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Lynne Henderson

University of Nevada, Las Vegas -- William S. Boyd School of Law

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WHOSE JUSTICE? WHICH VICTIMS?

Lynne Henderson*

WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS.
By George Fletcher. New York: Addison-Wesley. 1995. Pp. xi,
304. \$24.

George Fletcher's *With Justice for Some: Victims' Rights in Criminal Trials*¹ boasts an eye-catching title and a provocative introduction. Directed at a general audience, the book concentrates on a handful of cases that received broad media coverage, public attention, and, in several instances, verdicts that led to outcries of injustice, demonstrations, and even violence. These cases, Fletcher asserts, demonstrate that criminal trials in the United States need radical transformation. Fletcher evokes the literally burning image of Los Angeles as African Americans took to the streets immediately after the verdict in *People v. Briseno* — known as the “Rodney King” case — to set the stage for fear and loathing of the current criminal justice process.

In the book, Fletcher summarizes a number of mostly recent, highly publicized criminal cases, such as the Rodney King case, which he believes were wrongly and unjustly decided by juries. He argues that protest and even violence are proof of the verdicts' outrageousness as well as proof of the deep flaws within the criminal trial process in the United States. To correct these flaws, Fletcher argues for procedural and evidentiary reforms modeled mainly after the Continental scheme of criminal trials, a scheme he clearly prefers to the Anglo-American one. He advocates adopting these procedural and evidentiary reforms to give “rights” to “victims.”

After a brief and critical overview of the book's contents, I examine what Fletcher says about “victims' rights” and the relationship of his proposals to “victims” generally. Next, I discuss Fletcher's approach to the victimization of women, with a final observation about the relevance of a defendant's prior victimization to the determination of her culpability for subsequent action. Despite

* Professor of Law, Indiana University — Bloomington. A.B. 1975, J.D. 1979, Stanford. — Ed. Many, many thanks to Lauren Robel and Aviva Orenstein for their wonderful help with and patience in reading initial confused drafts. Many thanks also to Douglas Mountford and Robert Weisberg for listening to me whine and for their support.

1. George Fletcher is the Cardozo Professor of Law and Jurisprudence, Columbia University School of Law.

the fascinating issues that Fletcher raises, I regret to say that the book fails to address any of them adequately.

I. BRIEF OVERVIEW

The book has two basic parts, connected by a "bridge" chapter that compares European and Israeli criminal procedure with American criminal procedure and provides the bases for the reform proposals contained in the second part of the book. The first part consists of chapters headed "Gays," "Blacks," "Jews," and "Women." While the headings suggest a focus on structural bias against traditional outsiders or members of subordinated groups — and Fletcher does discuss issues of this type of bias in the context of specific trials — the book focuses more heavily on the problems he sees with juries, judges, prosecutors, and expert witnesses.

The chapter entitled "Gays" (pp. 9-36) discusses the Dan White case² in San Francisco. White was tried for first-degree murder in the killings of Mayor George Moscone and Supervisor Harvey Milk, the city's first openly gay Supervisor. The jury convicted White of two counts of voluntary manslaughter, touching off a violent reaction that became known as "White night." While Fletcher emphasizes the violence committed by some members of the gay community in San Francisco, and laments the exclusion of openly gay people from the jury that heard the case, he devotes much of his discussion to a critique of the prosecution, the psychiatric testimony, the "diminished capacity" defense, and California's substantive law (pp. 25-33). Similarly, while opening with the devastation of South Central Los Angeles, the chapter entitled "Blacks" (pp. 37-68) contrasts the merits of the state prosecution of Theodore Briseno, Stacey Koon, Laurence Powell, and Timothy Wind for using excessive force against Rodney King with the federal civil rights violation trial. Here, Fletcher criticizes the state prosecutor for failing to "empathize" with Mr. King, the state courts for allowing the change of venue from Los Angeles to Simi Valley, and the judge for admitting expert testimony on departmental policies (pp. 41-45, 50-51, 57-59). He then turns to the resulting chaos in South Central Los Angeles and the subsequent federal prosecution, with some ambiguous remarks about double jeopardy along the way (pp. 51-68). The chapter titled "Jews" (pp. 69-106) briefly chronicles the long history of anti-Semitism and cultural stereotypes of Jews, and then examines the prosecution of El Sayyid Nosair for the murder of Meir Kahane and of Lemrick Nelson for the murder of Yankel Rosenbaum, both of which took place in New York City. Here, Fletcher criticizes the explicit appeals to anti-Semitism in

2. *People v. White*, 172 Cal. Rptr. 612 (Cal. Ct. App. 1981).

these cases, and also takes on several trial participants, including the judge in the Rosenbaum case.

In all these cases, Fletcher concludes that jury acquittals constituted gross injustices to the individual victims and to groups that identified with the victim.³ Fletcher finds neither solace nor justice in the fact that juries convicted Dan White and Nosair on lesser felony charges. To Fletcher's mind, they were guilty as charged and ought to have been convicted accordingly.

The most peculiar chapter in this section is the last one, entitled "Women" (pp. 107-48). Here, Fletcher abruptly changes his style, tone, and focus from the preceding chapters, each of which discussed one or two cases in detail, made some references to historic discrimination against a particular group involved in the case, and condemned the acquittals or convictions on lesser charges in those cases. No wronged female victim appears here. Nor do women, as a group, suffer from stereotyping or prejudice. In this chapter, it is *men* — either as criminal defendants or crime victims — who are victims of injustice.

The chapter is an odd and breathless race through the history of rape law, to the trial of William Kennedy Smith, to the trial and appeals of Mike Tyson, with the Thomas-Hill hearings tossed in for good measure. Fletcher concludes that Smith's acquittal was probably "just" and heavily implies throughout the book that Tyson's conviction was a gross miscarriage of justice.⁴ Hurriedly, Fletcher then disputes the widespread existence of violence against women, raising the terrifying specters of mutilation in the Bobbitt case and the "sleeping husband" cases in which women "get away with murder." He then switches to the Menendez brothers' first trial in which the jury failed to reach a verdict. Fletcher cannot point to any violent protests against the outcomes in these cases, his apparent test for determining injustice in the previous chapters; thus, he has to strain a bit to create claims of gross injustice. That no one marched for John Bobbitt, or demonstrated for the dead Menendezes, demonstrates for Fletcher a failure of moral values and a neglect of victims. It does not seem to occur to Fletcher that men did not march for Bobbitt because they chose not to identify with a wife beater, no matter how injured. That no one marched for the Menendezes does not signify necessarily a lack of empathy for parents, as Fletcher suggests. Mr. Menendez *was* abusive in some ways, and therefore not a particularly sympathetic victim. Fi-

3. Fletcher, however, develops no theory of "group rights" anywhere in the book, nor does he explain how, when the interests of two groups conflict, one decides which group's rights "trump." For a discussion of the conflicting rights of women and other groups, see *infra* text accompanying notes 38-61.

4. See, e.g., pp. 155-58.

nally, it is odd that Fletcher does not make any reference to the demonstrations that occurred on behalf of Tyson, who, Fletcher apparently believes, was a possible victim of injustice.

