the legal system’s (mis)treatment of men accused of rape. The impact of his proposed “solution”¹¹ to ensure that defendants receive “fair” treatment in rape trials reveals a profound commitment to ensuring that women’s experiences of rape remain invisible.

5. “They seek their dignity in the heat of controversy. They fight back in the courts. When the frustration becomes intense, they take to the streets.” *Id.* at 4.

6. *Id.*

7. Although the American Bar Association immediately assembled a blue-ribbon task force following the L.A. riots, Fletcher informs us that not even “the best and the brightest in the legal profession” could comprehend the legal system’s structural defects. *Id.* at 5. He dismisses as “pap” the task force’s recommendations of precluding changes of venue to communities with few minority residents and sending more pro bono lawyers to represent minorities and economically disempowered citizens. *Id.* He attributes the superficiality of these suggestions to the fact that most lawyers are naturally conservative, resisting change. Moreover, they “know virtually nothing about the philosophical foundations of their system, and they are parochial about alternatives tried in other legal systems.” *Id.*

8. *Id.* at 4.

9. *Id.* at 5. The fact remains, however, that jurors *are* prejudiced. As Justice O’Connor has observed: “It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.” *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J., dissenting); see also *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1560 (1988) (finding that studies show Black jurors more likely to convict when the victim is Black and white jurors more likely to convict when the victim is white); cf. *Black and White: A Newsweek Poll*, NEWSWEEK, Mar. 7, 1988, at 23 (reporting that while 66% of Blacks believe that the criminal justice system treats Black defendants more harshly than white defendants, only 34% of whites share the same view).

10. FLETCHER, *supra* note 4, at 131.

11. Fletcher presents ten “solutions” to remedy the structural defects of the legal system. See *id.* at 241–58. While some of his solutions are addressed throughout this Review, the primary emphasis remains on the solution of a “two-tiered verdict” which has particular relevance to rape trials. See *infra* text accompanying notes 86, 88, and 98.

I. PANDERING TO PREJUDICE AT THE VICTIMS' EXPENSE

Fletcher begins his book with a survey of four high-profile criminal cases in which a homosexual man, a Black man, and two Jewish men were the victims. Through a combination of Monday-morning quarterbacking and supercilious pontification, Fletcher explores how these trials could have turned out differently. His primary purpose in outlining each case is to show how these cases could have resulted in convictions had defense attorneys been precluded from exploiting jurors' biases against homosexuals, Blacks, and Jews. Such exploitation is designed to facilitate jurors' propensity to blame the victim rather than to punish the defendant. By focusing on this particular aspect of each trial, however, Fletcher supports his thesis by consistently minimizing costly mistakes made by the prosecutions along with other factors that could have contributed to the verdicts.

Fletcher traces the emergence of the political trial to 1978, when Dan White was convicted of manslaughter instead of murder in the death of Harvey Milk, an openly gay councilman in San Francisco.¹² After White asserted successfully what has become notoriously known as the "Twinkie defense"¹³ to mitigate his guilt, gay activists took to the streets to protest the verdict. Not surprisingly, they perceived the verdict as demonstrative of society's historical contempt for homosexuals.

Fletcher's central criticism of the Milk case is grounded in his disdain toward the professionalization (or privatization) that has invaded criminal trials. He blames psychiatric testimony for legitimating the Twinkie defense, which allowed the jury to find Dan White guilty of a lesser charge.¹⁴ Fletcher maintains that defense psychiatrists should not have been permitted to shape "with imperial claims of expertise" the jury's sense of malice and premeditation (which he interprets as "legal and moral questions").¹⁵

Besides allowing expert testimony to influence unduly the jurors' assessment of culpability in the Milk case, Fletcher concludes that it allowed the defense to play on the jurors' homophobia. He contends that while the defense did not explicitly pander to homophobia among the jurors, it "played on the theme from the outset" by harping on traditional views that would covertly appeal to homophobic prejudice.¹⁶ He implies that the defense was able to keep homosexuals off the jury by seeking jurors who would perceive White as "the type of person who characteristically upheld law and order."¹⁷ Yet the only proof Fletcher offers to demonstrate that the defense actually succeeded in keeping gays off the jury is summarized as follows:

12. White also murdered George Moscone, another political rival, moments before killing Milk. He was convicted of manslaughter for the deaths of both Milk and Moscone.

13. The "Twinkie defense" is predicated on the notion that junk food can cause antisocial or violent behavior. FLETCHER, *supra* note 4, at 32.

14. *Id.* at 13, 28-36.

15. *Id.* at 47. His criticism of expert testimony is also woven throughout his discussion of both the state and federal prosecutions in the Rodney King case. Specifically, he argues that expert opinion in the King case concerning police departmental policy on the reasonable use of force was "just as moral and value-laden as were the questions of malice and accountability in the Dan White trial." *Id.* at 47, 57-61. His aversion toward expert testimony leads him to call for a reform that would impose more rigid restrictions on the admissibility of expert testimony. *See id.* at 255-56 (Solutions Eight and Nine).

16. *Id.* at 15.

17. *Id.* at 34.

Since the candidates for the jury had to declare their marital status, it was not too difficult to ferret out probable gays¹⁸ who would identify strongly with Harvey Milk. [The defense attorney] could use his peremptory challenges (without any need to give reasons) to ensure that the jury reflected . . . middle-class values . . .¹⁹

Fletcher's suggestion that homosexual jurors by definition eschew "middle-class values" is, to say the least, debatable.²⁰ He also insinuates that gays and lesbians are so easily identifiable that the defense had no trouble "systematically excluding"²¹ them from the jury.

But Fletcher also hints that the prosecutors made a mistake by introducing into evidence White's taped confession. White's recitation of the financial and political pressures that drove him to murder was apparently so eloquent and moving that it brought tears to several jurors' eyes.²² Moreover, the police officer to whom White made his confession (and the prosecution called as a witness) testified that White was an "exemplary individual" whom the officer "was proud to know."²³

Given the impact of the confession combined with the defense strategy aimed at showing that the killings were entirely inconsistent with White's personality, the jury arguably could have concluded he was indeed suffering from some sort of mental illness.²⁴ While one cannot underestimate the gravity and violence of homophobia in this country, Fletcher tries too hard (without sufficient proof) to insist that the defense strategy of inflaming such prejudices was ultimately responsible for the jurors' willingness to believe in the Twinkie defense.

Fletcher next reviews the prosecutions of the police officers who beat Rodney King. In the context of the state prosecution, he accurately describes the root of the problem as the decision to change the venue of the trial from Los Angeles to Simi Valley. He criticizes the appellate court that ordered the change of venue for failing to recognize that "the local African-American community[] had a right to participate in the adjudication of one of its most fundamental grievance, namely, the recurrent and systematic suffering of police abuse."²⁵

While intimating that the composition of the jury and the police officers' behavior may have reflected racism, Fletcher stops short of conducting a thorough investigation into whether and to what extent racism shaped both King's experience and the verdict.²⁶

18. Probable gays?

19. FLETCHER, *supra* note 4, at 34.

20. This stereotypical portrayal of gays and lesbians ignores that many enter into heterosexual marriages precisely because they seek a "middle class existence." See Trip Gabriel, *When One Spouse is Gay and a Marriage Unravels*, N.Y. TIMES, Apr. 23, 1995, at 1, 22. For an example of the schism that has emerged among gays and lesbians concerning the legalization of same-sex marriage, compare Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Disassemble the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993) (arguing that legalizing same-sex marriages will valorize marriage as an institution) with William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1421 (1993) (discussing the desire of many gays and lesbians to participate in the institution of marriage).

21. FLETCHER, *supra* note 4, at 41; see *supra* note 18.

22. FLETCHER, *supra* note 4, at 34. Although the prosecution only sought to introduce the transcript of the confession, "the defense insisted on playing the full tape. The tactic was well taken. The impact of this concentrated exposure to the defendant's humanity seems to have generated some sympathy for White among the jurors." *Id.*

23. *Id.* (footnote omitted).

