**THEODORE ROOSEVELT INN OF COURT**

**PRESENTS**

# Self Defense in a Criminal Case

## Bernard Goetz, Victim or Vigilante

**Nassau County Bar Association**
**Monday, April 28, 2014**
**6:00 pm**

**1.5 CLE Credits in Areas of Professional Practice and .5 CLE credits in Ethics**

**Presented by:**

**Judge: John L. Kase**
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**Defense Attorney: Stephen P. Scaring**

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# Bernhard Goetz

From Wikipedia, the free encyclopedia

**Bernhard Hugo Goetz** (born November 7, 1947) is a New York man known for shooting four young black men when they allegedly tried to mug him[2][3][4][5] on a New York City Subway train in Manhattan on December 22, 1984. He fired five shots seriously wounding all four. Nine days later he surrendered to police and was eventually charged with attempted murder, assault, reckless endangerment, and several firearms offenses. A jury found him not guilty of all charges except for one count of carrying an unlicensed firearm, for which he served two-thirds of a one-year sentence. In 1996, one of the shot men, who had been left paraplegic and brain damaged as a result of his injuries, obtained a civil judgment of $43 million against Goetz.[6]

| Bernhard Goetz | |
|---|---|
| **Born** | Bernard Hugo Goetz[1]<br>November 7, 1947<br>Kew Gardens, New York, US |
| **Nationality** | American |
| **Religion** | None, raised Lutheran |

The incident sparked a nationwide debate on race and crime in major cities, the legal limits of self-defense, and the extent to which the citizenry could rely on the police to secure their safety.[4] Although Goetz – who was dubbed the "Subway Vigilante" by New York City's press – came to symbolize New Yorkers' frustrations with the high crime rates of the 1980s, he was both praised and vilified in the media and public opinion. The incident has also been cited as a contributing factor to the groundswell movement against urban crime and disorder,[7] and the successful National Rifle Association campaigns to loosen restrictions on the concealed carrying of firearms.

## Contents

# Early life

Goetz was born on November 7, 1947 in Kew Gardens, Queens, New York City, the son of Gertrude and Bernhard Willard Goetz, Sr. His parents were Germany-born immigrants who had met in the United States;[8] Goetz's father was Lutheran; his mother, who was Jewish, converted to her husband's faith.[9][10][11][12]

While growing up, Goetz lived with his parents and three older siblings upstate, where his father ran a dairy farm and a bookbinding business.[13] He and his sister attended boarding school in Switzerland for high school. Goetz returned to the United States in 1965 for college, and earned a bachelor's degree in electrical engineering and nuclear engineering from New York University.[13] By this time the family had relocated to Orlando, Florida; Goetz joined them and worked at his father's residential development business. He was briefly married, and after his divorce moved to New York City, where he started an electronics business out of his Greenwich Village apartment.[13]

# Subway shooting incident

## Context

The incident occurred during the 1980s, when crime rates in New York City were peaking after rising since 1966. Between 1966 and 1981, violent crime rates in the city had more than tripled from 325 violent crimes per 100,000 to approximately 1100 crimes per 100,000 people. By mid-decade, the city had a reported crime rate over 70% higher than the rest of the U.S. In 1984, there were 2 homicides, 18 violent crimes, and 65 property thefts reported per 10,000 people. The subway became a symbol of the city's inability to control crime.[14] In an opinion poll of New York City residents taken the month after the shootings, more than half of those surveyed said crime was the worst thing about living in the city; about a quarter said they or a family member had been a victim of crime in the last year; and two-thirds said they would be willing to pay for private security for their building or block.[15]

Goetz alleged that while transporting electronic equipment in 1981, he was attacked in the Canal Street (IRT Lexington Avenue Line) subway station by three youths in an attempted robbery.[16] They smashed him into a plate-glass door and threw him to the ground, permanently injuring his chest and knee.[17] Goetz assisted an off-duty officer in arresting one of them; the other two attackers escaped. Goetz was angered when the arrested attacker spent less than half the time in the police station than Goetz himself spent, and he was angered further when this attacker was charged only with criminal mischief, for ripping Goetz's jacket.[13][17] Goetz subsequently applied

for a permit to carry a handgun, on the basis of routinely carrying valuable equipment and large sums of cash, but his application was denied for insufficient need.[13] He bought a 5-shot .38-caliber Smith & Wesson Model 37 Airweight revolver during a trip to Florida.[13][18]

## Background

In the early afternoon of Saturday, December 22, 1984, four young African American men from the Bronx—Barry Allen, Troy Canty, Darrell Cabey (all 19) and James Ramseur (18)—boarded a downtown 2 train (Broadway – Seventh Avenue Line express) carrying screwdrivers, apparently on a mission to steal money from video arcade machines in Manhattan.[19] When the train arrived at the 14th Street station in Manhattan, 15 to 20 other passengers remained with them in R22 subway car 7657,[20][21] the seventh car of the ten-car train.[22][23]

At the 14th Street station, Goetz entered the car through the rearmost door, crossed the aisle and took a seat on the long bench across from the door. Canty was across the aisle from him, lying on the long bench just to the right of the door. Allen was seated to Canty's left, on the short seat on the other side of the door. Ramseur and Cabey were seated across from the door and to Goetz's right, on the short seat by the conductor's cab.[21][22] According to Goetz's statement to the police, approximately ten seconds later Canty asked him, "How are you?" Goetz responded, "Fine." According to Goetz, the four men gave signals to each other, and shortly thereafter Canty and Barry Allen rose from their seats and moved over to the left of Goetz, blocking Goetz off from the other passengers in the car. By Goetz's account, Canty then said, "Give me five dollars." Canty and Ramseur testified at the criminal trial that they were panhandling, and had only requested the money, not demanded it. Cabey did not testify and Allen took the fifth amendment.

## Sequence of shots

Sources differ in reporting the sequence of shots fired, and whether Cabey was shot once or twice. Following are four versions from significant or reliable sources describing the sequence of shots:

### (1) Sequence of shots with Cabey shot on the fourth and fifth shots

Prior to the criminal trial, the media reported that Cabey had been shot on the fourth shot and then again on the fifth shot, with Goetz saying, "You don't look too bad, here's another." or "You seem all right, here's another."[24] This sequence of shots was discredited at the criminal trial when it was revealed that Cabey was shot once in the left side; however, some media still reported[25] this sequence long after the criminal trial.

### (2) Sequence of shots with Cabey shot on the fifth shot

"Speed is everything," Goetz said in a videotaped statement made after he surrendered nine days later.[22] He told police that while still seated, he planned a "pattern of fire" from left to right. He then stood, stepped clear of Canty, drew his revolver, turned back to Canty, and fired four shots, one at each man, then fired a fifth shot.[22] At the civil trial years later he said, "I was trying to get as many of them as I could."[26] Other sources repeated Goetz's statements to New York City police as to the sequence of shots: Canty was shot first, then Allen, then Ramseur, then Cabey.[23][22] In the related proceeding *People v. Goetz*, the New York Court of Appeals summarized the incident:

> It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "Give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun, and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the train scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.[27]

According to his statements to police, Goetz checked the first two men to make sure that they had been "taken care of", then, seeing that the fourth man was now sitting down and seemed unhurt, said "You seem to be all right, here's another", and fired at him again.[28] That the fourth man, Cabey, was shot only once[22][25][29][23][30] was a fact not made known to Goetz or his attorneys until shortly before the trial. One bullet missed, fragmenting on the steel cab wall behind Cabey. (The missed shot would also be the basis of a charge of reckless endangerment of other passengers.)[30]

**Cabey and the "here's another" issue**

Cabey ended up slumped in the short seat in the corner of the car next to the conductor's cab,[21] a lateral bullet wound in the rear of his left side and his spinal cord severed. Whether Cabey was struck by the fourth shot or by the fifth was critical to Goetz's claim of self-defense; this issue was fiercely contested at trial.[23] Medical testimony said that such an injury would render the lower half of Cabey's body instantly useless. According to the prosecution, the fourth shot missed; then Goetz shot a seated Cabey at point-blank range with the fifth. The defense theory of how Cabey ended up in the seat was that he was standing when hit by the fourth shot, then collapsed into the seat due to the lurching and swaying of the train; with the fifth shot being the shot that missed.[22]

A summary of Goetz's statements to the police had become public two months after the incident, drawing intense media coverage. Probably most damaging to Goetz's public support and to his claim of acting in self-defense was his statement that he had said "You don't look so bad, here's another" before firing at Cabey a second time. Media concentration on the summary's more damning portions created a public mindset that a wounded Cabey was shot a second time, with the second shot taken in a premeditated and deliberate way—an impression that stood uncorrected until the criminal trial two years later.[24] Eleven years later, at least one city newspaper was still reporting as fact that Cabey was shot twice.[29]

At trial, one witness testified that Goetz approached to within "two to three feet" of a seated Cabey, then demonstrated how Goetz stood directly in front of Cabey and fired downward, a description that matched Goetz's published statements.[23][22] Eight other independent witnesses testified that all shots came in "rapid succession";[23] one of these said the firing lasted "about a second".[22] None of the eight heard a pause before the final shot, and none saw Goetz standing in front of Cabey.[22]