Fletcher does make some useful observations about the trials he discusses in the initial chapters. For example, he does an excellent job evoking the mood of San Francisco at the time of Dan White's killing and of describing the prosecutor's inept response to White's defense. Yet Fletcher's narratives are definitely selective. Any advocate, of course, knows how to tell the story of a case by arranging facts in a way that supports her argument, but it is irresponsible for an advocate to overlook other possibilities or contradictory evidence. Indeed, this is *precisely* the criticism that Fletcher makes of prosecutors over and over again.⁵ Because Fletcher's presentations of cases with which I have some familiarity⁶ are so one-sided, I am suspicious of his treatment of cases about which I know little. The discussion of *Tyson*, for example, ignores all the evidence indicating that Tyson was in fact guilty of rape. Rather, according to Fletcher's account, Tyson fell victim to feminist pressure and Indiana hacks. This interpretation sounds strange to one present in Indiana at the time of the trial. No organized "feminists" placed pressure on the prosecutor's office. Indeed, the public pressured *against* prosecution and *for* Tyson. Prayer vigils were held in his behalf, demonstrators protested the prosecution, and the African-American communities in Indianapolis⁷ — as well as the national press — criticized the victim.⁸ Further, in his summary of the case, Fletcher says not a word about evidence corroborating the victim's testimony, including the testimony of the limousine driver and evidence of the victim's internal injuries, injuries consistent with

5. See, e.g., pp. 33-34, 46-48, 65-66, 80-81, 118-19.

6. In his remarks about the exclusion of three witnesses' testimony in the Smith case, for example, Fletcher concludes that the testimony was inadmissible on the grounds that "allegations of prior misconduct that never even led to an arrest" would be unfair and too prejudicial, period. Pp. 119-20. He portrays the proffered testimony as that of "three women who . . . were willing to say that Smith had made strong aggressive sexual advances toward them In one of the three cases, the woman had had intercourse with Smith, allegedly when she was too drunk to resist; the other two did resist, successfully." P. 119. I have read the deposition transcripts, and I believe they arguably demonstrated a definite pattern to Smith's conduct. One is almost a "fingerprint similar"; usually such similars can be admitted to demonstrate motive or identification, or to impeach a defendant's testimony. See depositions on file with the University of Miami School of Law Library. The extent of the cross examination of each woman and the dissection of her character by the defense in those depositions, however, indicated that the probative value of this testimony would easily be outweighed by distraction from the issues at the trial; together with the potential for prejudicial effect, the trial judge probably struck the balance between probative value and distraction properly.

7. See Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 999-1004; Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 49-50 (1993).

8. See Henderson, *supra* note 7, at 50-51.

forced penetration and inconsistent with "consensual sex."⁹ At least in the minds of some jurors, the injuries contradicted Tyson's testimony that the victim had consented to extensive oral sex before she consented to intercourse.¹⁰ A less serious distortion appears in his discussion of the White case. Fletcher implies that Mayor Moscone was quite popular at the time of his death, and that if White had only killed heterosexual Italian-American Moscone and not homosexual Milk, he would have been convicted of murder (pp. 254-55). Fletcher's desire to highlight bias against gay men in the White trial leads him, understandably, to emphasize homophobia; Moscone, however, had numerous critics, and his popularity arguably was waning at the time he was killed. Thus, it is not clear to me that the prosecution, as flat-footed as it was in the actual trial, would have obtained a conviction of first-degree murder of Moscone even if Milk had not been killed. Further, Fletcher's selective quotations of the psychiatric testimony in the case, while not stooping so far as to characterize it as a "twinkie defense," together with his condemnation of the psychiatrist's use of legal rather than medical terms, is somewhat misleading: he barely mentions the district attorney's disastrous cross examinations of these witnesses and does not mention that law frequently *imposes* the use of legal rather than medical terms on psychiatrists and psychologists in their testimony.¹¹

The first four chapters portray a criminal justice system in disarray, surrounded by interest-group pressure and violence. Lawyers prey on prejudice; courts permit experts to fool juries, which in turn causes juries to find reasonable doubts based on silly, biased, or unscientific grounds. Defendants, in turn, transform themselves into victims to avoid moral responsibility for their heinous crimes.

The "cure" for these miscarriages of justice is set out in the second part of the book. Ultimately, Fletcher outlines ten proposals for reform, proposals that ostensibly will increase "justice" for victims and end such breakdowns in the social order. Despite the fact that Fletcher's objections to the cases he discusses involve substantive law, the second part of the book has no real substantive recommendations. For example, in the chapter on the White trial, he deplores the incredibly confusing state of homicide law in California, including its then-existing definitions of premeditation and deliberation, its phenomenally confusing formulation of "malice," and the still-existing subjective standards for determining provocation

9. See *Tyson v. Trigg*, 50 F.3d 436, 443 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996).

10. See Telephone Interviews with Joseph Gelarden, reporter, INDIANAPOLIS STAR. Mr. Gelarden attended the trial throughout as criminal court reporter for the *Star*. See HENDERSON, *supra* note 7, at 51 & n.54.

11. See, e.g., STEVEN R. SMITH & ROBERT G. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE 393-95, 408-09 (1987).

and passion (pp. 25-33). Yet, his proposals are all procedural and evidentiary. They range from limiting peremptory challenges to prohibiting expert testimony on "ultimate issues," in some instances, to allowing victims to question witnesses during criminal trials.¹²

Overall, the proposals reflect his opposition to the jury system and his dislike of certain forms of expert testimony, presumably because psychiatrists and police experts mislead ingenuous juries. Although he much prefers the Continental style of bench trials, and praises former members of the British Commonwealth for abandoning jury trials (pp. 208-09, 223-27), the Sixth Amendment precludes him from advocating abolition in the United States. Nevertheless, Fletcher does his best to denigrate juries and to limit their roles in his proposals. Although he couches all of his proposals in terms of victims' rights, what these reforms have to do with victims — and which victims — is not always clear. To this subject I now turn.

II. THE RELEVANCE OF THE VICTIM'S STATUS IN CRIMINAL JUSTICE

Although Fletcher assumes that "we" would agree that the verdicts in the cases he reviews were wrong, leading one to wonder how he defines "we," he is right to say that the cases raise questions about attributions of responsibility, contested realities, appeals to prejudice, and conflicting visions of victimization in criminal cases. Certainly, the questions of who counts as a victim and when, how the substantive law ought to deal with claims of victimization, and how criminal trials should operate in an era of increased assertion of group identity hold great importance. Yet on closer examination, his proposals really do not address the concerns of victims, victim groups, or anyone else. Nor do they do much to increase prosecutorial efficacy or skill in difficult or out-of-the-ordinary cases. Despite his advocacy of victims' rights, nowhere does Fletcher refer to the extensive literature and legal reform about just that subject.¹³

A book invoking crime victims' rights that overlooks the extensive legal reform instituted under the rubric of "victims' rights" in the past fifteen years and only offering criticism of the ABA's *pro-*

12. See, e.g., pp. 177-258.

13. See, e.g., Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373; Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC. REV. 349 (1979); Henderson, *supra* note 7. See also *infra* notes 20-23.

posal pertaining to victims' rights (pp. 190-93), misrepresents the state of the law as it presently exists in many jurisdictions. Moreover, to suggest that the concerns for crime victims has not inspired any influential political movement or that law and legal actors ignore crime victims is simply false. Fletcher passes over the last fifteen years of voluminous "victims' rights" legal reform. He does refer to California's 1982 "Victims' Bill of Rights" referendum (pp. 35, 255, 260), but inexplicitly omits the even more recent and extensive "Crime Victims Justice Reform Act," also known as Proposition 115, which voters approved in California in 1990,¹⁴ the Federal Victim and Witness Protection Act of 1982,¹⁵ and numerous other state reforms aimed at increasing victims' rights.¹⁶ Nor does he mention the formation and vitality of various victim-advocate groups, such as Mothers Against Drunk Driving, during this time period.