24. Less than two years after being released from prison, Dan White committed suicide. *Id.* at 36.

25. *Id.* at 42.

26. For example, while suggesting that the prosecution never presented a firm image of the police—it vacillated between portraying the officers as racists on one hand, and as racked by guilt for engaging in a cover-up on the other hand—Fletcher seems to empathize with this confusion, explaining that it was not easy to depict the police as racists. *Id.* at 44-45. Despite Laurence Powell's reference earlier that evening associating Blacks with "Gorillas in the Mist," Fletcher

Despite acknowledging what perspective Black jurors could have brought to the deliberations, he does not address the systematic racism that might lead white jurors to conclude, "You know, we rely on the police to make sure that 'his kind' of people do not endanger our neighborhood."²⁷ Instead, Fletcher maintains that the real problem with the prosecution's strategy was its failure to recognize the impact that expert testimony regarding the officers' use of force would have on the jury.²⁸ But given that the jury included no Blacks, Fletcher ignores the opportunity to examine the prejudice that might have animated the white jurors' perceptions of both Rodney King and the white police officers. Though expert testimony may have been problematic for the prosecution, the jurors' racialized life experiences certainly may have accounted for their belief that the beating was justified "because the police officers reasonably believed King's movements were menacing."²⁹

In contrast to his disregard of how white jurors' racism specifically affected the verdict in the Rodney King case, Fletcher examines closely how Black jurors' anti-Semitism might have affected their verdict in the trial of an Arab immigrant named El Sayyid Nosair, who was charged with murdering Rabbi Meir Kahane. While Fletcher concedes that "[n]o one knows . . . whether this anti-Semitic propaganda had seeped into the minds of either the blacks or the whites who voted to find Nosair not guilty of homicide,"³⁰ he emphasizes the connection between Nosair's acquittal to the defense's claims that a "Jewish Defense League conspiracy" was involved.³¹ More specifically, Fletcher suggests that this defense strategy served to manipulate potentially anti-Semitic attitudes held by the largely Black jury.³²

Fletcher's emphasis on "statistical prejudice" eclipses his politically correct disclaimers found elsewhere.³³ He reasons that the defense was successful in appealing to jurors' prejudice because Blacks with no university education are statistically prone to view Jews

cautions that "[i]t is hard to know" what Powell meant. *Id.* at 45-46. Such an "unsocialized" or "off-color remark does not define Powell's essence as racist and evil. He might even be more honest about his racial sensibilities than better-trained contemporaries who are savvy enough to avoid politically incorrect comments." *Id.*

27. *Id.* at 43. Despite the impact jurors' racism may have on their view of the case, Fletcher warns that the legal system must not seek "representative" juries by imposing "quotas." To do so would undermine the "principles of neutrality and impartiality." *Id.* at 55. This observation leads to one of his recommended reforms, which is to limit the number of peremptory challenges for both the defense and the prosecution "and to let the lawyers use them as they see fit." *See id.* at 251; *cf.* Coke, *supra* note 3.

28. *See supra* note 15.

29. Coke, *supra* note 3, at 386 n.164 (citation omitted). This may explain why a white female juror asserted that, even though handcuffed and lying on the ground, King remained "in full control" and was resisting arrest. *Id.*

30. FLETCHER, *supra* note 4, at 84.

31. *Id.* at 75-86.

32. *Id.* at 85-86. Fletcher also concedes, however, that the verdict might be explained in light of the jury's investigatory zeal. One juror (Fletcher does not reveal his race) actually raised his hand in the middle of the prosecutor's examination of a witness, asking if he could pose a question to the witness. Remarkably, the judge agreed, provided that the juror presented the question in writing. *Id.* at 85.

Fletcher also criticizes defense tactics for keeping Jews off the jury. One Jewish woman was seated on the jury over the defense's objections. She was eventually dismissed for two reasons. She knew a prosecutorial aide, and the clerk of the court erred in asking in open court whether each side accepted the jury, which required the defense to state out loud its objection to this particular juror. Fletcher describes these factors as "peripheral human dramas." *Id.* at 79.

33. *Id.* at 75 ("[T]here is no way of knowing how much [the jurors] were influenced by prejudiced assumptions about gays, blacks, and Jews. The most I can claim for the discussion in this chapter is that it explores the mechanism by which anti-Semitism might have influenced jury deliberations . . .").

as “power-mad” and “conspiratorial.”³⁴ Moreover, he cites “Christian anti-Semitism” as a factor that inflames negative stereotypes. Thus, he deduces:

In view of the relatively high rate of Christian observance among African-Americans, hostility toward “Christ-killers” might run higher than in the population as a whole. In view of the fact that jury service draws the less-well-educated (and presumably more religious) segment of the public, the likelihood that black jurors will harbor anti-Semitic attitudes approaches one in two.³⁵

Again, however, Fletcher attempts to minimize significant problems and mistakes in the prosecution’s case that most likely had an impact on the jury’s decision to acquit Nosair. He insists that the jury’s anti-Semitic leanings led it to validate “chimerical evidence” pointing to the possibility that the defendant had been framed. Yet jurors later explained their verdict,³⁶ citing contradictions within the prosecution’s case.³⁷ And even though “at least one black juror fought hard for conviction,”³⁸ Fletcher essentially ignores the jury’s explanation for its verdict, claiming that, either as an alternative or supplementary account, the “defense’s manipulation of potentially anti-Semitic attitudes cannot be disregarded.”³⁹

Conceding that it would be unfair to attribute anti-Semitism to the Black jurors who served on the Kahane⁴⁰ case, Fletcher nevertheless cautions, “[y]et the danger [of anti-Semitism] is there, and the disturbing consensus reached by these two juries requires that we explore how they could have reached their surprising verdicts.”⁴¹ Thus, it is not surprising that he presents anti-Semitism as a partial explanation for the jury’s acquittal of a young Black man named Lemrick Nelson, who was accused of murdering Yankel Rosenbaum in Crown Heights.

In the context of the Rosenbaum case, Fletcher infers that the Black jurors’ natural vulnerability to anti-Semitic appeals were exacerbated by the unscrupulous motives he attributes to the Black defense attorney. While berating defense attorneys in general, not once does Fletcher suggest that white defense attorneys attempt to ingratiate themselves

34. *Id.* at 73-74. According to the Anti-Defamation League, 20% of all Americans harbor anti-Semitic views. Thirty-seven percent of all Blacks hold stereotypical prejudice against Jews; among Blacks who have no university education, the number rises to 46%. *Id.*

One juror on the Kahane case later described the educational background of the jury as a “mixture of high-school and college graduates.” *Id.* at 79. Given the conclusions Fletcher reaches about the increased probability of anti-Semitism among less educated Blacks combined with his intimations that Black jurors were more likely to buy a conspiracy theory in the Kahane case, he apparently assumes that the Black jurors were the high school graduates.

35. *Id.* at 74.

36. Nosair was acquitted of murder and all other charges relating to the death of Kahane. He was convicted of assault with respect to two other victims.

37. The jurors described too many inconsistencies among the testimony of the 51 witnesses the prosecution presented. Fletcher describes this as “evidentiary overkill.” While “too many minor inconsistencies” emerged, he maintains that “[d]iscrepancies are normal.” It was the defense that generated “an obsessive interest in discrepancies.” He expresses irritation toward the jurors, who “wanted to compare the precise details presented by the prosecution’s witnesses.” FLETCHER, *supra* note 4, at 80-81. The jurors also pointed to the prosecution’s failure to locate the lethal bullet, the absence of eyewitnesses, and sloppy police work in explaining its verdict. *Id.* at 84.

38. *Id.*

39. *Id.* at 86.

40. *Id.* at 75.