Whether Goetz actually said the words "You don't look so bad, here's another" aloud, or only thought them, is still a matter of dispute. He has subsequently denied on several occasions making the statement.[31] In his closing summation to the jury, prosecutor Gregory Waples conceded:

> In all probability, the defendant uttered these words only to himself and probably not even mouthing the words, but just saying them in his own mind as he squeezed the trigger that fifth time.[23]

**(3) Sequence of shots with Cabey shot on the fourth shot**

At the Bronx civil trial Goetz testified the first shot was Canty, Allen second, the third shot missed, Cabey fourth, and Ramseur fifth. The following similar shooting sequence is from Bernie Goetz's website:

> I decided to shoot as many as I could as quickly as I could. I did a fast draw, and shot with one hand (my right), pulling the trigger prior to the gun being aligned on the targets. All actual shots plus my draw time occurred easily within 1.6 seconds or less. This is not as difficult to do as some might think, and occasionally I give a description of the technique along with a re-enactment. The first shot hit Canty in the center of the chest. After the first shot my vision changed and I lost my sense of hearing. The second shot hit lightning fast Barry Allen in the upper rear shoulder as he was ducking (later the bullet was removed from his arm). The third shot hit the subway wall just in front of Cabey; the fourth shot hit Cabey in the left side (severing his spinal cord and rendering him paraplegic). The fifth shot hit Ramseur's arm on the way into his left side. I immediately looked at the first two to make sure they were "taken care of", and then attempted to shoot Cabey again in the stomach, but the gun was empty. I thought Cabey was shot twice after reading a media account no shots missed; I had lost count of the shots and while under adrenaline I didn't even hear the shots or feel the kick of the gun. 'You don't look too bad, here's another', is a phrase I came up with later when trying to explain the shooting while I was under the impression that Cabey was shot twice. Cabey, who was briefly standing prior to the shooting, was sitting on the subway bench during all attempted shots. The others were standing. Shortly after the shooting my vision and hearing returned to normal.[32]

**(4) Sequence of shots, *Time Magazine* (April 8, 1985)**

Goetz said one of the boys made gestures that may have implied he had a weapon.[13] He rose and partly unzipped his jacket where the revolver was concealed, and plotted his "pattern of fire" for shooting them.[13] He asked Canty what he had said, and he repeated his statement. At this Goetz unzipping his jacket the rest of the way, drew the gun, and shot Canty, hitting him in the center of the body. He then turned to shoot Allen, who had tried to flee, hitting him in the back, and then shot Ramseur, wounding him in the chest and arm.[13] He then shot again, at Cabey, but may have missed. According to Goetz he then approached Cabey and shot him on the ground; however another witness disputed that Goetz shot Cabey a second time.[13] In any event, all four were wounded, but survived, though Cabey was permanently paralyzed from a bullet that severed his spinal cord.[13]

## Flight and surrender

The terrified passengers ran to the other end and out of the car, leaving behind the two women who had been closest to the shooting, fallen or knocked down by the exodus, and immobilized by fear. Goetz talked to them to make sure they were not injured, then was approached by the conductor of the train. Goetz stated "They tried to rob me."[22] The conductor asked whether Goetz was a police officer, receiving the reply, "No." Some time after a brief conversation in which he refused to hand over his revolver,[22] Goetz jumped to the tracks and ran south through the tunnel to the Chambers Street station, where he exited the system.[23] He went home to gather some

belongings, then rented a car and drove north to Bennington, Vermont, where he burned his blue jacket and dismantled the revolver, scattering the pieces in the woods north of town. He drove around New England for several days, registering at motels under various names and paying in cash.

On December 26, an anonymous hotline caller told New York City police that Goetz matched the gunman's description, owned a gun, and had been mugged previously.[33][34] On December 29, Goetz called his neighbor, Myra Friedman, who told him that police had come by his apartment looking for him, and had left notes asking to be contacted as soon as possible.[17] He gave his side of the story to Friedman, and described his psychological state at the time:[17]

> Myra, in a situation like this, your mind, you're in a combat situation. Your mind is functioning. You're not thinking in a normal way. Your memory isn't even working normally. You are so hyped up. Your vision actually changes. Your field of view changes. Your capabilities change. What you are capable of changes. You are under adrenaline, a drug called adrenaline. And you respond very quickly, and you think very quickly. That's all. [...] You think! You think, you analyze, and you act. And in any situation, you just have to think more quickly than your opposition. That's all. You know. Speed is very important.

Goetz returned to New York City on December 30, turned in the car, picked up some clothing and business papers at his apartment, rented another car and drove back to New England. Shortly after noon the next day, he walked into the Concord, New Hampshire police headquarters and told the officer on duty, "I am the person they are seeking in New York."[34]

## Statements to police

Once the officer realized that Goetz was a genuine suspect, Goetz was given a Miranda warning and he waived his right to have an attorney present. After an interview that lasted over an hour, a Concord detective asked Goetz to consent to making an audiotaped statement. Goetz agreed, and a two-hour statement was recorded. That evening, New York City detectives and an assistant district attorney arrived in Concord, and Goetz submitted to a two-hour videotaped interview. Both interviews were eventually played back for the grand juries, the criminal trial, and a civil trial years later. When the audiotape was first played in open court, Goetz was described by *The New York Times* as "confused and emotional, alternately horrified by and defensive about his actions, and obsessed with justifying them."[35]

In his statements, Goetz described his past mugging in which he was injured and the only assailant arrested went unpunished. He called New York City "lawless" and expressed contempt for its justice system, calling it a "joke", a "sham", and "a disgrace". Goetz said that when the four men he shot surrounded him on the train, he feared being "beaten to a pulp" as well as being robbed.[36] He denied any premeditation for the shooting, something that had been speculated on by the press.[22] Asked what his intentions were when he drew his revolver, Goetz replied, "My intention was to murder them, to hurt them, to make them suffer as much as possible."[28] Later in the tape, Goetz said, "If I had more bullets, I would have shot 'em all again and again. My problem was I ran out of bullets." He added, "I was gonna, I was gonna gouge one of the guy's [Canty's] eyes out with my keys afterwards", but said he stopped when he saw the fear in his eyes.[37] At the criminal trial, Goetz's defense attorneys, Barry Slotnick and Mark M. Baker, argued that this and other extreme statements by Goetz were the product of emotion and an overactive imagination.

Goetz was brought back to Manhattan on January 3, 1985, and arraigned on four charges of attempted murder, with bail set at $50,000. He was held in protective custody at the Rikers Island prison hospital.[38] Refusing offers of bail assistance from the public and from his family, he posted bail with his own funds and was released on bond January 8.[39]

# Early reports

Because of the loudness of the shots inside the confined space of the subway car, there were initial witness reports that suggested the gun involved was a .357 Magnum revolver. Goetz alluded to these reports in a December 2004 interview on the *Opie and Anthony* radio show, saying that the first shot he fired that afternoon had been unusually loud in part because it was the first shot fired by the small-frame .38 caliber revolver after the factory tests, which "cleaned the barrel".

After the incident, rumors spread that Goetz had been threatened with sharpened screwdrivers.[40] This rumor was published as fact by some newspapers including *The New York Times*;[3][41] however, neither Goetz nor the men made any such claim. During his subsequent statement to the police, Goetz expressed a belief that none of the young men had been armed.[42] Paramedics and police did find a total of three screwdrivers on two of the men; when Canty testified at Goetz's criminal trial, he said they were to be used to break into video arcade change boxes and not as weapons.[3]

# Public reaction

"The Subway Vigilante", as Goetz was labeled by New York City media, was front-page news for months, partly owing to the repressed passions the incident unleashed in New York and other cities. Public opinion tended to fall into one of three camps: Those in the first camp tended to believe Goetz's version of the incident, that he was aggressively accosted and surrounded by the four men and feared he was about to be beaten and robbed. Those in the second camp tended to believe the version told by the four men, that they were merely panhandling to get some money to play video games. A third camp believed that Goetz had indeed been threatened, but viewed the shooting as an unjustified overreaction.