As with many victims' rights arguments and laws, Fletcher's use of the term "victims' rights" has an elusive meaning. Fletcher, as many before him, invokes the victim category that furthers his particular arguments, rather than staying with any one definition. For Fletcher, victims are, variously, individuals hurt by a *particular* criminal act, members of subordinated groups, or people who identify with a particular victim or class of victims in some way. Yet different "rights" and concerns may attach to differing categories of victims, as their injuries differ, and these interests may in fact have nothing to do with any particular criminal trial.

Fletcher cabins his view of victims by invoking the "pure, blameless stereotype" or "innocent" victim image of previous victims' rights arguments.¹⁷ That is, the term "victim," in Fletcher's narrowest usage, is a person physically injured or killed by a specific, narrowly framed criminal act, a person who is entirely blameless or at least undeserving of the violence. Someone who has *been* a victim, on the other hand, is not a proper victim in Fletcher's view, if she strikes back at the person who victimized her. Even members of subordinated groups who have been victimized must be blameless to be true victims.

14. See generally Laura Berend, *Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?*, 23 PAC. L.J. 1131 (1992). Among other things, Proposition 115 limited attorney voir dire, required defense lawyers to grant broad discovery to prosecutors, allowed for hearsay testimony in preliminary hearings, explicitly limited independent state grounds of constitutional interpretation in criminal procedure, increased penalties, and amended large parts of the California Constitution and the Penal Code. See *id.*

15. Pub. L. No. 97-291, 96 Stat. 1248 (1982).

16. See generally Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

17. *Id.* at 951-52.

Because he identifies victims as blameless people, Fletcher, like many victims' rights advocates before him, has to "cheat" by ignoring the complexities of victims themselves. That is, either one *is* a victim or one *is not* a victim; one cannot be a victim in some ways and a perpetrator in others. For example, Fletcher presents Jews, historically victims of prejudice, stereotype, and genocide, as blameless victims of anti-Semitism — especially Black anti-Semitism — in his discussion of the Nosair case and the Rosenbaum case (pp. 75-105). To preserve Jews' "true victimhood," Fletcher omits any discussion of American-Jewish racism against African Americans or Arabs (the term *schwarzer* is not a compliment). African-American anti-Semitism *is* inexcusable, an unforgivable adoption of a larger cultural prejudice, but Jewish racism against Blacks is no more excusable; it is an equally horrible acceptance of the larger culture. If William Kunstler, the defense attorney in the Nosair case, made the kind of blatant anti-Semitic pitch that Fletcher says he did (pp. 81-86), it is deplorable. And the defense's use of anti-Semitic codes in the Lemrick Nelson case is also unconscionable. But the fact remains, racism and hostility are not unidimensional in these cases.

To the extent that Fletcher gives any content to the terms "victims' rights" and "justice," he appears to believe, simply, that a *real* victim has a right to the defendant's conviction. A failure to convict a defendant is *injustice* to the victim if, on Fletcher's view, the defendant should have been found guilty (pp. 177-80). This thesis is provocative to say the least, although Fletcher never fully develops or defends it. Fletcher's use of the word "justice" is equally elusive. His conception of justice appears to rest on an underdeveloped notion of corrective justice, based loosely on a Kantian "just deserts" formula, for morally blameworthy conduct. The book contains numerous, loose, Durkheimian and Kantian allusions to the need to condemn wrongful acts, and to the premise that the accused acts autonomously and ought to be punished because of moral guilt. It also contains a third, confused notion of criminal convictions as expressions of community solidarity with the victim — the alternative apparently being collaboration with the offender and with evil — and a notion of the community itself having some metaphysical claim to the defendant and the trial.

Untangling Fletcher's various conceptions of victimhood, we find him discussing individual victims of particular crimes, past victims of crimes who raise that victimization as a defense, victims who are members of victimized groups or groups that identify with some characteristic of the victims, and defendants who belong to groups that have suffered discrimination. While each category of victim involves fascinating issues, Fletcher fails to deal with any very well; his main focus in the latter part of the book is on individual victims.

Individual victims (or their surviving relatives) constitute a category that he believes suffers particular injustice under the current system and in whose name he advocates many of his reforms.

Fletcher asserts that we should treat all criminal trials as "new political trials" (p. 242). By that term, he apparently means something that favors victims as he conceives them. Judges apparently must "represent" the victim or the victim's interests in some way (pp. 242-45), although Fletcher does not clarify what this means or why it will not negatively affect our ideal of judicial impartiality. For example, he states that during the first Menendez trial, "the judge should have treated the parent-victims as though they represented a political force Judge Weisberg could easily have justified the conclusion that the inquiry about parental sexual abuse was simply irrelevant and prejudicial" (p. 243). But Judge Weisberg justifiably could conclude that the evidence was relevant and that its probative value outweighed any prejudicial effect.

"[A]ll courts, in all cases," Fletcher asserts, "[ought] to act as though the victims were organized and demonstrating outside the courthouse doors" in this new political trial (p. 243). Judges can prevent violence only if they approach their work in this manner (pp. 242-43). This proposal collapses individual victims and groups identifying with victims: not only does it suggest that judges become victim advocates, but also that the amount of — or potential for — outrage, turmoil, or publicity surrounding a case should affect judges. That these factors ought to affect determinations of guilt is a surprising, and unsupported, assertion. Fletcher's model denies rule of law aspirations to justice through due process, equal treatment, impartiality, and coherence, and supplants those ideals with a kind of hip judicial vigilantism. Moreover, Fletcher's proposal highlights his error of using protest demonstrations in individual cases to measure the level of injustice. Riots and demonstrations may be more attributable to patterns of injustice rather than a specific case, as some trials, for complex reasons, become symbols of past injustice. Violent reactions to a verdict in such symbolic cases can be poor indicia of justice (to attribute the violence in Los Angeles solely to the verdict in the King case, for example, overlooks the decades of injustices perpetrated against the people of South Central).

What this all has to do with *victims* is yet another issue. Surely we would like judges to be courteous to victims, but ought victims have a right to solicitous concern or advocacy from judges? Ought victims expect evidentiary or substantive rulings in their favor, as Fletcher suggests in asserting that evidence of abuse should have been excluded in the Menendez trial (p. 243)? If *judges* are to be victim advocates, then it is unclear why Fletcher believes victims

also should have their own advocates and right to participate in the trial through separate counsel, another one of his proposed reforms.

According to Fletcher, individual victims ought to be able to question witnesses and pursue matters of importance to them in a criminal prosecution. This follows from the fact that the trial may have "greater positive meaning" for victims than anyone else (p. 250). Fletcher does not explain how trials have positive meanings for victims, much less whether victims' attributions of meaning ought to matter. Fletcher wants to allow victims to ask questions and to make unsworn statements in trials, but he acknowledges that this practice might be barred by the confrontation clause (pp. 249-50). Therefore, he suggests that victims should be able to ask questions through counsel. Fletcher does not address the fact that questioning by victims could lead to confusion of issues in a trial and would benefit only those victims wealthy enough to hire counsel. In response to the latter objection, he simply opines that most victims would forego the opportunity to have counsel (p. 250). Further, his concerns for fairness to defendants, at least in rape cases, appear ill-served by a practice that allows two lawyers to attack one defendant. Finally, perhaps only vengeance-seeking victims would avail themselves of the process, which contradicts the law's historic opposition to private vengeance.

Fletcher's proposal to bifurcate verdicts confuses this issue even more.¹⁸ Fletcher states that criminal juries ought to bifurcate their verdicts, somewhat along the lines of cases involving the insanity defense.¹⁹ In Fletcher's system, the jury first determines whether the victim's rights were violated (pp. 180-88, 245-47). What those "rights" are or how they are defined remain unclear at best, as Fletcher does not develop the point particularly well. Thus, it is not clear if all the jury must decide is whether the defendant did the act, or whether it also must determine whether the prosecution proved all the elements of an offense, including *mens rea*, in the first phase.