41. *Id.*

with white jurors based on their race.⁴² But he intimates that Lemrick Nelson's attorney might have been engaging in a conspiracy of his own.

Our understanding of anti-Semitism is so primitive that we do not know how a skilled African-American lawyer (and [the defense attorney] is black) might trigger these biased sentiments in the minds of the jurors. My hypothesis as I began to watch the trial on videotape was that [the attorney's] strategy would be to put himself in the role of a victim, and thus elicit the jury's sympathy and induce *at least the six black jurors to identify with his resistance against the Jewish power arrayed against him in the courtroom*. The more overbearing the Judge came across, the more sympathy and identification might flow forth from the jurors.⁴³

Yet Fletcher recites a litany of mishaps within the context of this trial, ranging from the trial judge's remarkable arrogance⁴⁴ to the prosecution's failure to seek a conviction on a lesser included offense.⁴⁵ Fletcher presents these facts as isolated pieces of the puzzle, making no connections between them as possible bases for the outcome in this case. Most glaring is his derogation of the significant reasonable doubt created by the prosecution's own evidence that certainly could have accounted for the jury's verdict.⁴⁶

Moreover, Fletcher's discussion of race in the context of the Rosenbaum case essentially ignores the fact that the defendant was Black. Riots broke out in connection with the Crown Heights case because of the belief among Black residents that Jews received preferential treatment from the police.⁴⁷ The disturbances began when a Jewish man's car spun out of control pinning two Black children against a wall.⁴⁸ The appearance of preferential treatment became painfully obvious when police seemed more concerned with helping Jews escape the mounting tensions in the area than with helping the two

42. To the contrary, one of Fletcher's more illuminating observations is that white male prosecutors have proven to be the most effective advocates on behalf of minority or female victims. *See id.* at 118-19.

That Prosecutor Marcia Clark relied on Fletcher's book in persuading Judge Lance Ito to allow the families of Nicole Brown and Ronald Goldman to remain in the courtroom during the entire trial of O.J. Simpson is a credit to her. *See* Patricia Holt, *A Sympathetic Vote for the Victimized*, S.F. CHRON., Feb. 13, 1995, at E6 (Books). Suggesting that Clark is a bit too cold and distant, Fletcher wonders whether the Los Angeles District Attorney "made the mistake of picking one attractive white woman to prosecute in a case where the victim [Nicole Brown] was also an attractive white woman." FLETCHER, *supra* note 4, at 148. Curiously, even though the Simpson trial had not yet begun when the book was published, he consistently speaks of the case in the past tense—as though Simpson had already been acquitted. *Id.* at 147-48.

43. FLETCHER, *supra* note 4, at 93-94 (emphasis added). So sure is Fletcher that Nelson's attorney was pandering to the Black jurors that, in describing a major confrontation between the attorney and trial judge, Fletcher states: "No doubt to [the attorney's] regret, the jury was in the next room. He would have relished the role of the browbeaten black lawyer." *Id.* at 98.

44. The trial judge constantly reprimanded the (Black) defense attorney, sometimes instructing him in front of the jury on the proper way to question witnesses. *Id.* at 94-95. The judge also "sucked candies during the trial" and took telephone calls from the bench. *Id.* at 95. Perhaps most significantly, the judge "blurt[ed] out disbelief in the prosecution's case." *Id.* at 96.

45. Fletcher opines that the prosecution made a fatal mistake by not seeking a conviction based on aiding and abetting, for which Nelson could have been convicted of manslaughter. *Id.* at 101-02. He maintains his argument despite the judge's jury instruction on complicity, dismissing the actual instruction as including "arcane expression ordinarily used in tort law." *Id.* at 102.

46. For example, Fletcher lambastes the jury for possibly seizing on a "minor fact barely mentioned at trial." The minor fact was that the arresting officers had applied for a reward for having apprehended Nelson in connection with the murder. *Id.* at 99. The defense's suggestion that the jury should deem more credible the officers who had not applied for a reward is condemned by Fletcher as "totally irrational." *Id.* at 101. Moreover, the prosecution failed to inform the defense of two African-American officers who were at the scene; the evidence showed that the defendant was left-handed, which created significant problems for the prosecution to explain why a knife would be in his right pocket; in addition, the prosecution failed to test blood found on his left pocket. *Id.* Fletcher minimizes these facts as "slip-ups" by the prosecution. *Id.*

47. For instance, police routinely closed off streets in Crown Heights (where 80% of the residents are Black) so that Jewish residents could observe the Sabbath and other holidays. *Id.* at 87.

48. The car was part of a police-escorted motorcade that twice a week accompanied the "Rebbe" to visit a cemetery where his family members were buried. *Id.* at 86-87.

children who remained pinned behind the car.⁴⁹ This backdrop of perceived discrimination against Blacks and preferential treatment toward Jews may well have affected the jurors' assessment of the police officers' credibility at trial.⁵⁰ Nonetheless, Fletcher's primary attention to race concerning the dynamics of this trial was to illustrate how a Black lawyer helped a largely Black jury to tap into its anti-Semitism to deliver a patently unjust verdict.

II. SHIFTING GEARS IN RAPE CASES

George Fletcher is so distressed at the violence acquittals inflict upon victims of political trials that he argues in favor of designing "some form of appeal . . . when juries fail to convict."⁵¹ He reasons that such a remedy can be envisioned by looking at cases where "victims have fought back and won. This is not the story of a minority, but of a majority gender that for too long has received the short shrift in American criminal justice."⁵² Turning his discussion to the further victimization women endure in the context of rape trials, Fletcher traces "to the long tradition of defending men against rape" the etiology of blaming the victim in criminal trials.⁵³

But Fletcher's constant flip-flopping over whether women are oppressed within the criminal justice system reaches dizzying proportions within pages of this promising declaration. His empathy for victims engaged in the political trial soon evaporates. He warns that the "heavy hand"⁵⁴ of the political trial emerges as a "distortion of justice" in rape cases.⁵⁵ His polemic against sinister defense machinations shifts seamlessly to a grave concern over the possibility that defendants who are "morally innocent" will nevertheless be convicted of rape.

Although Fletcher consistently argues that the acquittals in the Milk, King, Kahane, and Rosenbaum cases sent the message that victims had "no value at all,"⁵⁶ his logic takes a curious turn in the context of rape cases. Suddenly it is the defendant who is in dire need of protection.⁵⁷ Just because a woman's "bodily autonomy" has been violated through coerced sex does not mean that criminal liability must follow.⁵⁸ Under the present system, he explains, we cannot know whether an acquittal constitutes a devaluation of the victim or whether it simply means that the defendant "could not be fairly blamed for the apparent evil."⁵⁹

49. *Id.* at 88.

50. See Robert D. McFadden, *Teen-Ager Acquitted in Slaying During '91 Crown Heights Melee*, N.Y. TIMES, Oct. 30, 1992, at A1 (reporting that jurors voted to acquit because they concluded that "the police were not honest"), cited in Coke, *supra* note 3.

51. FLETCHER, *supra* note 4, at 105.

52. *Id.* at 105.

53. *Id.* at 108.

54. The unstated implication is that the "hand" belongs to feminists.

55. FLETCHER, *supra* note 4, at 131.

56. Not surprisingly, missing from his discussion is the message that Patricia Bowman and women in this country received when William Kennedy Smith was acquitted of rape. Cf. *infra* note 65 and accompanying text.

57. As Susan Estrich has pointed out, "[t]he usual procedural guarantees and the constitutional mandate that the government prove the man's guilt beyond a reasonable doubt have not been considered enough to protect the man accused of rape." SUSAN ESTRICH, *REAL RAPE* 5 (1987).

58. FLETCHER, *supra* note 4, at 179 ("The violator might have a good excuse for unwittingly acting in disregard of the victim's rights: He did not know and could not fairly have been expected to know that he was violating her preference not to engage in sex.")

59. *Id.* at 179-80.