## Supporters

Supporters viewed Goetz as a hero for standing up to his attackers and defending himself in an environment where the police were increasingly viewed as ineffective in combating crime.[43] The Guardian Angels, a volunteer patrol group of mostly black and Hispanic teenagers,[44] collected thousands of dollars from subway riders toward a legal defense fund for Goetz.[45] The Congress of Racial Equality (CORE), a civil rights organization, supported Goetz.[46] Its director, Roy Innis, offered to raise defense money, saying Goetz was "the avenger for all of us", and calling for a volunteer force of armed civilians to patrol the streets.[45] The prior criminal convictions of the four men (and the published accounts of such) prevented them from gaining sympathy from many people. A special hotline set up by police to seek information was swamped by calls supporting the shooter and calling him a hero.[41][45] Harvard Professor of Government James Q. Wilson explained the broad sentiment by saying, "It may simply indicate that there are no more liberals on the crime and law-and-order issue in New York, because they've all been mugged".[45]

### Detractors

Some believed the version of the incident as told by the four men, that they were merely panhandling with neither intimidation nor threats of violence. This view was later discredited when Cabey admitted in a newspaper interview that his friends had indeed intended to rob Goetz, who looked like "easy bait".[47] Some saw the incident as racial (Goetz was white, the four men were black), and the jury verdict as a blow to race relations. Benjamin Hooks, director of the NAACP, said "The jury verdict was inexcusable. [...] It was proven—according to his own statements—that Goetz did the shooting and went far beyond the realm of self-defense. There was no provocation for what he did." Representative Floyd Flake agreed, saying "I think that if a black had shot four whites, the cry for the death penalty would have been almost automatic".[48] C. Vernon Mason, a candidate for district attorney and co-counsel for Cabey who was later disbarred, said Goetz's actions were racist,[48] as did the Rev. Al Sharpton. Organized demonstrators accused Goetz of genocide.[49] Goetz's racial language about criminal activity on 14th Street, allegedly made at a community meeting 18 months before the shooting, "The only way we're going to clean up this street is to get rid of the spics and niggers",[17] was offered as evidence of racial motivation for the shooting. Black political and religious leaders twice called for Federal civil rights investigations.[50] An investigation by the office of U.S. Attorney Rudolph Giuliani determined that the impetus for the shooting had been fear, not race.[51] In an interview with Stone Phillips of *Dateline NBC*, Goetz later admitted that his fear was enhanced due to the fact that the alleged muggers were black.[52]

## Grand juries

Manhattan District Attorney Robert Morgenthau asked a grand jury to indict Goetz on four counts of attempted murder, four of assault, four of reckless endangerment, and one of criminal possession of a weapon.[53] Because they would have to be granted immunity from prosecution, neither Goetz nor the four men he shot were called to testify. The 23 jurors heard witnesses, considered the police report of the shooting, and studied transcripts and tapes of the sometimes conflicting statements Goetz made to police in New Hampshire.[24][54] The jury refused to indict Goetz on the more serious charges, voting indictments only for unlawful gun possession – one count of criminal possession of a weapon in the third degree, for carrying in public the loaded unlicensed gun used in the subway shooting, and two counts of possession in the fourth degree, for keeping two other unlicensed handguns in his home.[53] The case was assigned to Judge Stephen Crane.

The shootings initially drew wide support from a public fearful and frustrated with rising crime rates and the state of the criminal justice system.[43][55] A month after the grand jury's decision, a report summarizing statements Goetz made to police became public, indicating he had fired one shot at each of the four men, then checked their condition, and seeing no blood on the fourth, said "You don't look so bad, here's another" and fired again.[24] The media now wrote of a change in the public mood[56][57] and demanded that Goetz be tried on the attempted murder and assault charges while suggesting approaches that would allow Morgenthau to convene a new grand jury.[58] Public figures including New York Governor Mario Cuomo raised questions based on the police summary. Senator Arlen Specter of Pennsylvania called for a special prosecutor.[54]

Stating that he had a new witness, Morgenthau obtained Judge Crane's authorization[59] to convene a second grand jury, which heard testimony by Canty and Ramseur and indicted Goetz on charges of attempted murder, assault, reckless endangerment and weapons possession.[60] Judge Crane later granted a motion by Goetz to dismiss the

new indictments, based on alleged errors in the prosecutor's instructions to the jury regarding Goetz's defense of justification for the use of deadly force. A second factor in the dismissal was the judge's opinion that testimony by Canty and Ramseur "strongly appeared" to have been perjury, based on later public statements by Canty and Ramseur that they had intended to rob Goetz,[60][61] and on a newspaper interview where Cabey stated that the other members of the group planned to frighten and rob Goetz because he "looked like easy bait".[62] The judge allowed the weapons possession and reckless endangerment charges to stand.[61]

The New York Court of Appeals, in *People v. Goetz*,[63] reversed Judge Crane's dismissal, affirming the prosecutor's charge to the grand jury that a defendant's subjective belief that he is in imminent danger does not by itself justify the use of deadly force. The court agreed with the prosecutor that an objective belief, one that would be shared by a hypothetical reasonable person, is also required.[60] The appeals court further held that Judge Crane's opinion that the testimony of Canty and Ramseur was perjurious was speculative and inappropriate.[27] All charges were reinstated, and the case was sent to trial.

# Criminal trial

The case was defended by Barry Slotnick and Mark M. Baker. Slotnick argued that Goetz's actions fell within the New York self-defense statute. Under Section 35.15, "A person may not use deadly physical force upon another person... unless... He reasonably believes that such other person is committing or attempting to commit [one of certain enumerated predicate offenses, including robbery]."

Goetz was tried before a mainly white Manhattan jury,[25] six of whom had been victims of street crime.[64] He was acquitted of the attempted murder and first-degree assault charges and convicted of criminal possession of a weapon in the third degree – carrying a loaded, unlicensed weapon in a public place.[60] He was sentenced to six months in jail, one year's psychiatric treatment, five years' probation, 200 hours community service, and a $5,000 fine. An appellate court affirmed the conviction and changed the sentence to one year in jail without probation. The order of the appellate court was affirmed because the trial court had not erred in instructing the jury that, if it found the People had proved each of the elements of the crime beyond a reasonable doubt, it "must" find the defendant guilty. This was not a directed verdict. Goetz served eight months.

# Civil trial

A month after the shootings, Cabey's lawyers William Kunstler and Ron Kuby filed a civil suit against Goetz.[65] The case was tried in 1996, eleven years later, in the Bronx, with race as the dominant theme.[66] During jury selection, Kuby asked the mostly non-white prospective jurors whether they had ever been discriminated against. Goetz admitted to previous use of racial language and to smoking marijuana laced with PCP in the 1980s.[67] Kuby portrayed Goetz as a racist aggressor; Goetz's defense was that when surrounded he reacted in fear of being again robbed and beaten. Newspaper columnist Jimmy Breslin testified that in a 1985 interview, Cabey denied his involvement in an attempted robbery, but said that Canty, Allen, and Ramseur intended to rob Goetz.[47]

The jury found that Goetz had acted recklessly and had deliberately inflicted emotional distress on Cabey. Jurors stated that Goetz shooting Cabey twice was a key factor in their decision.[68] The jury awarded Cabey $43 million – $18 million for pain and suffering and $25 million in punitive damages.[69]

Goetz subsequently filed for bankruptcy, saying that legal expenses had left him almost penniless. A judge of the United States Bankruptcy Court ruled that the $43 million jury award could not be dismissed by the bankruptcy.[70] Asked in 2004 whether he was making payments on the judgment, Goetz responded "I don't think I've paid a penny on that", and referred any questions on the subject to his attorney.[71]

# Legacy

The New York State legal standard for the self-defense justification use of deadly force shifted after rulings in the case. New York jurors are now told to consider a defendant's background and to consider whether a hypothetical reasonable person would feel imperiled if that reasonable person were the defendant. (Opinion by Chief Judge Sol Wachtler, People v. Goetz 68 NY2d 96 .)

After reaching an all-time peak in 1990, crime in New York City dropped dramatically through the rest of the 1990s.[72] As of 2006, New York City had statistically become one of the safest large cities in the U.S., with its crime rate being ranked 194th of the 210 American cities with populations over 100,000. New York City crime rates in the years 2000–2005 were comparable to those of the early 1960s.

Goetz and others have interpreted the significance of his actions in the subway incident as a contributing factor precipitating the groundswell movement against crime in subsequent years. While that claim is impossible to verify, Goetz achieved celebrity status as a popular cultural symbol of a public disgusted with urban crime and disorder.[73]

# Activities since the incident

In March 1985, soon after being released from hospitalization for treatment of his gunshot wound, James Ramseur falsely reported to police that two men hired by Goetz had kidnapped and attempted to kill him,[74] but was not charged in this hoax. In May 1985, Ramseur held a gun while an associate raped, sodomized and robbed a pregnant 18-year-old woman on the rooftop of a Bronx building, and in 1986 was sentenced to 8⅓ to 25 years in prison. According to the New York State Department of Corrections[75] inmate search site, Ramseur served his sentence and was released in July 2010. Ramseur was found dead of a drug overdose, in an apparent suicide, in a Bronx motel room on December 22, 2011, the 27th anniversary of the incident on the No. 2 train.[76][77]

Barry Allen committed two robberies after the shooting, the first a 1986 chain snatching in the elevator of the building where he lived.[61] The second arrest, in May 1991, brought him a sentence of three and a half to seven years for probation violation and third degree robbery. He was released on parole in December 1995.[75][78][79]

After a number of minor arrests for petty offenses, Troy Canty was ordered to undergo an 18-month drug treatment program at a rehabilitation center, which he completed in 1989.[79][80] He was later charged with assault, robbery, and resisting arrest in an altercation with his common-law wife in August 1996 but was not convicted and did not serve time.[81]

As of 2005, Goetz was again living in New York City and had run for Mayor in 2001 and also Public Advocate in 2005. Goetz has stated that while he did not expect to win, he did hope to bring attention to issues in the public interest. He is an advocate for vegetarianism and the serving of vegetarian lunches in the city's public schools.[82] Goetz is also involved with squirrel rescue in the city.[83] He installs squirrel houses, feeds squirrels, and performs

first aid. He sells and services electronic test equipment through his company Vigilante Electronics.[84] In the 2002 film *Every Move You Make*, Goetz played a criminologist who taught a female stalking victim how to use a concealed-carry weapon.

Goetz occasionally gives media interviews about the 1984 subway incident that brought him into the public eye. In 2004, Goetz was interviewed by Nancy Grace on *Larry King Live*, where he stated his actions were good for New York City and forced the city to address crime.[71] In 2010 he was interviewed and did a shooting demonstration on the inaugural episode of The Biography Channel's documentary show *Aftermath with William Shatner*.