18. See pp. 182-88, 245-47. Fletcher writes that "the jury in the Dan White case would have had to decide first whether the act was a *violation* of the victim's right to life, and second whether White was fully accountable or *guilty* for the killing." P. 180. "The best way for a jury to express this judgment would be to have the option of three verdicts: fully guilty, partially guilty, and not guilty." *Id.* Aside from the fact that this is apparently what the jury *did* in the White case, there is slippage between this apparently clear act/culpability distinction when Fletcher gets to rape. Although he argues a defense of mistake as to consent is a *mens rea* defense to the *crime* of rape, see *infra* text accompanying notes 42-51, he characterizes the consent defense in *Tyson* as "this alleged excuse" to forced intercourse. See p. 184. His examples are insanity — when the jury decides both act and *mens rea* *before* determining whether to excuse a defendant — and the *Sharon* libel case against *Time*, in which the jury found that an article was false, then decided it was not published with reckless disregard for the truth. See pp. 181-83.

19. See Nina Schuyler, *Invisible Victims*, CAL. LAW. Dec. 1995, at 29, 29 (moderated debate between George Fletcher and Roger Cossack).

If it is the latter, however, there would be no need for the second part of the verdict, in which the jury determines *moral* guilt — exactly the role of the *mens rea* requirement.

According to Fletcher's model, if the jury finds a violation in the "attribution" phase, it then moves to a "responsibility" determination, in which it decides whether the defendant is fully morally blameworthy, partially blameworthy, or excused from blame (pp. 180, 245-47). Ostensibly, this helps individual victims who feel wronged, while allowing "innocent" defendants to escape criminal liability. Why a victim, who Fletcher believes wants justice and who deserves to have the wrongdoer punished by the community, would be mollified by a finding that "he did it but is not guilty," is anybody's guess. This becomes even more perplexing in light of Fletcher's proposal to give victims absolute veto power over plea bargains. Why a role in the determination of moral guilt is crucial to the victim in the plea bargain context, but not the trial context, is baffling.

In yet another proposal, Fletcher argues that victims ought to have a veto over plea bargains but no say whatsoever in sentencing (pp. 247-48). Fletcher's veto appears to be a one-way veto. A victim can force a trial, but not a plea bargain, presumably because what victims really want is a trial (even though they may have to settle for a finding of attribution but not guilt). The absolute veto, unlike many current laws that promote victim consultation or participation in plea bargain decisions, would "empower" victims. He argues that victims' participation in the plea bargain process would allow them to be heard and taken seriously — certainly a goal of victim-participation laws generally²⁰ — because prosecutors will pay attention only if victims have veto power (pp. 191-92, 248). He advocates this position even though he notes prosecutors might oppose it because it "compromises the[ir] options," presumably options unworthy of respect (p. 248). Fletcher also claims that veto power over plea bargains would further encourage "victim-offender reconciliation" and diminish the victim's "urgent need for vindication at a public trial" (p. 248). The proposal's unarticulated assumptions about the nature of crime victims, what they want, and what is good for them are mystifying in light of the known complexities of victim responses to crime.²¹ The presumption that victims have an urgent need for vindication is bizarre. They may want a conviction, or revenge, or they may not, and with no urgency at all. They may need time to heal before a trial, which may be a far more

20. See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987); see also CANDACE MCCOY, *POLITICS AND PLEA BARGAINING VICTIMS' RIGHTS IN CALIFORNIA* (1993).

21. See generally Henderson, *supra* note 16.

pressing concern; they may want to avoid a trial altogether.²² Moreover, Fletcher ignores the potential for coercion of defendants²³ and victims, as well as the fact that a veto alone does not greatly increase victim *participation* in the process. Prosecutors could simply submit proposals to victims without consulting with them. Finally, the proposal for veto power over plea bargains places the state's penal resources in the hands of individuals, again making criminal convictions more a matter of private, rather than public, law.²⁴

Fletcher asserts that "[t]he purpose of the trial is to stand by the victim" (p. 256), and that the community should punish offenders in order to show solidarity with the victim. This idea is not well-developed anywhere in the book. It seems, however, that the (admittedly formal) presumption of innocence disappears under this theory, and trials become a distorted Durkheimesque ritual of condemnation and social cohesion rather than a determination of guilt. This proposal is ironic, for Fletcher argues that individual victims should not have any role in sentencing determinations, although he would make the sentencing an opportunity for the community to show "solidarity" with the victim (p. 203). Because Fletcher opines that it would be good if victims could make unsworn statements in trials — despite the fact that the confrontation clause and other considerations might preclude this practice (pp. 196-97) — it is odd that he would prevent victims from participating in the sentencing process, where the rules of evidence and confrontation do not apply.

Fletcher justifies the exclusion of victims from sentencing solely on the grounds of objections to victim-impact testimony in the penalty phase of death penalty cases. A defendant's moral culpability, and thus the decision to execute him, Fletcher argues, cannot be determined on the basis of a victim's characteristics of which the defendant could not possibly have been aware. The "moral worth" of any given murder victim is irrelevant to determining the defendant's sentence; all life ought to be treated as equally valuable for purposes of determining the death penalty. Further, he argues that the use of survivors' statements in the penalty phase of death penalty cases will exacerbate the tendency toward vengeance; it will not increase justice (pp. 188-201).

22. See Henderson, *supra* note 16, at 974-82.

23. See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1266-72 (1994) (describing creation of victim-offender dilemma to coerce "choice" to participate in context of lack of knowledge and threats of negative consequences).

24. See *id.* at 1287-91, 1296-1301 (describing conflicts with public concerns and justifications for criminal sanction).

This argument, which is fine as far as it goes, is problematic for several reasons. First, capital punishment is an odd paradigm to use for criticizing all impositions of the criminal sanction, in part because the penalty phase of a capital case is a kind of substantive trial as well.²⁵ Second, as Fletcher's overall argument stresses standing in solidarity with victims when we punish and emphasizes centering the victim, it is extremely odd that he so suddenly decenters the victim when it comes to a role in sentencing. Indeed, victim participation in the community's rituals of condemnation would seem to promote the very solidarity Fletcher advocates.²⁶

Legislatures throughout the United States have indicated a desire to include victims at sentencing through victims' rights reforms.²⁷ The prevalence of laws permitting victim participation, or victim-impact information, at sentencing, as well as Fletcher's own purported goals, seems to argue *for* such participation. A sentencing hearing is the one place where victims can make the free-form statement detailing the crime's effect on them that Fletcher seems to want. Also, victims may provide evidence relevant to the sentencing issues of compensation and restitution.

Fletcher responds to this criticism by stating that tort is the place for a victim to sue for damages (pp. 200-01), which is true. But Fletcher cannot have it both ways: to insist that a victim have power over public prosecution but to deny the victim the right to pursue damages in that same case on the grounds that damages are "private" is unintelligible and backwards. That he prefers to burden victims with two trials — instead of favoring some form of the French *partie civile* that consolidates the "public" and "private" cases — is astonishing, considering Fletcher's ostensible concern for victims. Moreover, it is "private law" that allows victims to make their own case, conduct their own questioning, and achieve vindication.

A possible thesis about individual victims may still exist separately from the specific recommendations. In his discussions of cases, Fletcher stresses that the prosecutors and juries failed to empathize with the victim, or that the juries improperly empathized with the defendant, rather than the victim. One then could say that one of Fletcher's goals is to increase empathy for victims and decrease empathy for defendants.²⁸ Aside from the fact that too much empathy for defendants is hardly a problem in the vast major-

25. For a thoughtful and principled analysis of the undesirability of victim-impact statements in capital sentencing, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 66 U. CHI. L. REV. (forthcoming 1996).