Focusing on the theory of consent, Fletcher examines the rape trials of William Kennedy Smith and Mike Tyson.⁶⁰ His approach to victims' rights takes on an entirely different perspective here, which is reflected in both the substance and tone of his argument. Despite indulging the reader with a brief synopsis of the law's deplorable treatment of women alleging sexualized violence, the epistemological underpinnings of his assumptions emerge quickly, informing the reader that rethinking the legal system does not mean challenging patriarchal constructions of the law.⁶¹ Instead, his analysis of rape cases merely reinforces a masculinist world view.⁶² In his discussion of Mike Tyson's conviction for raping Desiree Washington, it is no longer the mistreatment of victims that threatens to undermine the integrity of the legal system; rather, the divination of moral innocence of rape defendants becomes essential to preserving the rule of law.

Before presenting his theory about moral innocence, however, Fletcher gives us a glimpse of his attitude toward sexualized violence through his descriptions of the William Kennedy Smith and Mike Tyson cases, along with the Anita Hill/Clarence Thomas hearings. Discussing the Tyson case, Fletcher points out:

Tyson flirted with several of the contestants [at the Miss Black America pageant]⁶³ but left with Washington's hotel-room phone number and her expressed interest in seeing him on a date. At 1:30 a.m. the following morning, Tyson called Washington from his limousine. Though she was ready to turn in, she agreed to meet him, *spent 15 minutes preparing herself*, and then joined him in the back seat of his limousine. They then drove to Tyson's hotel and walked to his suite together. When they entered the suite, she accompanied him into the bedroom and *chose* to sit on the edge of the bed.⁶⁴

In the Smith case, Fletcher explains that victim Patricia Bowman "had to deal with some anomalous facts, such as her leaving her pantyhose in the car and the absence of signs of rough handling on her clothes."⁶⁵ Finally, Fletcher recounts the Hill/Thomas hearings, asserting that "[t]he public was challenged to believe the *cool, lawyerly* testimony of Anita Hill that Thomas, in private conversation, had said nasty things about

60. Fletcher describes these cases as involving men who "found themselves charged with ignoring the protestations of women who said they said no." *Id.* at 114. Perhaps his textual spin was intended to avoid acknowledging that Smith and Tyson were charged with rape.

61. As Diane Polan explains, "The whole structure of law—its hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values—defines it as a fundamentally patriarchal institution." Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 301 (D. Kairys ed., 1982), cited in Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338, 1364 n.114 (1989) (book review).

62. In a similar manner, Fletcher's conceptualization of self-defense reinforces this view in cases where battered women strike back at their abusers. "A sound claim of self-defense" is established when the abuser "was coming toward [his partner] with the *declared purpose of severely beating her*, [then] there would be little doubt that she could respond by killing him." FLETCHER, *supra* note 4, at 134 (emphasis added). Claiming that feminists are simply seeking to "adopt the venerable technique of blaming the victim for his own demise[.]" *id.* at 137, Fletcher provides no response to feminist scholarship identifying the sex bias inherent in the legal construction of self-defense. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

63. By contrast, one writer reports that Tyson's behavior toward the other pageant contestants involved "groping, fondling and sexually explicit, expletive-riddled remarks." Sonja Steptoe, *A Damnable Defense: Not Only Did Mike Tyson Lose His Rape Case, But His Lawyers Perpetuated a Racial Stereotype*, SPORTS ILLUSTRATED, Feb. 24, 1992, at 92.

64. FLETCHER, *supra* note 4, at 114 (emphasis added).

65. *Id.* at 115. Apparently, the fact that Bowman and Smith had planned to walk along the beach was insufficient to explain why she would take off her pantyhose; the only plausible explanation was that she intended to have sex.

pubic hairs and sexual prowess."⁶⁶ Encapsulating the meaning of these three cases in one sentence, Fletcher surmises: "1991, it seems, was the year in which the American public had to reevaluate traditional attitudes about whether women had an inclination to lie . . . about the sexual aggression of men with whom they had had a falling out."⁶⁷

A. Valuing Sexual Autonomy

In the context of rape cases, Fletcher emphasizes the need to locate "voluntary sexuality." Sexual autonomy gives women the power to say "yes" or "no" to sex, freeing them from patriarchal domination. He explains:

No one can be regarded as a person unless he or she can say no, effectively, about the things that matter most. It is unquestionably desirable to get the point across to men that they should take no for an answer and risk the loss of sexual pleasure, even if the female secretly wants them to persist.⁶⁸

But, because the concept of consent is inherently "chimerical" or "ephemeral,"⁶⁹ Fletcher insinuates three pages later that women are incapable of even knowing whether they have consented to sex. Elaborating further, he invokes rather grandiloquently the ubiquitous image of the scorned woman:

Sexual relations carry the potential for deep emotional bonding. But when that potential is abused in dissonance, the victim *suffers scarring in the place of romantic union*. The only buttress between abuse and bonding, between rape and love, is the thin prop of consent. Yet we are not entirely sure what we mean by this chimerical assertion of personality called consent. We do not know well enough what happens in the mind or heart for us to say that a woman wants and decides in favor of sexual union with a man. One wonders whether consent to sexual intercourse is ever fully autonomous—unaffected by circumstances, atmosphere, romancing, or the promise of emotional reward. And if consent is as shaky as it appears to be, we should pay more attention to what it means for men as well as women.⁷⁰

Fletcher thus concludes: "Whether and when women actually consent to sex may be a question too elusive for courts and juries to ponder."⁷¹ His answer to this dilemma is stated as follows: "What counts in the end is not the inner life of the person consenting but the reasonableness of the person who relies on the external indices of willing cooperation."⁷² What remains unclear is how this supposed reformation differs from the standard that is already in place. Fletcher's focus on the reasonableness of the perpetrator's view renders a woman's consent irrelevant, privileges the man's perspective while obliterating the woman's, reinforces dangerous resistance requirements, and ignores the roles that race and class play in rape prosecutions.

66. *Id.* at 116 (emphasis added). His obvious implication is that had Thomas really said the things Hill claimed, any respectable woman would be reduced to hysterics in recounting the remarks; see also Charles Bremner, *Photo Souvenirs "Motivated Visit to Tyson's Bedroom,"* THE TIMES (London), Feb. 1, 1992, at 9 (characterizing Desiree Washington's testimony during Mike Tyson's rape trial as "[c]hippy and articulate, despite the harrowing topic at hand").

67. FLETCHER, *supra* note 4, at 116.

68. *Id.* at 121.

69. He also uses the words "magic," "mystification," and "ineffable" to describe that elusive "inner moment called consent when [a woman] commits her personality." *Id.* at 124.

70. *Id.* at 123 (emphasis added).

71. *Id.* at 124.

72. *Id.*

B. *The Quest for Consent*

Fletcher emphasizes repeatedly the need to divine consent to determine whether a rape has been committed. His approach toward detecting consent is inherently masculinist, maintaining the status quo of women's oppression under rape law. His proposals for rethinking the ways in which the legal system can be reconceptualized simply reinforce the practice of placing the burden on women to prove their innocence in rape trials; yet, he presents his recommendations under the rubric of change.

Discussing the Smith case, he explains that the trial judge "sensibly"⁷³ denied the prosecution's motion to introduce the testimony of three women who would have testified that "Smith had made strong, sexual advances toward them . . ."⁷⁴ Arguing that Smith could not be expected to defend himself against four charges at once, Fletcher concludes that the testimony would simply have been too prejudicial.⁷⁵ The possibility that the testimony would have proven Smith's propensity to disregard a woman's lack of consent appears irrelevant to Fletcher. Instead, he expresses relief that the ruling "protected Smith against being labeled a man who forces himself on women. When the jury began to deliberate, *his reputation was intact.*"⁷⁶

Conversely, Fletcher condemns the trial court's exclusion of witnesses in the Tyson case.⁷⁷ Here, three women would have testified for the defense that they saw Tyson and Washington kissing in his limousine on the night of the rape. Fletcher queries, "If they were amorous at the outset, isn't it probable that they were so inclined a half-hour later?"⁷⁸ Clarifying his point, Fletcher claims that the defense would not have introduced the evidence to show that because Washington consented to kissing in the limousine that she consented to sex. "There was no suggestion that she was estopped from changing her mind . . . It's just that, by common experience, we know that if she was necking at 1:30 A.M., then we should recognize the increased probability that in fact she consented to sex at 2:00 A.M."⁷⁹ Presumably his standard of reference for "common experience" is that of the defendant.