On November 1, 2013, Goetz was arrested for allegedly selling $30 worth of marijuana to an undercover female NYPD officer in Union Square.[85] At a December 18, 2013 court appearance he rejected a 10 day community service plea, stating "Either dismiss it, or let's take it to trial and let a jury decide". Outside court Goetz said he offered the undercover female officer the marijuana three times for free but she insisted on paying for it, and that he thought the arresting officer was trying to get him to punch him to escalate the case.[86] At a February 20, 2014 court appearance Goetz again rejected a 10 day community service plea and called on Mayor de Blasio, among other things, to stop all marijuana arrests in NYC for a few months. [87][88]

# See also

- Tony Martin (farmer)
- Joe Horn shooting controversy

# Notes and references

## Notes


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# External links

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- 2005 NYC Voter Guide: Candidate Profile: Bernard Goetz (http://www.nyccfb.info/public/voter-guide/general_2005/cd_profile/PA_Goetz_687.aspx)
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HANDOUTS

The New York Times

Archives

# GOETZ IS CLEARED IN SUBWAY ATTACK; GUN COUNT UPHELD; GOETZ JURORS FOUND BOTH SIDES' EVIDENCE DIFFICULT TO ACCEPT

In the end, after all the 10,000-odd pages of testimony over seven weeks, the four-woman, eight-man jury in the trial of Bernhard H. Goetz was never convinced that he was guilty of anything more serious than illegal possession of a gun, jurors said last night.

It was not so much, the jurors said, that they believed the defense offered by Mr. Goetz, who maintained that he shot four young men in a downtown IRT subway car because he thought they were about to rob him. It was that they found it hard to accept much of the evidence offered by either side.

"There was a lot of conflicting testimony," said one juror, James Moseley, a 27-year-old graphic-arts salesman who had never before served on a jury. "A lot of people said a lot of different things, including Goetz himself." 'Tore Your Heart Out'

Even the rambling statements Mr. Goetz gave to the police in Concord, N.H., left the jurors skeptical. In his summation, Mr. Goetz's chief defense lawyer, Barry I. Slotnick, had urged the jury to discount his client's own words, saying that he had been under terrible stress.

"There were inconsistencies in the tapes, in those confessions," said Diana Serpe, a 33-year-old airline sales representative. "I wondered to myself, 'You have to consider the emotional state he was in.' I hate those tapes - they tore your heart out. We saw he was in so much pain at the time he gave himself up."

She and several other members of the all-Manhattan jury, reached by telephone last night, painted a picture of a meticulous, painstaking effort to meet the judge's charge to them, which was to consider every piece of evidence on its merits and to keep an open mind.

The jury conducted 35 separate votes over four days of deliberation, said Ms. Serpe, and in not one of them did anybody "ever cast a guilty vote on the major charges."

Looking back, Catherine Tyler Brody, a 59-year-old archivist at New York City Technical College, said: "I do not believe we ever said guilty on anything else but possession of the gun he used in the subway. We did say 'undecided' over and over again. We considered each of the 13 counts individually."

Mark Lesly, a 28-year-old actor-writer and martial arts teacher, said: "Our job was to do what they told us to do in terms of what the law does. It was the prosecution's burden to prove to us beyond a reasonable doubt that Bernhard Goetz had behaved unreasonably. It didn't." Mr. Lesly expressed admiration for the prosecutor, Gregory L. Waples, whose four-hour summary of the case last week included parts "that I found stirring and moving and some that I found offensive."

Mr. Lesly described as "preposterous" the suggestion, which he attributed to the prosecution, that Mr. Goetz "went out hunting people, like David Berkowitz," the Son of Sam serial killer. "We used common, everyday sense" to reach a verdict, Mr. Lesly said, and "it didn't make much sense to argue that Bernhard Goetz was such a man. He was just a very frightened person."

Another juror, Michael Axelrod, a 34-year-old telephone company technician, dismissed suggestions that racism had been a factor in the case. The four young men, one of whom is brain-damaged and paralyzed from the waist down from his wound, are black. Two of the jurors are black, the rest are white. A 'Rather Sad Figure'

"My only thing I had to fall back on was the law," Mr. Axelrod said on the ABC-News program "Nightline," adding that to suggest "that this was a racial thing is just a bunch of garbage,"

"Mr. Goetz is rather a sad figure," he said, but he is not "a vigilante."

Ms. Serpe insisted that in acquitting Mr. Goetz of attempted murder, assault, reckless endangerment and more serious gun possession charges, "We were not trying to send a message to the public.

"The verdict doesn't reflect our opinions about what Goetz did or about actions such as that. I hope the public understands that."

"There was no strong anti-Goetz voice on the jury," she said. "There were a few people who were locked into not guilty positions from the beginning. But there were also some people who I would say were strongly undecided."

The jurors agreed that Mr. Waples, an assistant district attorney, had put together a formidable case. Mr. Waples had argued that Mr. Goetz, in his actions, had gone far beyond what a "reasonable person" would have done under the same circumstances.

"I thought his summation was masterful," said Mrs. Brody, whose rapt attentiveness in court convinced many that she was a stickler for details. "I appreciated it very much. I understand what he was trying to prove. I could not find the evidence to support his conclusions."

Asked if the jury was "proud" of the verdict, as a member of Mr. Goetz's defense team maintained, Mrs. Brody said, "We weren't proud of the verdict, but proud of the fact that we did our job well."

At one point yesterday, as deliberations quickened, the jury asked for a rereading of testimony by Christopher Boucher, one of the prosecution's strongest witnesses. Mr. Boucher, a San Francisco resident was on the subway car where Mr. Goetz shot the four youths on Dec. 22, 1984.

Mr. Boucher testified that one of the victims, Darrell Cabey, had been sitting down when Mr. Goetz shot him, leaving him paralyzed. The jury's request sent a buzz through the courtroom that the jury was moving toward a conviction for either attempted murder or assault.

"The prosecution placed great emphasis on Mr. Cabey's being different from the other three," Mrs. Brody said. "We didn't find evidence to prove it." Didn't Believe Goetz's Statements The jurors said that the main problem with Mr. Boucher's crucial testimony was inconsistencies they said had been brought out in cross-examination by Mr. Slotnick, the chief defense lawyer. Many of those, they said, had to do with the witness's description of how Mr. Cabey was sitting when the .38-caliber bullet severed his spine.

"It was just far-fetched," Ms. Serpe said of the testimony. "We could not find anything in the evidence that could substantially paint a theory that Cabey could have been shot while sitting in the seat with Bernie Goetz standing directly in front of him."

But by the same token, the jurors said they had had a difficult time believing Mr. Goetz, especially what he said in his videotaped statement to the New Hampshire police.

"I felt he was not far from the edge of hysteria at the time he made those tapes," Mrs. Brody said.

Mr. Moseley agreed. "The jury basically discounted the whole videotaped statement," he said. "The guy had been driving around for nine days, he'd been in the police station for 12 hours - and there were contradictions in what he said on that tape."

"We talked a lot about the law of justification, of self-defense," said Mr. Moseley, a 27-year-old native of Evansville, Ind., who often appeared in court with his long brown hair tied in a ponytail. "If you're being robbed and you feel your life is in danger, you can respond with lethal force. We discussed and discussed and discussed that."

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NEW YORK

# MY NEIGHBOR BERNIE GOETZ

BY MYRA FRIEDMAN
WITH MICHAEL DALY

I was napping when the telephone rang. I picked up the receiver and heard a voice that was tense and fearful.

As I recall, the conversation went like this: "Myra, this is Bernie." "Bernie who?" "Bernie Goetz." "Bernie, what in the world...?" "Listen, can you rent a car?" "Rent a car? What are

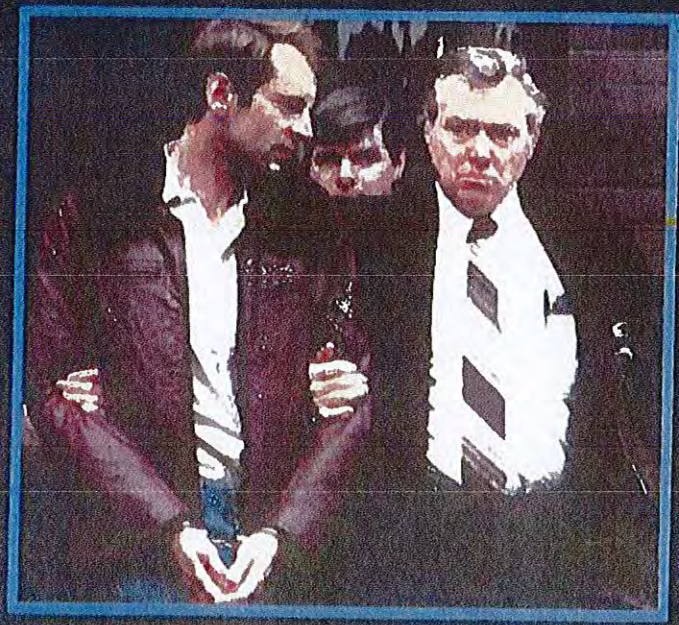
Continued on page 34

NEW YORK

# MY NEIGHBOR BERNIE GOETZ

BY MYRA FRIEDMAN
WITH MICHAEL DALY

FOR ALL the worldwide publicity, Bernhard Goetz remains a cardboard creature of the tabloids. But Myra Friedman, his neighbor in their 14th Street high rise, came to know Goetz as few others have, and while a fugitive, he confided in her in a series of extraordinary telephone conversations. Tapes of two of these conversations helped persuade a grand jury not to indict Goetz for attempted murder, but to charge him only with illegal gun possession.