26. See pp. 201-05.

27. See, e.g., Hall, *supra* note 13, at 238-41; Henderson, *supra* note 16, at 987 & n.233.

28. See Bandes, *supra* note 25; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

ity of criminal cases, including those few that actually go to trial, a number of substantive and theoretical problems plague Fletcher's suggestions. First, to argue that juries fail to empathize with victims of violent crimes based on a handful of cases is terribly misleading, especially as these cases were filled with strategic blunders, legal errors, and conscious counter-empathic moves by one side or the other. Second, Fletcher confuses sympathy with empathy — a common enough mistake, but one that confuses the argument still more. Sympathy means pity or compassion, while empathy does not necessarily entail either emotion. Fletcher seems to believe that if a jury sympathizes with victims, it will do the ostensibly desirable thing and convict the defendant. But a jury might be *very* sympathetic to a victim, while still finding reasonable doubt as to a defendant's guilt; a jury might also have considerable antipathy toward a victim and still convict. As Fletcher opposes appealing to jury sympathy in death penalty cases, he argues against this point. Additionally, one cannot assume that all victims are likeable or objects of irrational prejudices. What about nasty victims? They exist, we do not like them, and we do not empathize with them. Which best affirms the community's moral sensibilities and cohesion: a jury's failure to empathize with a nasty victim and consequent decision to acquit or a rule forcing juries to convict no matter what? Perhaps the former happened in the acquittal of Mrs. Bobbitt for mutilating her husband, an acquittal Fletcher finds so unjust. Or, alternatively, the jurors in both Bobbitt cases may have said "a plague on both your houses" — a reaction not necessarily at odds with the community's sense of justice — or as Fletcher asserts (without support), the jury could have concluded both had suffered enough (p. 244).

What of forbidding the defendant from claiming victimization and appealing to juror empathy? Does that then deny the effect of victimization and remove society's support from victims? Fletcher assumes that empathy is a limited capacity, such that it is impossible to empathize with a victim and defendant simultaneously. Appeals to fear of empathic standoffs and decisional paralysis to support arguments against empathy with persons or groups are a common means of dismissing empathy altogether.²⁹ But such arguments often mask unexamined bias and antipathy rather than provide any principled justification.³⁰ Alternatively — and Fletcher uses this old chestnut to argue against a defendant's appeal to juror empathy — it is not necessarily the case that to understand all is to forgive all (p. 17). This common enough assumption again is a result of

29. See, e.g., Henderson, *supra* note 28, at 1584-85, 1651-53.

30. For a principled argument against empathic decisionmaking in some instances, see Bandes, *supra* note 25.

confusing sympathy with empathy. The belief that judgment is lost if one understands the plight of another is a false one: it is entirely possible to empathize with another without approving of her conduct.

Because the cases Fletcher discusses often involve appeals to prejudice, the argument that representation of subordinated groups on juries will preserve the victim's point of view or rebut prejudice and increase empathic understanding might be appealing. So, too, is the argument that prosecutors ought to empathize with members of these groups who are crime victims. But again, we are left with questions and contradictions. Empathy, of course, is one of the best ways to rebut prejudice and hatred, but it is not the only way. Dedication to human rights and dignity is another.³¹

Fletcher's chapter titles and references to historical oppression suggest that groups that have been subjects of injustice might have some claims as victims and some right to be heard. To increase empathy and victim representation in this sphere, Fletcher recommends that juries should be "diverse" (p. 250). By this, he means juries ought to include members of the same race, ethnicity, religion, or background as the victim; these members can represent the victim against stereotyping and prejudice (pp. 250-51). But what characteristics "count" for purposes of Fletcher's diversity goal is not altogether clear. By focusing on *Batson v. Kentucky* and *J.E.B. v. Alabama*³² he inappropriately implies that concern with racial bias in jury composition has only recently become an issue. He limits concerns about representation on juries, concerns that trace back to *Strauder v. West Virginia*,³³ an 1879 case holding that excluding Blacks from jury duty violated the Equal Protection Clause, as being limited to a concern with the rights of former slaves rather than a concern for victims. *Strauder* does, at least, discuss the need for jurors of like experience, a proposition with which he ought to agree. Instead, he argues that current doctrine forbidding race- and sex-based peremptory challenges is wrong, because "[b]lacks and women are singled out for special treatment, and no one knows quite why" (p. 250) (one is tempted to snap in response: "Because of the Equal Protection Clause"). His explanation, that "'antidiscrimination' sells better than 'victims' rights'" (p. 217), seems absurdly out of touch with current political and constitutional-law realities.

31. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 447-52 (1991).

32. See pp. 213-18 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994)).

33. 100 U.S. 303 (1879).

To achieve victim representation on juries, Fletcher proposes that legislatures "reduce the number of peremptories on each side sharply, say, to three or fewer" (pp. 222-23, 251). But limiting peremptory challenges would do little to cure the lack of victim representation on juries because jury panels are not diverse to begin with in many jurisdictions. Nor does prohibiting changes of venue, another proposal that Fletcher makes (pp. 252-53), increase the likelihood of minority group members serving on juries. The community that he asserts has such an interest in the outcome of a trial that changes of venue are never justified (pp. 252-53) may indeed be homogeneous and have few, if any, members of the relevant group available for jury service even if the jury selection process is unbiased.³⁴

Fletcher's second complaint, that prosecutors fail dismally to empathize with victims — for example, Mona Lasch in the Smith case, and the state prosecutor in the Rodney King case — is interesting, but more complex than Fletcher would have it. While it is beyond the scope of this review to discuss them fully, two distinct questions arise here. First, *must* prosecutors empathize with a group to be effective and second, must prosecutors be able to empathize with every individual victim in order to obtain convictions? Empathy can play a large role in overcoming bias towards groups, but in the authoritarian, conventional world of many prosecutors' offices, it is unsurprising that the prosecutors themselves hold biases. Yet training prosecutors to be alert to potential biases might be more useful in eliminating the prejudices that lead to prosecutorial failures in cases with issues involving subordinated groups than eliminating peremptory challenges or making victims co-prosecutors. For example, in the Dan White case, the defense and prosecutor selected what would ordinarily be considered a pro-prosecution panel. But given the likelihood of sympathy for White's politics and bias against gay men in a "typically" prosecution-friendly jury, the prosecutor ought to have sought to empanel the type of liberal jurors he ordinarily would reject in a murder case. This common-sense lawyering hardly requires any major procedural changes.

That prosecutors ought to treat victims with respect should go without saying. Understanding the victim's story and experience may be extremely important in constructing a case both for plea-bargaining and trial purposes. Further, preparation of victim-witnesses and consultation with the victims are parts of good lawyering. But neither requires empathizing with victims in the sense of total understanding. In fact, empathy can be dangerous here both

34. See Stephen J. Schulhofer, *The Trouble With Trials; The Trouble With Us*, 105 YALE L.J. 825, 843-45 (1995) (reviewing *With Justice for Some*).

for prosecutors and victims. Without training in detachment or distancing, prosecutors may be easily overwhelmed by the victim's pain and find themselves losing patience with the victim's anguish or identifying with the perpetrator because of the victim's imperfections, and so on.³⁵ The ability to empathize with the defense's case and to anticipate defense "theories" or narratives of a case might, therefore, be more important to an effective prosecution than the prosecutor's ability to empathize with victims. For example, Fletcher criticizes Mona Lasch for not empathizing with the victim in the Smith case, but also states that the fact that the victim removed her panty hose before walking on the beach pointed to consent (p. 115). Lasch — and Fletcher — missed an obvious point that did not require empathy with this victim: Logically, most women would (do?) remove their stockings before walking on beaches. The real failure in the White, King, and Smith cases may have been the District Attorney's failure to understand the defense story rather than her lack of empathy for the victims.