Fletcher concludes that the trial court ruled wisely in the Smith case, but tragically in the Tyson case, concerning the admissibility of past conduct. But his conclusion ignores one critical point noted by Professor Susan Estrich: "[E]vidence that a man has abused

73. *Id.* at 120.

74. *Id.* at 119.

75. *Id.* Fletcher apparently intended for his readership to include mostly nonlawyers. In Florida, similar fact evidence of other crimes or acts is admissible to prove a material fact such as *absence of mistake*. FLA. STAT. ANN. § 90.404(2)(a) (West 1989) (emphasis added).

76. FLETCHER, *supra* note 4, at 120 (emphasis added).

77. Fletcher intimates that the trial judge's former role as a sex crimes prosecutor inclined her to favor the state in almost every discretionary ruling. *Id.* at 158. One commentator took an even dimmer view, describing the judge as "a blonde . . . known locally as the 'Ice Queen.'" Charles Bremner, *Race Prejudice Threatens Trial*, THE TIMES (London), Jan. 29, 1992, at 7.

78. FLETCHER, *supra* note 4, at 120.

79. *Id.* at 122. This confidence in the wisdom of "common experience" must have accounted for one reporter's conclusion as to why Desiree Washington sustained vaginal abrasions after being raped. Although an expert testified that consensual sex rarely results in such abrasions, the reporter opined, "[t]hen again, consensual sex only rarely involves" a woman weighing 108 pounds and a man weighing 225 pounds. Robert Wright, *TRB: Tyson v. Simpson: The Issue of Reasonable Doubt*, THE NEW REPUBLIC, Apr. 17, 1995, at 4, 4.

other women is much more probative of rape than evidence that a woman has had consensual sex with other men is probative of consent."⁸⁰

Had the court permitted Tyson to present the testimony of the three witnesses (who would have testified about Washington and Tyson kissing), Fletcher opines that this evidence could have established that Tyson made a reasonable mistake in thinking Washington "was also consenting in the bedroom."⁸¹ Instead of focusing on Tyson's "reasonable reliance," the jury was forced to focus on "an ineffable moment in Washington's psyche. He became guilty or not guilty not on the basis of what he did and thought but on the basis of what the jury perceived that she thought."⁸²

In Fletcher's estimation, what Washington did, said, or thought should not have determined Tyson's guilt.⁸³ And, he does not wish to get "bogged down in irrelevant ideological disputes, such as whether a woman has a right to go to a man's room in the middle of the night and then say no to sex."⁸⁴ Invoking notions of women as inherently unpredictable and unreliable, he deduces:

Establishing a woman's rights in the abstract has little to do with doing justice, retrospectively, in a disputed case of rape. If there is a trial in a date-rape case, we can assume that the woman claims *and may even think, in good faith, that she said no. And we can also assume that the male defendant believes that he heard yes.*⁸⁵

Thus, "[r]ecognizing the relevance of mistake—of the defendant's 'honest and reasonable belief'—provides a splendid means of reconciling conflicting objectives in a criminal trial."⁸⁶

The proposed reform that emerges from Fletcher's application of a reasonable mistake defense in rape cases evolves in the form of a two-tiered verdict. The first question under this approach is whether the woman was raped (*i.e.*, subjected to nonconsensual intercourse). If the jury decides that she was raped, it then determines whether the defendant was "morally responsible" for the rape. Determining moral responsibility requires ascertaining whether the defendant honestly and reasonably mistook her lack of consent for consent. If he did make such a mistake, "he is not morally responsible for the rape and should not be convicted."⁸⁷

Although he argues that this reform could be incorporated into any criminal trial,⁸⁸ Fletcher admits that it may not succeed in eliminating unreasonable biases and prejudices that often infect the deliberation process. For example, he concedes that in the trial of Dan White, homophobia might still have resulted in mitigating his culpability, despite

80. Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 519 (1992). Congress has recognized the inherent difficulties women face when charging an acquaintance with rape, as well as with the probative value of a defendant's prior behavior. Consequently, it has enacted three new evidence rules which make evidence of a defendant's past similar acts admissible in civil and criminal actions when he is charged with sexual assault or child molestation offenses. FED. R. EVID. 413-415 (effective July 9, 1995).

81. FLETCHER, *supra* note 4, at 124.

82. *Id.* at 124-25.

83. While Fletcher does not suggest that Washington should have been precluded from testifying, he essentially contends that what she said should not have mattered in determining whether Tyson reasonably believed that she consented to intercourse. This position stands in stark contrast to his earlier approval of prosecutors who called Rodney King to testify at the federal civil rights trial because it "illuminate[d] the importance of the victim as a participant." *Id.* at 65.

84. *Id.* at 125.

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.* at 126.

88. *Id.* at 246.

the two-tiered model.⁸⁹ But, he tells us, his two-tiered verdict form "would focus the jury's deliberations on the *right* issues in rape cases."⁹⁰

Therefore, in the Tyson case, "[w]hether Tyson is guilty depends not on the way [Washington] saw the matter but on the way he perceived the interaction and whether this perception measured up to the criteria of reasonableness—what we can fairly expect of *men* under the particular circumstances."⁹¹ While it may be important to protect women victimized by rape, Fletcher exhorts that we dare not "go so far as to accord women complaining of rape a presumption of honesty and objectivity."⁹² Consequently, because determining whether a woman consented is simply too difficult a task for the legal system to discern, her perspective cannot govern whether she was raped.

C. Perspective

Despite Fletcher's assertions,⁹³ feminist efforts toward rape reform have not resulted in adopting a "women's" perspective to undergird the legal conception of rape. Rather, force and consent requirements continue to be based on the male perspective, failing to challenge or unhinge cultural myths of male innocence and female responsibility.⁹⁴ As Professor Lynne Henderson suggests, "What might charitably be termed confusion over what rape is results from the belief that women are guilty in sexual encounters and that dominance and submission is the paradigmatic context for heterosexuality."⁹⁵ Rape law is grounded in normative understandings of sex roles, embodying a masculine perspective "by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victims', or the women's, point of violation."⁹⁶

Thus, Fletcher's proposed "reform" offers no reform at all; it merely sends women reclining back to a time before society heard feminist arguments concerning the sexual inequality upon which rape laws are constructed. Twelve years ago, Professor Catharine MacKinnon exposed the legal system's complicity in women's oppression that stems from adopting a masculine perspective to conceptualize rape. Although her cogent critique predates Fletcher's analysis, it provides a persuasive rebuttal to his suggested reform, demonstrating that his approach, rather than representing change, restores traditional views. MacKinnon writes:

[T]he male anxiety that rape is easy to charge and difficult to disprove (also widely believed in the face of evidence to the contrary) arises because rape accusations express one thing men cannot seem to control: the meaning to women of sexual encounters.

Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology. For example, when an accused wrongly but sincerely believes that a woman

89. *Id.* at 181 (noting that a judgment about the defendant's guilt may appear to be a judgment about the value of the victim's life).

90. *Id.* at 184 (emphasis added).

91. *Id.* at 185 (emphasis added). He maintains, however, that this same rationale must not extend to women accused of killing or injuring their batterers. Suggesting that most American lawyers are simply too ignorant to understand why his rationale should not apply in cases involving self-defense, Fletcher makes clear that reasonable mistake is best suited for rape cases because the difference is clear between "actual consent and mistakenly perceived consent." *Id.* at 187-88.