Bernhard Goetz arrives in New York after turning himself in to police in New Hampshire.

I WAS NAPPING WHEN THE TELEPHONE rang. I picked up the receiver and heard a voice that was tense and fearful. As I recall, the conversation went like this:

"Myra, this is Bernie."

"Bernie who?"

"Bernie Goetz."

"Bernie, what in the world . . . ?"

"Listen, can you rent a car?"

"Rent a car? What are you talking about?"

"Do you know where Route 95 is to Connecticut?"

"Connecticut! What are you talking about?"

"Please, just listen to me. You can get a map and figure it out. Route 95. Take Route 95 to Connecticut, go off at Exit 6, and meet me at the Howard Johnson's there with a couple of the Guardian Angels and a tape recorder."

For a moment, there was only silence. I thought of the ongoing manhunt for the "*Death Wish* Vigilante." He had been described as tall, lanky, and blond, with a thin face and wire-rimmed glasses. This description fit 37-year-old Bernhard Goetz perfectly. My stomach churned.

"You? My God!" I said.

"Yes," he said.

"Where in the world am I going to find Guardian Angels?"

"I think they're picketing the mayor's mansion."

"Bernie, my God, I've got to go to the bathroom. Do you want to hold on?"

"No, no. I'll call back."

"Just give me three minutes."

"Well, I'll give you five."

I hung up. I remember feeling stunned and wondering if Bernie was having some sort of fantasy. I also wondered if he was *not* having some sort of fantasy and, if he was not, why he had chosen to call me. We had lived in the same building on West 14th Street for six years, but at least as I saw it, we were hardly the closest of friends.

Yet for reasons I still do not fully understand, I was the only person Bernie Goetz contacted. We spoke four times in three days, and he was, by turns, frightened, sickened, confused, ashamed, and outraged. He verged on tears several times. He laughed twice. He said that the four young men he had shot had not actually robbed him. They had shown what to him were unmistakable "signs" that they intended to attack. He said that one had thrust his hand into his pocket to indicate that he had a weapon.

"I saw what was going to happen," Bernie said. "And I snapped."

Bernie said that he had been forced to pull his gun on two previous occasions and had not fired. He said he did not want to be considered a hero and that he was not interested in fame or money. His primary concern seemed to be his privacy. He said he simply desired to resume a "normal life," and he appeared to believe this was actually possible. I realized that whatever crimes Bernie Goetz may or may not have committed he was in some bizarre way an innocent soul.

"I just want to be left alone," he said.

Until Bernie Goetz awakened me with that first phone call, ours was a relationship of hundreds of brief encounters. We both worked at home and often took breaks in the lobby. He seemed intense and hyperkinetic, and he had an obsessive nature that appeared appropriate for an engineer who specialized in calibrating electronic equipment. He walked astonishingly fast. Often, his hands were clenched as he scurried through the building. While I never heard him raise his voice, I sensed a tension in his speech and gestures. There was nothing remarkable about his mild green eyes. He was unfailingly proper and polite.

For several years, Bernie lived in an apartment facing 14th Street. He then moved into a quieter one-bedroom flat in the rear, directly above my own. The previous tenant had been a rather boisterous sex-show producer, and I was delighted to have Bernie replace him. Bernie covered his windows with stained glass, which gave the place a curious religious feeling. The rooms were sparsely furnished. The few pieces he did have were remarkable, and he appeared very pleased when I admired a massive mahogany chest he had inherited. Everything was orderly and clean.

When Bernie left the cathedral-lit sanctuary of his apartment and passed through the lobby, he found himself on a littered street of drug dealers and tawdry bargain stores. Junkies nodded out under the building's awning. Once, he stopped to peer curiously into a shopping cart full of rags and papers. A bag lady called for the police and accused him of theft. All of this chaos seemed to be too much for Bernie, and he found a focus for his obsessive nature in cleaning up 14th Street.

Because I was a member of the block association, Bernie constantly pursued me through the halls with new ideas. I would be rushing off to an appointment, and he would corner me in the lobby to suggest a city ordinance mandating the cleaning of all buildings every twenty years. I would be returning with a take-out lunch, starving, and he would whip out a document about street peddlers.

"Bernie, I have to go," I would say.

"Myra, it'll just be a minute," he would say.

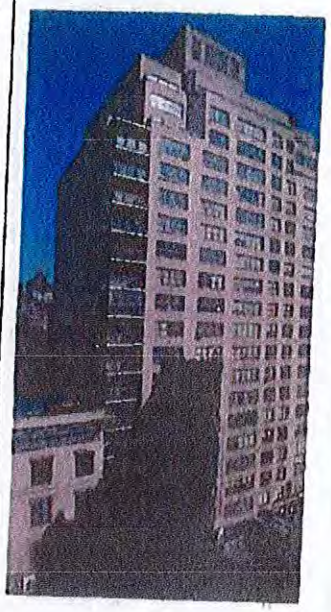
For months, Bernie badgered various city agencies to remove an abandoned newsstand on the corner. The structure continued to be used by drug dealers as a trash bin, urinal, and leaning post. One night, the issue was settled by a fire. There were rumors that Bernie was the torch. I can only say that he cleared away the debris and swept up the cinders.

The other troubles of 14th Street remained. People in the building who had always considered themselves to be liberal began expressing some surprising sentiments. Bernie was one of these people. At a community meeting, I heard him say, "The only way we're going to clean up this street is to get rid of the spics and niggers." I was shocked to hear a man whom I knew to have close black and Hispanic friends talk this way, and I said, "I'm getting out of here." Later, somebody close to Bernie for many years suggested that he used an occasional racial epithet just to shock.

"So he would go to the extreme of saying 'nigger' and 'spic' just to get the liberals wild, because he's pissed at them," the friend, Paul Barbuto, says. "He can also say the city government needs to be doing something for black kids. That's Bernie."

In 1981, Bernie was mugged by three black teenagers in the Canal Street subway station. He

The 14th Street building where Goetz has a rear apartment.



**'You see, it appears to everyone that I was right. Fine. Okay. Maybe they're right, maybe they're wrong. I think those four guys know if I was right or wrong."**

Photographs: left, Robert Maass/Photoreporters; right, Chris Morris/Black Star.

Over the years, he seemed obsessed with trying to clean up 14th Street.

**"I think what I did was appropriate or reasonable, if you can believe that, under the circumstances. Just appropriate and reasonable under the circumstances."**

fought with one of the attackers until police appeared. The attacker claimed Bernie had assaulted him. The mugger was released in two and a half hours. Bernie was detained for six. He never discussed the incident with me. He regarded the building staff almost as family, and he did confide in a doorman.

"He was laughing, but not really," the doorman said to me.

Bernie returned to his immaculate apartment with permanent damage to cartilage in his chest. I did not know that he later saw his attacker robbing a couple. I only later learned that he tried, unsuccessfully, to secure a pistol permit. I did not notice any change in him at all. He continued to scurry after me with petitions and to pester me to support yet another plan.

Quietly, Bernie paid $200 out of his own pocket to have an unsightly placard removed from the building canopy. He spent another $300 for litter bins. He bought a chair to replace one at the front desk that squeaked, and he served for a time as treasurer of the tenants' association. Yet he seemed to shy away from block-association meetings. With all his passion for the neighborhood, he somehow remained a loner, a community-minded man uncomfortable with community.

Often, I saw Bernie playing with children in the lobby. He would lift a child and laugh and seem momentarily at peace. He appeared far less at ease with his adult neighbors. In the midst of a conversation, he would sometimes abruptly whirl around and march away. He had apparently said all he wanted to say. One day, he visited a man on the tenth floor who was playing a recording at low volume. Without a word, Bernie went over and turned off the stereo. While I was not alone in retaining an odd affection for Bernie, I was also not the only one who found his eccentricities trying.

"You know," I would say to one of the men at the front desk. "That guy is going to drive me nuts."

THEN, ON THE EVENING OF DECEMber 29, Bernie telephoned and asked if I could meet him at the Howard Johnson's off Route 95. He said he would call again in five minutes. The phone rang at precisely the appointed moment. I am a writer. I had done a biography of Janis Joplin titled *Buried Alive* and was working on another book. I had no doubt that I was in the midst of a remarkable story. Without a second thought, and without telling Bernie, I flicked on the tape recorder, which happened to be next to my phone. Bernie's voice had a tremor, and his sentences were punctuated with sighs.

**Bernie:** Now that I think about this, I'm going to come to New York tomorrow. So you don't have to drive up here. If you want, we can talk about this for a few minutes, and I just have to ask you a favor. Why don't you just forget this conversation ever took place.

**Me:** I'm not going to do anything to hurt you, I promise you that. But I would like you to be a little, you're not being as coherent as you are usually prone to be.