Finally, if we place the "victims at the center,"³⁶ then the whole question of victim responsibility or victim precipitation arises. Victim conduct or moral blameworthiness may be relevant to a defendant's blameworthiness, despite Fletcher's apparently contrary assumption. Indeed, here, Fletcher's argument becomes even more confusing. He supports a notion of victim responsibility in the rape context, while denying it in cases of battered women or abused children, themselves victims, who kill.

III. STILL BLAMING THE VICTIM: WOMEN

If we are to stand in "solidarity with the victim" (p. 203), which victims count and why? Although Fletcher accuses others of failing to empathize with or understand victims, and points to prejudice against homosexual men, African Americans, and Jews, his own unreflective empathy for men and stereotyping of women lurks just below the surface of his text. Superficially sympathetic to rape victims and victims of battering, Fletcher denigrates data, selectively uses facts, and resorts to the current popular trend of scapegoating feminists throughout the book. He uses the threat of Lorena Bobbitt's mutilation of her husband and the trope of male innocence and female guilt³⁷ to argue that feminists and women have gone too far and have distorted justice. Feminists, according to Fletcher, are

35. See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 140-47, 151-54 (1992) (discussing trained therapists' difficulty in avoiding being overwhelmed by victims and identifying with the perpetrator).

36. P. 177. This phrase appears as the heading for chapter 6.

37. Cf. Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127, 132-44 (1991) (discussing cultural stories of male innocence and female guilt in the context of rape).

responsible in large part for injustices perpetrated against men, who have no lobby to "protest their victimhood" (p. 243). This is a revealing proposition, as every legislature and court system is dominated by men in sheer numbers, not to speak of their likely empathy for men or attitudes to women. Yet Fletcher seems to believe prosecutors, legislators, and judges deeply fear a feminist juggernaut that has distorted justice beyond tolerable levels in cases involving female victims.

Fletcher's book contains two particularly troubling parts for those concerned about violence against women. First, he implies that rape reform laws have gone too far in easing prosecutions (pp. 115-17). Second, he misrepresents the extent and effects of battering. In a book on victims' rights, the denial of the extensive victimization of women is shocking and wrong.

A. *Rape: The Switch to "Alleged" Victims*

At the beginning of the chapter entitled "Women," Fletcher states that the problem of so-called "victim blaming" defenses, discussed in preceding chapters, originated with defenses to the crime of rape (p. 108). This is a dubious assertion at best. While it is true that putting the woman on trial in rape cases was and is commonplace,³⁸ "blaming the victim" has never been confined to rape cases. Innuendos about dead victims are not uncommon in murder cases. In voluntary manslaughter and self-defense cases, for example, defendants have argued for years that the victim precipitated the killing or "asked for it" in some way that either partially or totally exonerates the defendant. Less obviously, lawyers routinely level subtle and blatant attacks on victim credibility and bias in criminal cases in which the victim is alive.

After a nod to the pervasive bias against women in rape law, and a hasty, inaccurate summary of the enactment of rape shield laws in the 1970s — laws that he largely opposes — Fletcher notes that "we still encounter the problem of proving that the woman said no. . . . So how do we know? And what happens if we can never know for sure?" (p. 113). Fletcher thus raises the specter of the lying, vindictive, or confused female in rape cases and sets the stage for his attack on the Tyson prosecution and rape reform generally.

The rape cases come down to tests of female credibility for Fletcher, and he finds that credibility wanting. "No" does not mean "no": "If there is a trial in a date-rape case, *we can assume the woman claims and may even think, in good faith, that she said no. And we can also assume the male defendant believes he heard yes*"

38. See, e.g., Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-15 (1977); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094 (1986).

(p. 125; emphasis added). Consent is "chimerical" (p. 123). From this observation he concludes: "Whether and when women actually consent to sex may be a question too elusive for courts and juries to ponder" (p. 124), presumably because women are too confused about such matters. Thus, *apparent* consent from the man's point of view becomes enough to exonerate him: "In a criminal trial, there is even stronger reason to focus not on the victim's actual consent but on the defendant's reasonable or unreasonable perception of consent."³⁹ Given her confusion, we should focus on the man's mens rea as to consent, and almost anything a woman has done to lead him to believe that she has consented will exculpate him. Fletcher writes: "If you are a rational better, you would probably bet that consensual necking is more likely to breed consensual sex" (p. 123). In other words, she asked for it.

Not only are women *confused*, they *lie*, and, as Fletcher's selective discussion of the testimony in *Tyson* suggests, protecting the lying woman is also unjust. The victim's testimony that she said "no" in the hotel room ought to have been irrelevant to Tyson's mental state, Fletcher argues. After his reference to the rational better, he writes: "This elementary fact of nature is well known in Indiana. . . . [T]here is something revealing in the proposition that the only relevant consent is consent 'that immediately precedes the intercourse' " (p. 123). The three excluded defense witnesses, who allegedly would have testified to seeing Tyson and a woman variously kissing, holding hands, or being close,⁴⁰ were crucial to establishing Tyson's honest and reasonable belief that the victim, Desiree Washington, consented (pp. 120, 124-25). "If Washington appeared to be consenting a half-hour before the events in the bedroom, there is a stronger basis for understanding why Tyson thought she was also consenting in the bedroom" (p. 124). Consenting to *what* is an obvious question, but Fletcher apparently believes the stereotype that consent to necking is consent to intercourse, or close enough to exculpate.

Unless all rape defendants raising consent as a defense are entitled to jury instructions on honest and reasonable belief, there is a problem Fletcher never deals with in the *Tyson* case. Tyson testified that Washington consented, that he knew she consented, and that there was no question whether she consented. Washington testified that she said "no" and never consented to any sexual activity. This was not a dispute over ambiguous facts or a mistaken belief as to consent. It came down to credibility, not mens rea. Perhaps this

39. P. 124. Fletcher identifies neither the "reason" nor why it is "stronger" in rape cases than in other criminal cases.

40. *Tyson v. Trigg*, 50 F.3d 436, 447 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996); *Tyson v. State*, 619 N.E.2d 276, 285-86 (1993), *cert. denied*, 114 S. Ct. 1216 (1994).

is why Fletcher strongly suggests that the victim was a liar. In an abrupt reversal of his earlier arguments that the judge ought to protect the *victim* in a criminal trial, Fletcher attacks Judge Gifford in *Tyson* for doing precisely that by prohibiting cross examination on issues of the victim's chastity and motives to lie (p. 127). According to Fletcher, the Indiana rape shield statute wrongly prevented an attack on the victim's chastity, an issue raised, apparently, *not* by her testimony that she was chaste, but rather by prosecutor Garrison's reference to her as a "good Christian girl" (p. 127). Apparently, for Fletcher, a lawyer's characterization of a client or witness is tantamount to character testimony that the opposing side can then impeach. Worse, according to Fletcher, "[t]he trial court would not allow cross-examination of Washington's parents with regard to their daughter's possible motives for making up a rape charge" (p. 127). Impeachment on one ostensible motive to lie — a civil suit for damages — is important to the victim's credibility in *Tyson*, according to Fletcher (p. 147). He ought to be aware that this opens the door for any of his "real" victims to be impeached on the same grounds, as all crime victims at least in theory have the right to sue perpetrators in tort for damages. That this is one clear legal right that persons harmed by crimes have — and one reason he would exclude victims from sentencing hearings (p. 201) — seems irrelevant to him in the context of rape.