92. *Id.* at 131.

93. *Id.* at 112-13 (discussing "rape shield" laws).

94. Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 *TEX. J. WOMEN & L.* 41 (1993).

95. *Id.* at 54.

96. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 649 (1983).

he sexually forced consented, he may have a defense of mistaken belief. . . . One commentator notes, discussing the conceptually similar issue of revocation of prior consent (i.e., on the issue of the conditions under which women are allowed to control access to their sexuality from one time to the next): "Even where a woman revokes prior consent, such is the male ego that, seized of an exaggerated assessment of his sexual prowess, a man might genuinely believe her still to be consenting; resistance may be misinterpreted as enthusiastic cooperation; protestations of pain or disinclination, a spur to more sophisticated or more ardent love-making; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance." . . . Now reconsider to what extent the man's perceptions should determine whether a rape occurred. From whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's experienced violation? This aspect of the rape law reflects the sex inequality of the society not only in conceiving a cognizable injury from the viewpoint of the reasonable rapist, but in *affirmatively rewarding men with acquittals for not comprehending women's point of view on sexual encounters.*⁹⁷

Fletcher would most likely respond that his two-tiered verdict would serve women's interests because the verdict would acknowledge that she had indeed been violated, if the jury were to conclude that she did not consent to the sexual encounter.⁹⁸ But if the defendant successfully argued that he reasonably mistook her lack of consent for consent, the jury will reward him with an acquittal for ignoring her perspective, and she will be denied relief.⁹⁹ Such a verdict would split a woman's reality. It would say that "[the] woman was raped but not by a rapist[, and] the law [would] tend[] to conclude that a rape *did not happen.*"¹⁰⁰ What remains incomprehensible is how a woman will be empowered upon hearing, "Yes, that's the one who raped you, but we can't hold him morally responsible for the act because that's not the way he saw it."¹⁰¹

Case law provides examples of how applying the masculine perspective plays out in determining whether a woman has been raped. For example, in Texas a grand jury refused to indict a man for rape because the victim asked the rapist to wear a condom so she would be protected from AIDS and other sexually transmitted diseases.¹⁰² Even though the facts otherwise fit the classic paradigm of a stranger rape—he broke into her house after 3:00 a.m. and raped her at knife point—the defendant argued, "there was no rape to it. She's the one who gave me the condoms. If she didn't want to, why would she give me the condoms?"¹⁰³ The grand jury apparently agreed with the defendant, accepting that his mistake was reasonable under the circumstances.

97. *Id.* at 553-54 (emphasis added) (footnote omitted) (quoting Richard H.S. Tur, Note, *Rape: Reasonableness and Time*, 1 OXFORD J. LEGAL STUD. 432, 441 (1981)).

98. See FLETCHER, *supra* note 4, at 247.

99. The "relief" I am speaking about is that which the victim may obtain from knowing the rapist is in jail. While at one point Fletcher defends his two-tiered system by claiming that a victim does not "gain tangibly" when a defendant "suffer[s] in prison," he later concedes that punishment is essential to "counteract the criminal's achieving dominance over the victim." *Id.* at 183, 203.

100. MacKinnon, *supra* note 96, at 554 (emphasis is in original). This baffling rationale was expressed by one observer of Tyson's trial: "[Tyson] may have well raped Desiree Washington—indeed, he probably did rape her—but he definitely wasn't guilty beyond a reasonable doubt." Wright, *supra* note 79, at 4.

101. This is no doubt the result Fletcher envisions. He reasons:

If the woman says no and nonetheless suffers a *sexual imposition*, she has been raped. But it does not follow that the particular defendant, the man standing on the dock, need be held responsible for the rape If he acted under an honest and reasonable mistake about consent, his actions may have been wrong but he should be excused on the ground of moral innocence.

FLETCHER, *supra* note 4, at 125-26 (emphasis added).

102. Henderson, *supra* note 94, at 55 (citing Jim Phillips & Kimberly Garcia, *Grand Jury Decides Not to Indict on Rape Charge*, AUSTIN AM. STATESMAN, Oct. 9, 1992, at A1, A6).

103. *Id.* at 67.

In another case, a jury acquitted a man of raping his wife under South Carolina's marital rape law. The state presented a videotape recorded by the defendant, showing him engaging in sexual intercourse with his wife after dragging her by the throat into the bedroom, tying her hands and legs with rope, covering her mouth and eyes with duct tape, and putting stockings and a garter belt on her legs.¹⁰⁴ The defense attorney "argued that the woman enjoyed it when her husband slapped her and that her screams were part of a sex game."¹⁰⁵ He asked the jury, "Was that a cry of pain and torture? Or was that a cry of pleasure?"¹⁰⁶ The defense succeeded in satisfying the jury that the victim enjoyed sadomasochistic sex—even if she did not particularly enjoy it on this occasion. Thus it found that her husband had made a reasonable mistake in assuming the cry was one of pleasure rather than of torture.¹⁰⁷ It is only through adopting the perpetrator's perspective that such a conclusion could be reached; his perspective obliterates hers.

In support of his proposal, Fletcher claims that accepting reasonable mistake as a defense will actually operate to dissuade defense attorneys from attacking rape victims' credibility. He suggests that defendants could simply concede that the victim did not consent to sex and risk their entire defense by limiting their strategy to arguing the defense of reasonable mistake.¹⁰⁸ Thus, they will not be "under increased pressure to attack a woman's character during rape trials."¹⁰⁹ In this situation, everybody wins, and rape trials are no longer reduced to a zero-sum game.¹¹⁰ Exactly how the victim wins remains unclear.¹¹¹

Fletcher's suggestion that a defendant may hinge his entire strategy on the second prong of this reform is questionable. Most likely, the defendant will argue that the victim consented and, even if she did not, he reasonably believed that she did. However, even if the defendant was willing to take such a risk and concede that the victim did not consent, he will have to develop the facts necessary to explain why his mistake was reasonable under the circumstances. In the context of the marital rape prosecution described above, for example, how else would the defense establish reasonable mistake other than by introducing the "history" of their sexual relationship to support his view of her consent? Particularly in cases where the defendant and victim know one another, the victim's prior sexual behavior (and whether her behavior was "sexual"—like taking off her pantyhose to walk on the beach—will be judged from the defendant's perspective) will become crucial to judging the reasonableness of the defendant's mistake. From the victim's perspective, this approach might well feel like an attack on her character.

104. *Marital Rape Acquittal Upsets Activists: Man Tied, Gagged, Videotaped Wife*, MIAMI HERALD, Apr. 19, 1992, at 11A.

105. *Id.*

106. *Id.* (quoting defense attorney Wayne Floyd).

107. Similarly, in *State v. Alston*, 312 S.E.2d 470 (N.C. 1984), the court relied on a history of violence within the sexual relationship between the victim and the perpetrator to reverse a conviction for kidnapping with the intent to commit sexual assault. One month after the victim broke off their relationship the defendant kidnapped her and took her to a friend's house where he raped her. Because the alleged rape was "entirely consistent with the well-established pattern of [their] consensual sexual relationship"—during which times she remained passive "while the defendant at times engaged in some violence [during] sexual intercourse"—she was not raped. *Id.* at 474. Even though the victim told the defendant their relationship was over, "[i]t in no way indicated to [him] that he would have to rape [her] in order to have sexual intercourse with her." *Id.*

108. FLETCHER, *supra* note 4, at 126.

109. *Id.*

110. *Id.* at 126.

111. Fletcher concedes that the victim would benefit by having the court acknowledge that her rights were violated and by the possibility of seeking civil damages against the defendant. These "benefits" will not do much to relieve the victim's need to have the rapist put in jail.