**B:** How can you understand these things? It's, it's, it's, I'll tell you what, listen, probably, well, not probably, but I have a good possibility of perhaps being able to live a normal life. So, look, what I'm gonna do is, I'm gonna ask you a favor. Please, tell no one ever about this. I'll come in to New York tomorrow. If you wanna talk to me for a few minutes tomorrow, I'll be in my apartment, but maybe, just maybe, I can get away with it.

**M:** Bernie, can you tell me what happened?

**B:** Myra, you don't understand. Listen, and this is what it amounts to in this situation. I have protection with the truth, and I have protection with silence. Okay? Either one. . . . Myra, you weren't in the situation, and what is important to me is what is right and what is wrong. And I'm not even going to say that what I did was right or wrong. . . . I mean, that, to me, is a real issue. And what I'm going to be judged on are technicalities, and that's a farce. . . . You see, it appears to everyone that I *was right. Fine. Okay. If* they want to reach that conclusion. Maybe they're right, maybe they're wrong. I don't think people can say that. I think those four guys know if I was right or wrong!

**M:** What do *you* think?

**B:** What do you think I think? Myra, do you think that I was looking for that?

**M:** No.

**B:** Myra, I responded viciously and savagely. It's a state of mind that you're not familiar with. If you corner a rat and you are about to butcher it, okay? The way I responded was viciously and savagely, just like that, just like a rat. Now, the city, they can drag me through the dirt by showing how savage and vicious I was and by not releasing the whole truth, even on the technical things that happened. . . . I know the truth. Those guys know the truth. The people are looking for an easy answer. They're looking for a good guy defending himself, or a Clint Eastwood. Or if they want to condemn it, they're looking for someone who was looking for trouble. Or they can say, "Well, this person is crazy." Or they can say this person was uncivilized. Can you believe that, Myra! I heard some attorney from the Civil Liberties Union on television yesterday saying that I responded in an uncivilized way. Like he knows what went on. It's unbelievable! . . . Most people assume I did what's called the right thing. I'm not going to say that. I think what I did was appropriate or reasonable, if you can believe that, under the circumstances. Just appropriate and reasonable under the circumstances. And I knew what was happening right at the time. And a person does this and at the same time chooses to run away instead of turning himself over to the legal system—do you know what kind of statement that is about the legal system? If you have a clear-cut case, you would rather say the hell with it. See, Myra, you don't understand the situation in New York. In a way, in New York, the people are cornered, the people particularly in the poor sections, they're cornered like a rat. Myra, in the past three years, I have been attacked three times. And I've been threatened twice seriously. The people, particularly in the poor sections—you don't know how many guns there are in New York. The people *have* to have guns. And yet the city tells you, "Don't you *dare* have a gun; you get a one-year mandatory." I mean, this is just for starters. See, Myra, you don't understand. The society—

**M:** The what?



Photographs by Chris Morris/Black Star.

**B:** The society in its own way even uses terrorism. They say, for example, "You know what it's like to go to jail?" Myra, I don't care what happens to me. But you know what they tell the rest of society? In jail, just for example, one of the unspoken fears, if you go to jail, among guys, is you're going to get gang-raped. Okay? In jail, you're going to get beaten, gang-raped, the whole f------ business. It's a subtlety that is used, it's a subtle form of terrorism of a lot of the population. Whether you believe it or not doesn't matter to me. That's something you have to think about. I'm not worried about going to jail, Myra.

**M:** You're not going to go to jail.

**B:** Myra, in terms of the values of the society, I have everything to gain. *Everything.* Whether it would be money, or whatever, or fame, or popularity. These things just make me sick. But the whole situation . . . the legal system is a farce. It's a farce. It's a self-serving bureaucracy. These lawyers who want to defend me for free, Myra, the case is an open-and-shut case on technicalities. It's a simple thing.

**M:** You mean, you are innocent on technicalities or you are guilty on technicalities?

**B:** Obviously, I'm innocent, but on technicalities. It would be a joke to beat this . . . a joke.

**M:** Then what in the world are you afraid of?

**B:** What I want to lead is a normal life. That's all.

**M:** In other words, they menaced you.

**B:** Myra, why do you think these guys aren't telling the truth? Well, the police, either they're not telling the truth or they're releasing information that's bad information deliberately. But that doesn't matter.

**M:** The police don't think these guys were innocent.

**B:** You don't understand the issue. For example, on a technicality, they'll say they were carrying [screwdrivers], but they didn't display them. So therefore, I did not have the right to respond, Myra. . . . I know it. And they know it.

**M:** But you just said on a technicality you are innocent!

**B:** On *numerous* technicalities.

**M:** Then what difference does it make? Turn yourself in. Let a lawyer—

**B:** No. No, Myra. I just want to be left alone. I want no part of it. I don't have the strength to see this through. I have projects that I'm working on in my apartment. Things I want to do, and I want to do those things. That's what I want. I just don't want to spend one day on this. And if I turn myself in, this is just gonna run my life for the next several months.

**M:** But I also do not think there is a chance in hell that you are going to do any time.

**B:** That's not the issue. You don't understand. That's not what I'm afraid of. Myra, if someone comes up to me and puts a bullet in my head, I don't care.

**M:** I thought you had things in your life that you wanted to do.

**B:** If I'm going to live. Myra, that's not it. . . . What I want to do is forget this. Look, I'll tell you what. . . . I'll drive in to New York tomorrow, and what happens happens.

**M:** What is your option if you don't?

**B:** Listen, Myra. If I don't, if I don't turn myself in, if I don't get caught, I can lead a normal life. To you, that sounds unimportant. It seems like nothing to go through this. But I just don't want to go through it.

**M:** I do understand. You are in a pickle.

**B:** I'm not in trouble. It's just—Myra, this society makes me sick. Its values are so twisted. It's just crazy. I don't know. Anyway, look, why run up the phone bill?

**M:** I cannot be the only person in the world you have told about this.

**B:** You are. You are the only person who I have told who knows for sure. There are plenty of other people who, who *know.* But I haven't spoken to anyone about it. Well, one deputy sheriff.

**M:** What did the deputy sheriff say?

**B:** He recognized me. And he said I should get a medal.

**M:** But that's what I'm trying to tell you.

**B:** But that's not what I want! He knew what I wanted. And that is to be left alone. You understand? See, for you, it's easy to say, "Go ahead and do this and let's get all the dirt out." Myra, rather than go through this, I'd rather put a bullet in my head.

**M:** Don't talk like that.

**B:** To you it sounds ridiculous.

**M:** It doesn't sound ridiculous. It sounds frightening.

**B:** Well, you're not in my position. That's all. Well, anyway, the hell with it. Probably nothing will happen, I hope. Okay. I'll be around. Why don't you just go to bed now? I'll be in tomorrow. If you want, you can stop by. I won't be in until the afternoon.

**M:** And you're going to stay here in New York City, and you're going to manage to go on with your life and not tell anybody about this?

**B:** Sure. What I'm gonna try to do, I'll stay in New York for a period of time. Oh, by the way, Myra, there've been some very serious rumors about we're going to get a red herring [a prospectus for co-oping of the apartment building] in January. But anyway, whether it happens or not doesn't matter. Maybe I'd like to stay for a period of time. But I just want to move out of New York. Myra, if you could see New York City the way I see New York City.

**M:** Before this happened, had you thought that if something like that happened that you might do something like that if you got angry enough?

**B:** What do you mean?

**M:** Before this happened, and you were threatened or frightened, or they threatened to attack you.

**B:** Myra, you don't understand. I know a little bit about fighting. And I know how to defend myself. . . . You work out many different options under the circumstances. Do you understand? To say, I knew, it was premeditation—or whether it was not premeditation—is not important. Automatically, if you are thinking of defending yourself, whether you carry a gun or a screwdriver or a razor blade or anything, automatically there is a type of premeditation to your thinking. That a situation can occur.

**M:** So you're saying, in a way, that this is a scenario that you had kind of run through in your head.

**B:** *No. No, it's not!* Any situation that you come

**"I just want to be left alone. I want no part of it. I don't have the strength to see this through. I have projects that I'm working on in my apartment. Things I want to do."**

Doorman Al Welsh with the chair Goetz bought to replace the squeaky one.

**"You're in a combat situation. You're not thinking in a normal way. You are so hyped up. Your vision actually changes. You are under adrenaline, a drug called adrenaline."**

The prosecutor wondered if Goetz was a member of a vigilante group.

across can become a crime. Something like this? You never know what's going to happen. No one ever acted out anything like this. In that situation, Myra, you can use every facility you have, every bit of intelligence and treachery and speed and things like that. You're using all your facilities. And, Myra, I wasn't hunting those guys. I didn't even know they were on the train. Until I got on.

**M:** Answer me yes or no. Did they threaten you?

**B:** What do you think?

**M:** I think they appeared to be very menacing.

**B:** I *know* what was in their minds. And they know that I know. Do you understand? The threats. If a physical threat is displayed, that was irrelevant compared—

**M:** Compared to what?

**B:** Compared to the threat. The threats are what you see. With your eyes.

**M:** What do you mean?

**B:** The threats were numerous. Numerous and subtle.

**M:** You perceived that they were a threat to you.

**B:** I didn't perceive. I *know*. I know and they know. The police—I don't know how much they've checked into these guys.