Although it contradicts his earlier assertions that courts should stand by victims, Fletcher concludes his analysis with the following anti-victim statement: "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" (p. 131).

B. *Battering: Denying the Harm, Mocking Female Victims*

Fletcher agrees that women who are *killed* by their partners deserve the solidarity of the courts and law enforcement as they are "real" victims. However, Fletcher also states that because women also kill *their* partners (at about half the rate of men) the blood of men stains *their* hands, and the courts must not be complicitous with the evil of killing men (p. 132). Fletcher overlooks the fact that women frequently kill their partners for different reasons than men, in different circumstances, as well as the fact that for years, the criminal law averted its gaze from male violence against women.⁴¹

In a section titled "Battered Women Strike Back" (pp. 132-40), Fletcher minimizes the extent of violence against women by casting doubt upon the data indicating high rates of abuse and upon the

41. See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2154-57 (1995).

researchers in the area. Fletcher implies that reports indicating that one in four women will be assaulted by "their men" at least once in their lifetime are misleading because the figure includes "hostile contact that varies from a slight slap to life-threatening attacks" (p. 132). Fletcher's suggestion is that "slight slaps" are more prevalent than other forms of assault and, as such, are not violent, but minor, undamaging, *contretemps*. He also calls into question the accuracy of emergency room data indicating a high rate of admissions of women for injuries inflicted by intimates, citing Christina Hoff Sommers for the proposition that women may over-report such assaults.⁴² He nowhere mentions the substantial empirical evidence indicating that women underreport intimate violence to health care providers and others.⁴³ And, lest we be tempted to believe the extensive literature on battered women and domestic violence, Fletcher cautions: "[t]he professional writing in this area is motivated largely by political solidarity with women like Judy Norman," a battered woman convicted of murder in North Carolina (p. 135).

After asserting that the Simpson case was the first "celebrity" case involving battering and that there were no notorious cases on the subject until the Bobbitt case, Fletcher writes, utterly without irony, that "[m]ore typical cases of battered women are one-sided affairs" and cites *State v. Norman*⁴⁴ as a case representing the "general pattern" (p. 133). *Norman* was a so-called sleeping husband case, involving a relatively rare form of battered women's self-defense.⁴⁵ Despite the fact that *Norman* is not representative of the majority of cases, Fletcher makes the case the center of his attack on feminism's efforts to include considerations of the effects of prior violence on women in self-defense cases. The seemingly innocent, sleeping, vulnerable man is his prototype victim in his caricature of battered-women's syndrome evidence. Fletcher suggests that sympathy for defendants can run amok in these cases because of dubious expert testimony (pp. 135-39), although he never explicitly argues for the exclusion of battered-woman syndrome evidence.

In a reverse flip from the wide time frame for determining mens rea as to consent in rape cases, Fletcher narrows the time frame drastically in battered-women's self-defense cases by focusing on

42. P. 132 & n.41 (citing CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 201-03 (1994)).

43. He does state the percentage "is disputed," but does not refer to studies indicating underreporting. See generally DIANA E.H. RUSSELL, RAPE IN MARRIAGE 96-101 (1990); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1212-14, 1229 (1993).

44. 378 S.E.2d 8 (N.C. 1989).

45. Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

"imminence." What, Fletcher asks, is *imminently* threatening about a sleeping man (pp. 133-34)? By phrasing the question this way, Fletcher denigrates in every possible way the extensive knowledge about battered women that research has produced and the defendant Judy Norman. Because Fletcher has already dismissed the extensive feminist legal writing in the area as *too* victim-centered (p. 133), I shall use one of those writings to evaluate his approach. Thus, the following discussion of *Norman* draws from the reported opinion and from the thoughtful feminist analysis of Martha Mahoney's article on battering,⁴⁶ an analysis that Fletcher utterly ignores.

Judy Norman's husband brutalized her so severely, and for so long, Mahoney notes, that it is hard to know "where to begin" in discussing the case.⁴⁷ Mrs. Norman had been beaten, tortured, starved, forced to eat dog food, threatened with death, and attacked every time she tried to separate from her husband.

The thirty-six hours before Judy Norman shot her husband were marked by incredible violence, which escalated after her husband was arrested for drunken driving. He beat her almost continuously . . . threatened to cut off her breast and "shove it up her rear end" and put out a cigarette on her chest.

On the first evening after the drunken driving arrest, Judy called the police for help. An officer told her they could only help if she filed a complaint . . . She replied that "if she did so [her husband] would kill her." An hour later, she swallowed a bottle of "nerve" pills, and her family called for help. Her husband told the paramedics to let her die and repeatedly obstructed their attempts to save her.⁴⁸

The police did not prevent Mr. Norman from interfering with efforts to help his wife, nor was he charged with obstruction of officers in the performance of their duty. After that, Judy Norman contacted a mental health center to discuss pressing charges and having her husband committed. Her husband said he would cut her throat and interrupted her interview for welfare benefits, forcing her to return home.⁴⁹ She got away from him while he slept, got a gun at her mother's house, and shot him.

Fletcher admits some of the brutality Judy Norman endured but insists that Norman should have left, that she was free to leave, and that since she did not, she was fully blameworthy for murder. He characterizes her testimony as having "a self-serving spin" (p. 133), but plenty of other evidence existed and proved her husband's vio-

46. Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 91 (1991).

47. *Id.* at 91.

48. *Id.* at 90 (footnotes omitted).

49. *Id.* at 91.

lence and her efforts to leave.⁵⁰ So Fletcher has to concede the point — barely (pp. 133-34). For Fletcher, the severe beatings, some of which Norman received in response to her previous attempts to leave her abusive husband, apparently did not affect her ability to leave or the danger she faced if she tried. Rather, Fletcher concludes she was “addicted” to the violence (p. 135) — an outrageous misstatement of battered-women’s syndrome.

Even if they live in a “gulag,” according to Fletcher, victimized women are autonomous and therefore blameworthy moral agents (p. 134). Relying on an article by Anne Coughlin that criticizes the reliance on the learned helplessness aspect of the battered-women’s syndrome defense,⁵¹ Fletcher declares: “The point of Coughlin’s article is to sharpen our perception of women’s responsibility for their own choices. If married women can now be held liable for their crimes . . . they can be held accountable for their failure to leave abusive husbands” (p. 139). Judy Norman, however, tried, and tried, to leave. She was not addicted to the violence; she was held prisoner by it — a fact relevant to a claim of self defense, one would think: in a gulag, how is one “free”? As a dissenting justice in a similar “imminent danger” case in Kansas noted, if a person were held captive by a terrorist, and the guard fell asleep, we would consider killing the terrorist justifiable homicide.⁵²

Fletcher exclusively relies on David Faigman’s and Coughlin’s characterizations of expert testimony on battered-women’s syndrome⁵³ to denigrate its applicability to determinations of reasonableness (pp. 138-39). The focus of their, and his, criticism is the work of Lenore Walker, particularly her early borrowing from Martin Seligman’s work on depression.⁵⁴ Fletcher omits any reference to the extensive work of others in the field and the sophistication of the studies over time, and he wrongly accuses feminists of having a biased view that is uncritical of learned helplessness. In fact, leading feminist legal scholars on violence against women and battered-women’s syndrome have criticized the original learned helplessness model for years.⁵⁵ Further, battered-women’s syndrome evidence may be relevant to matters beyond the victim’s pathology, including

50. *Id.* at 89-92; see also Fletcher’s grudging acknowledgement of “ample” corroboration at pp. 133-34.