By implying that feminism has become so powerful that it has completely skewed rape law to favor victims,¹¹² Fletcher apparently believes that the degradation of rape victims during cross-examination is history. Not once in describing trials in rape cases does he acknowledge that

[u]nder the best of circumstances, prosecuting a rape case has unique costs for the victim. And many jurisdictions have made it harder still, by imposing unique obstacles in rape cases, from the requirement that the victim's testimony be corroborated by other evidence to the requirement that she resist her attacker to the inquiry into her sexual past.¹¹³

Fletcher opines that Mike Tyson was deprived of the opportunity to demonstrate his moral innocence.¹¹⁴ Yet he also ignores that Tyson's attorney grilled Desiree Washington on cross-examination, demanding, for example, to know why she decided to remove a pantyliner when she used the bathroom in Tyson's hotel room.¹¹⁵

Women who have been raped are often again assaulted by the criminal justice system.¹¹⁶ It is a system that clings to the notion that "real rape" is where a stranger (usually Black) jumps out from behind the bushes, brutally attacking a woman, who must submit or die.¹¹⁷ Yet, being raped by someone who a woman has known and trusted is often more traumatic than being raped by a stranger.¹¹⁸ As Catharine MacKinnon concludes, it is only in the man's best interest to believe that rape is not so terrible when a woman is raped by someone with whom she's previously had sex.¹¹⁹

Moreover, the supposed difficulty in distinguishing between sexualized violence and romance constantly muddies the identification and definition of rape. Confusion over the boundaries appropriately separating rape from "ordinary 'courting' behavior reflect this definitional difficulty."¹²⁰ Consequently, when a man asks a woman for her telephone number after raping her, it would appear that from his perspective the encounter was more like a date than a sexual assault.¹²¹

112. Fletcher contends, "Women are well organized to protest their victimhood. Men are not. When Lorena Bobbitt went on trial for having cut off her husband's penis, she claimed that she had been abused. The Ecuadoran National Feminist Association voiced support for Lorena . . ." FLETCHER, *supra* note 4, at 243. "No one[.]" he notes, "marched for John Wayne Bobbitt." *Id.* at 243. He neglects to mention, however, that while John Bobbitt was acquitted outright for allegedly raping Lorena, she had to spend a few months in a mental hospital after being acquitted by reason of insanity of "malicious wounding."

113. ESTRICH, *supra* note 57, at 3.

114. FLETCHER, *supra* note 4, at 124.

115. Joe Treen, *Judgment Day: Payback Comes to Sexual Predator Mike Tyson, Who Broke All the Rules—Until a Victim Fought Back*, PEOPLE WEEKLY, Feb. 24, 1992, at 36. One male reporter snidely mentioned that she threw away the pad "which she had put on only 20 minutes before." Bremner, *supra* note 66, at 9.

116. Rape law has been the only area of the law where prosecutors routinely interview victims before filing charges. See Wallace D. Loh, *The Impact of Common Law and Rape Reform Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 582 (1980) (citing study where 41% of prosecutors routinely interview complaining rape victims to determine, among other things, the victim's credibility). In addition, until recently in Alabama, sexual assault victims had to pay the state for the cost of their physical examinations, whereas no other class of victims bore this cost. In July, 1995, the Alabama state legislature approved a bill changing its law. *Rape Victims No Longer Have to Pay Bill for Exam*, THE ORLANDO SENTINEL, July 28, 1995, at A10.

117. See generally ESTRICH, *supra* note 57 (arguing that this is the only type of forced sex that society perceives as rape).

118. MacKinnon, *supra* note 96, at 648.

119. See *id.*

120. Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 97 (1992) (citation omitted).

121. See *State v. Rusk*, 424 A.2d 720 (Md. 1981); *Goldberg v. Maryland*, 395 A.2d 1213, 1216 (Md. Ct. Spec. App. 1979). As two commentators have pointed out:

The American dating system . . . places females in the position of sexual objects purchased by men. Women are groomed to compete for men who will shower them with attention and favors; men are socialized to expect sexual

D. Resistance

Fletcher's two-tiered verdict in rape cases would also reinforce the notion that a woman must exert sufficient physical resistance to overcome the defendant's claim that he reasonably believed that she consented. Thus, if she fails to resist in a manner that communicates to the reasonable man that she does not want to have sex, that failure will support his claim of reasonable mistake.

In *Commonwealth v. Berkowitz*,¹²² the Pennsylvania Supreme Court recently held that the victim's lack of consent was insufficient to sustain a rape conviction. The determinative factor was the level of force the defendant exerted. The weight of his body on top of hers did not constitute sufficient force, and the fact that she continually said "no" during the entire encounter was irrelevant.¹²³ Dispositive in this case was whether the defendant exercised "forcible compulsion," which is to "be interpreted as something more than a lack of consent."¹²⁴

Likewise, in *Goldberg v. Maryland*,¹²⁵ the court reversed a rape conviction, characterizing the victim's fear of resisting as legally insufficient to be reasonable. She was fearful because she was alone with the defendant, who was much larger than she, "in a house with no buildings close by and no one to help her."¹²⁶ The court concluded that the defendant used no actual or constructive force; therefore, he did not rape her. "This is so even though the intercourse may have occurred *without the actual consent and against the actual will of the alleged victim*."¹²⁷ Although the court did not rely specifically on the theory of reasonable mistake to excuse the defendant's actions, it was apparently concerned with distinguishing between whether a woman has been raped or merely seduced.¹²⁸

E. Racialized Sexual Stereotypes

One might think it quite impossible to discuss the Tyson and Hill/Thomas cases without an in-depth analysis of the role race played in each. Nonetheless, Fletcher pays scant attention to this issue. In a very short, enigmatic paragraph, he intimates that because the Smith case involved a white man and a white woman, whereas the Tyson and Hill/Thomas cases involved Black men and Black women, any distinctions between them may rest more on "cultural mores" attributed to differences between the races rather than

reward (or at least to try for that reward) for their attention to women.

Susan H. Klemmack & David L. Klemmack, *The Social Definition of Rape*, in *SEXUAL ASSAULT: THE VICTIM AND THE RAPIST* 135, 136 (Marcia J. Walker & Stanley L. Brodsky eds., 1976).

122. 641 A.2d 1161 (Pa. 1994).

123. *Id.* at 1164 (noting that whether the victim said "no" throughout the encounter goes to determining consent, not whether the defendant used sufficient force to constitute a rape).

124. *Id.* at 1164-65; see also *State v. Alston*, 312 S.E.2d 470, 474-75 (N.C. 1984) (recognizing that there was no question that sexual intercourse was against victim's will, but state did not offer substantial evidence of force).

125. 395 A.2d 1213.

126. *Id.* at 1219.

127. *Id.* at 1220 (emphasis added).

128. As one judge has remarked,

While courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist.

State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).

prejudice against the African-American race. His one sentence analysis concludes: "There may indeed be localized variations in the way men speak to women and the assumptions they make when women condone and accept treatment that others might regard as unacceptable."¹²⁹ Exactly which specific localized variations, cultural mores, men, women, and "others" he is talking about remains unexplained; likewise, it is unclear to whom he attributes assumptions, condonation, and acceptance.