**M:** They've got records.

**B:** What kind of records?

**M:** Criminal records.

**B:** Myra, those guys, those guys, I'm almost sure, are vicious, savage people. What I did, I responded in a vicious and savage way. And you just think. The savagery that's involved, it's a lot more than pulling a trigger.

**M:** Had you thought of this kind of scenario before? If some people menaced you, or you perceived them to be menacing, that you were liable to pull out a gun and shoot them?

**B:** Myra, you listen. I have been. I was attacked previously to this by two guys. Actually attacked. With weapons. And I got the drop on them, and I held one at bay. One of them ran; I held one at bay, and I let him run away. But that was a different situation. . . . I was threatened once, on the street, a serious threat, and I pulled the piece and the person ran away. I allowed the person to run away. Once, the situation where I was attacked by two people, I had *no* choice but to pull the piece, and showing it was enough. The situation where I was threatened by one person, I didn't have to pull the piece, because I reacted in anger. I didn't even have to show the gun. If I were smarter, I would have just run inside a store and just stayed in the store. . . . [In the subway shooting], I saw what was going to happen. And I snapped. The truth of the thing, the total truth would protect me. The technicalities would protect me. But I think, for me, I'm much better off just being totally silent. . . . For me, the best thing is to just try to forget and live a normal life. There really isn't much more to say.

**M:** How did you get through that subway?

**B:** Speed.

**M:** What do you know from subway tunnels?

**B:** You don't! Myra, you have to . . . Myra, in a situation like this, your mind, you're in a combat situation. Your mind is functioning. You're not thinking in a normal way. Your memory isn't even working normally. You are so hyped up. Your vision actually changes. Your field of view changes. Your capabilities change. What you are capable of changes. You are under adrenaline, a drug called adrenaline. And you respond very quickly, and you think very quickly. That's all.

**M:** You're saying you don't even know what you were doing there?

**B:** Oh, sure. I knew exactly what I was doing. In a sense, I knew exactly what I was doing.

**M:** How'd you get out of the city?

**B:** It doesn't matter. It doesn't matter. You think! You think, you analyze, and you act. And in any situation, you just have to think more quickly than your opposition. That's all. You know. Speed is very important.

**M:** Did you pass policemen on the way?

**B:** It doesn't matter. The story is unimportant. I'm going to try and get some sleep. Myra, just please don't tell anyone. I'll be staying. I don't want to go out. I just don't want to do anything. When I come back, I'm going to have to answer a bunch of mail and write some checks and do some paperwork and this and that. I've got things that I normally would be doing that I'm planning on doing. I need a good shower, I have to change my clothes. I'd like to straighten up my apartment a little bit and answer some mail and clean myself up and just things like that.

**M:** You better get a good night's sleep.

**B:** Well, it's not easy. Okay, Myra. I'll see you around. Bye-bye.

AFTER THE CONVERSATION, I WENT to buy a newspaper. I was dazed. I remembered that I had seen a detective I knew sitting in the building the previous Thursday. The detective's name is Maurice Cerulli, and I had said, "Hey, Moe, what are you doing here?" He had said, "Just routine." Given that I live on 14th Street, I had accepted the answer without a thought. Now I went to one of the doormen and asked what the police had been doing there.

"I don't know," the doorman said. "They were asking questions about Bernie. They left a note in his door and a note in his mailbox."

Back upstairs, I wondered if I should call Moe. I decided first to give Bernie a chance to turn himself in. I reasoned that the notes from the police might prove to be too much of a shock for him. I slipped up to the ninth floor and pocketed a piece of paper stuck in the door reading, "Mr. Goetz—Please contact the police A.S.A.P." The following morning, I retrieved the note from the mailbox.

Around noon on Sunday, I heard footsteps coming from the apartment upstairs. I dialed Bernie's number. There was no answer. I ran down to the front desk and asked the doorman if Bernie was home. The doorman said he was. I raced to the elevator. At that moment, the door slid open. There stood Bernie Goetz, on his way down to the laundry, holding a dirty blue sock.

"I can't talk now. I've got a lot of things to do. I can't talk," Bernie said.

About 2 P.M., there was a faint knock at my door. Bernie whisked into the apartment. Before I had a chance to tell him about the notes, he said he had found a message from the police under his door. I suggested he turn himself in. He said, "I can't, I can't." He said he could not endure the commotion. He said he might hide out in New England "until this blows over."



Photographs: left, Robert Mauss/Photoreporters; right, A. Tannenbaum/Sygma.

When I asked about the shooting, he paced back and forth. He appeared unable to put what had happened into words. He was able to leave me with a clear impression of how frightened he must have been. He finally turned and demonstrated a gesture he said one of the young men had made. He shoved his right hand into his pocket and thrust the fingers forward to suggest a weapon. He said something like "Look, Myra."

As he spoke, Bernie moved from chair to chair. He sat down. He stood up. He sat down. While he was in the recliner, I asked, "Bernie, what's with the guns, for God's sake?" He said, "Oh, Myra, I grew up on a farm. Guns are nothing on a farm. I knew about guns when I was a kid."

Bernie moved to the love seat. He reminded me that one of the doormen had been so badly beaten in a mugging that he had spent over a year in the hospital and had been left maimed. He said that the criminal-justice system allowed hoodlums to get away with anything short of homicide.

"Myra, they can do anything to you but kill you," Bernie said. "They can fracture your skull. They can squash your brain. They can ruin your kidneys. They can break your legs. They can wreck your spine."

Then Bernie shifted to the sofa. He rambled on about the poverty and bad schools that had spawned the four teenagers he had shot. He said that everyone was blameless. He said that everyone was to be blamed. He threw his hands in the air and said something like "I don't know, Myra, the whole thing's hopeless." He suddenly jumped to his feet and bolted out of the apartment.

"I got to get going," he said.

Less than an hour later, I heard a second faint knock. Bernie came in holding a neatly folded paper bag. He said, "Would you keep this for me for a couple of days?" I gave him a look, and he said, "This is not the weapon that was used." He raced toward the bedroom, and I said, "No, not there." I pointed to the front closet. I asked, "Will it explode?" He answered, "No, there are no bullets in there." I said, "I'm not touching it." He placed the package on the closet shelf.

"You have a lot of stuff on the floor in here, you know," he said.

A moment later, Bernie left, saying, "I got to go." I sat for a few minutes, and I decided I had to talk to Bernie about the package. I went up to his apartment and knocked. I said, "Bernie, it's me." There was no response, and I went back downstairs. That evening, I tried to contact a childhood friend who is a lawyer. The friend was on Martha's Vineyard for the New Year's weekend. I stared at the package in the closet. I had no desire to inspect what was inside.

AT 8:30 A.M. THE NEXT MORNING, THE telephone rang. Bernie was calling from somewhere outside the city. I heard the same anxious breathing and the same stammering speech. He sounded worn and fatigued. More than anything else, he seemed sad. I again turned on my tape recorder. He spoke about the police.

**B:** For some reason, they really want to get me. Okay, fine. It doesn't matter. But anyway, it's only a matter of time. Because once they start asking me questions, Myra, you know, what am I going to do? I'm not going to be able to lie to them.

**M:** Yeah, I think it would be very hard for you.

**B:** Okay. Now, what I'm planning on doing—I figure for me, probably the best course that I can do is, you know, give myself up to the police here in New Hampshire and just make a deal with the city and say, "Look, if you want the whole truth, I'll tell you everything I possibly know. You can do whatever you want with me. But just, you know, give me my privacy. All I'm asking for is my privacy. It's very important to me. If you give me my privacy, temporarily. Just temporarily, that's all. You don't have to give me amnesty or anything. Just my privacy temporarily, and then what I would like, you know, is to go on leading a normal life afterwards. This would be giving me my privacy permanently." . . . Myra, what I did—I turned into a monster, and that's the truth. But if most people, a lot of people, would have been in my shoes, they would have done the same thing.

**M:** Of course. Everybody knows that.

**B:** But here's the thing. The authorities are out to get me, Myra. As I see it, it's only a matter of time. So I think I'm going to try to pull this deal off. My privacy is worth a lot to me. What's going to happen though, too, once they start checking up on me, they're probably going to start checking into, tracing all my activities. And they'll probably start questioning a number of people, many people, including you, in about a week or so. I'm just giving you some warning.

**M:** I am a little concerned because of what you left in the apartment.

**B:** It's going to be next to impossible that they would search your place.

**M:** It's not that. It's that if they asked me I'd have to tell them.

**B:** I see. Well, uh, uh, gee, Myra, I hadn't thought that out.

**M:** I know. And neither had I.

**B:** Well, uh. Oh, gee.

**M:** You don't want to come take them back, do you?

**B:** Oh, gee. Myra. They could say, "What was this guy doing talking to you?" You could just say, "He talked to me about this and that." You're worried, okay, they're going to put you on the spot saying, "Did he leave anything here, or did you assist him in any way, or anything like that?"

**M:** Something to that effect. What transpired.

**B:** You could say I just talked about it in general terms. . . . Myra, this Dr. Joyce Brothers wrote an article that I would be bragging about it and the whole thing. Oh, my God!

**M:** I saw it. I know. Listen, there is no way that I can get back into your apartment to put that stuff back in?

**B:** First of all, no, there isn't, because I have the only set of keys, and they're with me. And second, boy, that would really be bad for me too.