51. Ann Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994).

52. See *State v. Stewart*, 763 P.2d 572, 584 (Kan. 1988) (Herd, J., dissenting).

53. See Coughlin, *supra* note 51; David Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

54. See MARTIN SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984). Fletcher cites one research paper by Seligman, et al. See p. 281 n.50.

55. See Mahoney, *supra* note 48, at 39-43; Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195, 220-22 (1986); see also Dutton, *supra* note 43, at 1196-1201.

dispelling myths the jury might believe, such as the beliefs that the woman was addicted to violence, deserved violence, or could leave unmolested. It can also explain a woman's heightened awareness of imminent or immediate danger. A woman might, based on previous experience, be very aware of mortal danger to herself — that is, that her husband will try to kill her or inflict great bodily injury on her within a certain "at risk" period — which could continue for some time. Indeed, many stalking laws address precisely this problem. Fletcher, relying on statutory language, could insist on an extremely narrow time frame, but determining the length of the "imminence" period is ultimately an arbitrary endeavor. It has little or nothing to do with moral autonomy or asking the simplistic question: "Why didn't she simply leave?" (p. 135).

In the end, although he does not explicitly say so, Fletcher appears to want to bar an accused from claiming victimization — either as an individual or a member of a group — as a defense to a crime. Thus Fletcher would deny claims of child abuse or battering as relevant to reasonableness in self-defense cases. He trots out the first Menendez trial as the *reductio ad absurdum* of the dangers of "the abuse excuse" (pp. 140-48), and raises the specter of Bernard Goetz to caution against empathy for victims of prior violence who then act violently (pp. 187-88). Why should we preclude these victims from using evidence of victimization to show reasonableness? Because, Fletcher asserts, we should not endorse victims "taking the law into their own hands" (p. 134).

Self-defense law provides that if a person has an honest and reasonable belief she is about to be killed or gravely hurt — the time frame may be characterized as "imminent" or "immediate" — she may resort to deadly force. Prior threats and abuse at the hands of the victim certainly speak to the honesty and reasonableness of a defendant's belief in the need to use deadly force.⁵⁶ Thus, judges should admit evidence of the victim's character — past bad acts — despite Fletcher's opposition to "blaming the victim" (p. 137). Fletcher might respond to this argument, at least in the case of battered women, by claiming that batterers do not kill. In yet another attack on feminists, this time in a discussion of the O.J. Simpson case, he opines that the "motives for battering and killing are different" (p. 148). "Battering expresses a desire to dominate and con-

56. See, e.g., *People v. Moore*, 275 P.2d 485, 492 (Cal. 1954); *People v. Aris*, 264 Cal. Rptr. 167, 173 (Cal. Ct. App. 1989); *People v. Pena*, 198 Cal. Rptr. 819, 825-26 (Cal. Ct. App. 1984); *People v. Bush*, 148 Cal. Rptr. 430, 435-39 (Cal. Ct. App. 1978); *People v. Torres*, 210 P.2d 324, 327-28 (Cal. Ct. App. 1949); *Terry v. State*, 467 So. 2d 761, 763-64 (Fl. Ct. App. 1985); *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fl. Ct. App. 1982); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988); *Banks v. State*, 608 A.2d 1249, 1253 (Md. Ct. Spec. App. 1992); *People v. Torres*, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985); *State v. Richardson*, 525 N.W.2d 378, 381-82 (Wis. Ct. App. 1994).

trol. Batterers want their victims to remain alive so that they may continue the cycle of abuse and repentance" (p. 148). Where Fletcher gets this information is anybody's guess: killing is the ultimate act of dominance and control, either as "righteous slaughter"⁵⁷ or as an expression of the motive that "if I can't have you, nobody can."⁵⁸ Indeed, after the acquittal of Simpson, battered women's shelters reported that men were using phrases such as "I'm going to O.J. you" to keep women in abusive situations.⁵⁹

In yet another move, Fletcher claims that because batterers outnumber killers, "[t]he odds, therefore, that any particular batterer will kill are very low" (p. 148), which presumably would rebut a battered woman's claim of reasonable apprehension of death or serious bodily injury. But in the context of the "whodunit" nature of the Simpson case, not to mention in the context of the many women killed by lovers and husbands, that is not the right question: as Elaine Scarry said at a Yale conference, the question is not how many batterers end up killing, but how many women are killed by someone *other* than their abusers?⁶⁰

Fletcher seems to say that because defendants will opportunistically claim abuse when there was none, or exaggerate the nature and extent of their abuse at the hands of their victims or others, genuine victims of severe abuse should not be able to introduce evidence of that abuse in their defense. Although one might be justifiably skeptical of quasi-psychological, deterministic explanations for a particular defendant's behavior, one need not revoke concern for victims of abuse in order to condemn them for striking back at their tormentors, nor need one turn perpetrators into innocent victims. Given the knowledge of the effects of extreme trauma on human beings,⁶¹ we ought not dismiss out of hand "abuse excuses" or the effects of prior violence and victimization on the human personality. This perhaps requires a careful re-thinking and reconfirmation of substantive law, and one can deplore opportunistic claims of victimhood in the meantime. But this does not mean we should ignore the effects of brutalization and trauma. We may consciously choose to limit or expand defenses, depending, but victimization itself raises serious doubts about Fletcher's assumptions about free will and autonomy. One need not be a complete determinist to recog-

57. See JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 12-18 (1988).

58. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 SO. CAL. REV. L. & WOMEN'S STUD. 71, 91 (1992).

59. I heard the specific phrase after the verdict. See *Simpson Verdict's Chilling Message: Service Providers for Battered Women Report Clientele is Withdrawn, Scared*, SAN FRANCISCO EXAMINER, Oct. 22, 1995, at A-3.

60. Interviews with Professors Robert Weisberg and Robin West.

61. See generally HERMAN, *supra* note 35; Henderson, *supra* note 16, at 953-64.

nize that Judy Norman had no more escape than a prisoner held by terrorists. Indeed, such victimization can and does deprive individuals of autonomy and condemns them to terror and hypervigilance.

CONCLUSION

There is absolutely nothing wrong with an author using trials that are likely to be familiar to general readers for illustrative purposes. But to base an argument for massive law reforms solely on cases that are legal anomalies causes the author to run the risk of exaggerating minor faults and overlooking major ones. The fact that the vast number of criminal cases never go to trial, and of those that do, most result in convictions, makes extrapolating from anomalous cases tricky and ill-advised. Furthermore, such extrapolations suffer from an ahistoricism that often infects popular criticisms of the criminal justice system in the United States. Throughout our history, persistent beliefs that wily lawyers and inept juries let criminals off with great regularity have led to numerous reforms to "crack down" on crime.⁶² The rhetoric is old, and it is increasingly less justifiable. In today's crime-control climate, in which we execute people who may be innocent, for Fletcher to suggest that people regularly get away with murder seems irresponsible. His promotion of the idea that juries have too much empathy for defendants or antipathy for victims simply does not ring true. And invoking the popular rhetoric of "victims' rights" to justify a reform program cannot compensate for fundamental flaws in that program.

In his Introduction, Fletcher declares, "This is an angry book" (p. 4). It also is not a very good book. Flashes of anger or irritation do appear, but the book is more muddled and vexing than an effective polemic. Fletcher apparently wrote the book for a general audience, not cranky law professors, and so it may not be fair to demand too much analytic precision or scholarly care from his effort. Yet it cannot be the case that the "popular" label excuses failure to develop a coherent thesis or argument, sloppy reasoning, numerous internal contradictions, and disorganized writing. If Fletcher has an argument, the reader will frequently wonder with whom he is having it and to whom he is trying to communicate. At many points, she will find herself asking: "What has this to do with justice?" and "What has this to do with victims?"

62. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 449-65 (1993).