Fletcher's insistence that feminism is responsible for the miscarriage of justice that culminated in Tyson's conviction¹³⁰ downplays the defense attorney's blatant appeal to racist and classist sexual stereotyping of Black men. As one commentator concludes, the defense's message to the jury was:

Tyson is your worst nightmare—a vulgar, socially inept, sex-obsessed black athlete. And any woman who would voluntarily enter a hotel suite with him must have known what she was getting into. In other words, both principles [sic] were animals—the black man for the crudity of his sexual demands, the black woman for eagerly acceding to them.¹³¹

Conceding that this defense carried a "whiff of racial stereotyping[.]" Fletcher qualifies it as a "novel strategic" move and argues that Tyson's lawyers were *forced* to exploit racial stereotypes:

They were forced to shift the blame to Washington because they could not build a defense around Tyson's reasonable misinterpretation of her interest in having sex. This is one of the tactical distortions produced by the trial judge's ignoring the defense's sensible efforts to introduce evidence of the couple's amorous interaction a few minutes before their apparent falling out in the bedroom.¹³²

Fletcher apparently does not consider that the defense strategy of exploiting racist stereotypes simply backfired. He ignores that, by convincing the jury that Tyson was such an animal, the defense may have made it easier for the jury to convict him of rape.¹³³ It is important to remember too that this defense tactic of discrimination and pandering to prejudice is exactly what Fletcher condemns in the Milk, King, Kahane, and Rosenbaum trials. In the context of those cases he concludes that the tactics produced acquittals and thwarted justice. However, in the context of the Tyson case, such tactics merely

129. FLETCHER, *supra* note 4, at 116. Professor Kimberle Crenshaw addresses the impact of "cultural differences" explanations in the context of the Hill/Thomas hearing, after which a Harvard professor argued that even if Hill's claims of sexual harassment were true, Thomas's behavior merely reflected "a style of 'down home courting.'" Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, Address Before the National Forum for Women State Legislators (Nov. 15, 1990), reprinted in 65 S. CAL. L. REV. 1467, 1471 (1992) (quoting Orlando Patterson). Such responses legitimize sexualized violence against Black women, particularly when it is intraracial. *Id.* at 1472.

130. *E.g.*, FLETCHER, *supra* note 4, at 3-4 (citing the Tyson case as an example of a political trial).

131. Steptoe, *supra* note 63, at 92. Additionally, Tyson's lawyers wanted to measure his penis to show the jury that its larger-than-average size accounted for the vaginal abrasions Washington sustained. *Id.* This ploy played upon myths of Black men having oversized genitals.

132. FLETCHER, *supra* note 4, at 127-28. Despite claiming later in his book that he holds no opinion concerning Tyson's guilt, *id.* at 187, his analysis of the case which is woven throughout the entire book suggests differently. For example, in discussing testimony Tyson gave to the grand jury which conflicted with what he later said at trial, Fletcher concludes: "Even an innocent defendant can be hoist on his own petty inconsistencies." *Id.* at 160. The petty inconsistencies included significant conflicts between his testimony before the grand jury compared to that at trial. *Id.* at 117.

133. Similarly, in reviewing the highly publicized "Central Park jogger" case involving a white woman who was raped by Black youths, Kimberle Crenshaw observes that "in dehumanizing the rapists as 'savages,' 'wolves,' and 'beasts,' the press 'shaped the discourse around the event in ways that inflamed pervasive fears about black men.'" Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1267 (1993) (quoting Valerie Smith, *Split Affinities: The Case of Interracial Rape*, in CONFLICTS IN FEMINISM 271, 279 (Marianne Hirsch & Evelyn F. Keller eds., 1990)).

represented the desperate lengths to which the defense was forced to go—the conviction is deemed a tragedy.

Along with disregarding the impact that the defense strategy had upon the cultural construction of the Black man as rapist, Fletcher ignores that Black women's experiences of both interracial and intraracial rape have been historically silenced and that racist stereotypes of Black women's sexuality have painted them as "naturally" voracious and inherently unbelievable. Thus "[t]he notion of a Black woman being raped has always been considered patently absurd by white society."¹³⁴ And if a Black woman is poor, addicted to drugs or alcohol, or involved in prostitution, she does not have a prayer that her charges of sexual assault will be taken seriously. Such charges are negated as being "tainted by women who are transient, uncooperative, untruthful or not credible as witnesses in court."¹³⁵

Desiree Washington's innocence and firmly established middle-class roots¹³⁶ stood in stark comparison to Tyson's lower-class reputation as "tough on the streets."¹³⁷ Their respective class backgrounds quite likely led jurors to believe that Tyson fit more accurately the profile of the Black rapist than Washington fit the portrait of the promiscuous Black woman. However, Fletcher never addresses this point.

Fletcher also fails to recognize that Washington's unequivocal status as a "good girl" probably had a profound impact on the jury's deliberations. Washington was the perfect victim, described as a "wide-eyed teenager," who spoke in a "high-pitched, almost childlike voice, us[ing] words like 'neat' and 'yucky'" while testifying about the alleged rape.¹³⁸ While Fletcher sees Washington's persona as part of the wider conspiracy to convict Tyson (at one point he hints that there was a lot of dirt the defense might have brought out had the trial judge not been so biased toward the prosecution),¹³⁹ he does not seem to comprehend what Washington's good-girl status cost her as well as other women who are victims of rape. The costs are particularized for her as an African-American woman: "One can only imagine the alienation experienced by a Black rape survivor such as Desiree Washington when the accused rapist is embraced and defended as a victim of racism while she is, at best, disregarded, and at worst, ostracized and ridiculed."¹⁴⁰ For women as a group, the unequivocal message emanating from this trial was this: Unless you are young, chaste, and pure, do not even think about prosecuting a date rape case.

134. Barbara Omolade, *Black Women, Black Men, and Tawana Brawley—The Shared Condition*, 12 HARV. WOMEN'S L.J. 11, 16 (1988). Kimberle Crenshaw describes how feminist and antiracist discourses have disregarded the intersectionalities of race and gender, rendering invisible the injuries Black women sustain through sexualized violence. While feminist activists have focused their attention on white women victimized by rape and antiracist activists have concentrated on Black men falsely accused of raping white women, few have sufficiently problematized either the antirape or antiracism politics to address the experiences of Black women. Crenshaw, *supra* note 133, at 1265-82.

Discrimination against Black women who are victims of sexual assault is illustrated by the fact that "their rapists, whether Black or white, are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women." *Id.* at 1277.

135. Crenshaw, *supra* note 133, at 1281 (citation omitted).

136. See E.R. Shipp, *Tyson Found Guilty on 3 Counts as Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at A1, B15 (describing Washington as having middle-class suburban background, including being a Sunday school teacher and volunteer for program for mentally ill children).

137. Treen, *supra* note 115, at 40.

138. *Id.* at 36.

139. FLETCHER, *supra* note 4, at 127.

140. Crenshaw, *supra* note 133, at 1273.

CONCLUSION

Of the several cases George Fletcher surveys in his book, the only verdict he apparently (but not surprisingly) deems fair is the acquittal of William Kennedy Smith.¹⁴¹ He fails to realize that rethinking the foundations of our criminal justice system requires challenging the cultural prejudices that motivate juries to deliver verdicts that further marginalize historically disempowered groups. Pretending that racism, class bias, homophobia, and misogyny can only be tapped when unscrupulous defense attorneys are given free reign is both superficial and dangerous. The legal system itself was constructed upon the exclusion of women and minorities;¹⁴² any "reforms" that evade this reality merely perpetuate the oppressive nature of the status quo.

Fletcher claims that he is distressed over the plight of four identifiable groups of victims—homosexuals, Blacks, Jews, and *women*. But his concern is a (male) fist inside a velvet glove. His asserted purpose outlined early in his book—to figure out a way to empower victims—definitely does not apply to rape victims. The consideration for women is immediately problematized by that "ineffable" moment called consent. His response is to propose that the legal system do what it has always done: define rape according to what it means to men; punish it only on those rare occasions when reasonable men agree that a woman has been raped.¹⁴³ To do otherwise would be, in his opinion, morally irresponsible.

141. FLETCHER, *supra* note 4, at 120 (praising the Smith court for prohibiting testimony from women about their past sexual encounters with Smith).

142. The late Justice Thurgood Marshall pointed out the significance of the exclusion of Blacks and women from the political processes that led to the Constitution, maintaining that the document did not represent "the People" for most of its existence. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

143. The reality is, however, that "women who are even perceived as engaging in sex for nonmarital purposes (fun or profit) have been, and to a dismaying extent remain, unprotected by the legal system." Sanger, *supra* note 61, at 1364.