**M:** Yeah, I know.

**B:** Perhaps, could you just ask a friend, put them in a hatbox?

**M:** I can't do that.

**B:** Here's the thing. You do not necessarily know for sure what is in the bag. What I told you was what was not in the bag. I did not tell you what was in that bag. You have not opened the bag. I protected you in that way, Myra. Legally, I

While in jail, he declined offers of help in raising bail.


**'They're probably going to start checking into, tracing all my activities. And they'll probably start questioning a number of people, including you.'**

told you what was *not* in the bag. I said, "The weapon that was used is not in this bag."

**M:** Yeah, but—

**B:** I said, "There are no bullets in this bag. There's nothing loaded." Now, you knew what was in there, but . . . I did not tell you what was in there. I told you what was *not* in there.

**M:** Yeah.

**B:** You could surmise what is in there, but you could not necessarily know.

**M:** Bernie, I think the problem—a grand jury wouldn't believe me, that's all.

**B:** Myra, you're not going to be questioned that much, anyway.

**M:** Wait a minute!

**B:** Listen, I understand you're a little bit on the spot.

**M:** Could I drop them in the river?

**B:** Oh! That's a good idea. But here's the thing, rivers, uh—now that's an excellent idea—rivers get, uh, rivers get, uh, *dredged*?

**M:** Why are they going to dredge the river?

**B:** Well, there's all kinds of things to do. You can take the Staten Island Ferry and just, uh, you know, at night.

**M:** No, I don't have to be that obscure. I could just, I'll figure out what to do about that.

**B:** I just want to forget this if I possibly can.

**M:** I think it is an important story.

**B:** Myra, these are things that are just too much for people to bear. It's not art. It's *disgusting*.

**M:** That's not what I mean.

**B:** Don't go around telling anybody of any conversations that you've had or this and that. And I guess now if they ask me if I talked to anybody, I'll say, yeah, I talked to you for a while. I'm not going to say anything about what I left in your apartment. I'll say I talked to you about it in generalities and that I was thinking of turning myself over, of speaking to the Guardian Angels. See, at least I can make a deal. The deal is, the truth for my—how is it pronounced?—anon . . . anonym . . .

**M:** *Anonymity*.

**B:** A-non-y-mi-teee.

**M:** *Anonymity*.

**B:** Oh. It's not an easy word to pronounce.

**M:** I think that is the best thing you can do, just trying to make the circus as easy on you as possible. I think I can stand between you and that circus.

**B:** You can't. You can't, I won't do that. I don't feel I should have to hide anything from anybody. . . . I think I'll take a shower now and turn myself in, and that's probably all I can do.

**M:** Are people recognizing you, or are you slipping through pretty easily?

**B:** Well, like I say, New York City is out to get me. . . . I think what I'm offering them is reasonable. I don't see how they could, you know, turn it down.

**M:** Okay. Now what about a lawyer?

**B:** Here's the thing. I'll offer them anything. I'll tell them *everything* that they want to know. And, if they want to, they can put me on trial, and I'll plead no contest to *anything*. I'll make it so easy for them. I'll just tell 'em the whole truth, and if I did wrong, then they can judge me on that. I won't even fight it. . . . So anyway, I'm going to give myself up in a couple of hours. I don't know if I should drive to the state capital and give myself up or if I should just go into a local sheriff's department or something. . . . I'll play it by ear.

**M:** You don't want to come back into the city?

**B:** Well. Maybe, I'm a little bit of a fighter. It's a little bit of a way of giving one last kick to New York City. . . . The deal that I want to make—I don't see how the city can pass it up. . . . It seems so *fair* on my part.

**M:** Okay. As far as this other thing, telling anything afterwards, people will approach you.

**B:** Here's the thing. If I'm allowed to be anonymous, then they won't know who to go after. . . . My misfortune is I was in the wrong place at the wrong time, and I was number one, that's all. But Myra, people *have* to fight back. You have to. As I see it, if you don't, you're living like a dog.

**M:** The degree of anonymity . . . the press will drive them [the police] crazy.

**B:** Of course. The press. Oh, they just love their headlines.

**M:** So you want to stick to turning yourself in in New Hampshire.

**B:** I think that's what I'm going to do. For me, it seems it's the best course of action. Like I say, be calm. . . . I guess that's about it.

**M:** How come you were not in the army?

**B:** No. You don't have to be in the army. Why?

**M:** I just figured you would have been the right age.

**B:** For what? For Vietnam, you mean?

**M:** No. Nothing to do with Vietnam.

**B:** I did everything I could to get out of Vietnam, and I did. In terms of beating the system and stuff like that, I beat it good. I was an essential civilian working for the military, and I got canned from that job. . . . I was working on the nuclear submarines. And then from that, I went to a 4F. I got permanently disqualifed from the military.

**M:** How'd you get 4F?

**B:** I, uh, a psychiatrist trained me to act like a complete psychotic. Me and a number of other people. We actually went through a training program. It's ludicrous! . . . They're not going to want too much about my past. Generally, people want a simple answer, and it's just not.

**M:** Will you call me again?

**B:** Obviously not. Because I'm going to be in the hands of the police. So I won't be talking to you again until, well, maybe, I don't know if they could possibly release me on my own recognizance. Is that what it's called? But who knows? If you see me in the building, stop by and say hi. . . . Or, I'll give you a buzz or something like that.

**M:** Okay. I think you're doing the right thing.

**B:** I guess it's the only choice. Otherwise, it's going to be, I'm going to be a fugitive, that's all. Okeydoke. See you around. Bye-bye.

As a fugitive, he spoke of trying to meet with the Guardian Angels.

**"I did everything I could to get out of Vietnam. A psychiatrist trained me to act like a complete psychotic. We actually went through a training program. It's ludicrous!"**

AFTER THIS SECOND CONVERSATION with Bernie, I was finally able to reach my friend the lawyer, Paul Grand. He suggested that I could leave the brown paper bag at his office. He added, "I would hate to have whatever might be in that bag drop out on the sidewalk for the whole world to see." He told me to place it in a shoe box with a string. I decided that I had to follow his instructions to the letter, and I searched my apartment for a shoe box. I was unable to find



Photograph by A. Tannenbaum/Sygma.

one, and I went next door to a shoe store. I returned with a box, only to discover that Bernie's package was too large. I took a slightly bigger carton. I tied this with a cord and placed it in a shopping bag. I knotted a second cord, and I put the whole thing in a sack. I hopped a cab to Paul Grand's office.

That afternoon, I heard that Bernie had in fact surrendered to the police in Concord, New Hampshire. Through Paul Grand, I turned the brown paper bag over to the authorities. I learned that Bernie had given me a 9-mm. automatic pistol and a Smith & Wesson .38-caliber revolver.

For at least an hour, I was questioned by an assistant district attorney named Susan Braver. At the end of the interview, she stood up and said that she hoped Bernie was not a member of some sort of vigilante organization. I felt like saying that he could not even manage to attend block-association meetings.

"Bernie?" I said. "*Come on.*"

On television, I saw footage of Bernie being escorted to a squad car. He was handcuffed and surrounded by police. This was the first time I had ever seen him walk slowly. The newspaper reported that Bernie had insisted on giving a full statement and had stubbornly refused to accept even free legal advice. He had also declined offers of bail money. I heard that police had found a toy fire engine in his rented car. I thought of the children he played with in the lobby.

On January 3, Bernie was arraigned in Manhattan Criminal Court on charges of attempted murder and gun possession. I got a message to him, and he called. He was in a holding pen, and he said he was being transferred to Rikers Island. He said, "I'll raise bail and I'll get out of there if I survive it." I asked how he felt.

"I'm all right, Myra, everything's all right," he said. "Everything's fine. Fine."

The following week, I was called down to the grand jury. In the waiting room, I saw one of the four teenagers Bernie had shot. He was lying on a wood bench, wearing a blue hooded sweatshirt and sneakers. He moaned and said, "Get me a motherf------ ambulance. My stomach. My stomach." He limped as he went in to tell the jury that he had nothing to say.

Then my name was called. I entered a large room and noted that there were black and white jurors. Susan Braver stood to my left and questioned me aggressively. I felt she was intent on securing an indictment. My tapes were played, and several jurors laughed when they heard Bernie suggest that I dump his package off the Staten Island Ferry at night. Braver did not smile.

"What did you say when he delivered the package?" I remember Braver asking.

"A-i-h," I answered.

While the grand jury was still considering the case, Bernie raised bail. I stood downstairs that Tuesday evening awaiting his return. Somehow, he slipped through the reporters massed outside, and he scurried in through our building's back door. He was overjoyed to be home. He was more relaxed than I had ever seen him.

"Hi, everybody," Bernie said.

That night, I joined Bernie and some friends in his apartment. He seemed too happy to be upset by the mess the police had left. The room became crowded, and he suggested that we might be more comfortable in my flat. We went downstairs and ordered junk food. He said he had liked the meals at Rikers Island but had been put off by the roaches. He said his cellmates had included Emmanuel Torres, the accused killer of actress Caroline Eisenberg. Torres had given him a book.

Later, I heard Bernie walking alone in his apartment. Over the days that followed, the walking became pacing. One of the young men he had shot slipped into a coma at St. Vincent's Hospital. Bernie finally hired two attorneys. One, a well-known civil lawyer named Joseph Kelner, had been mugged in the past. The other, Barry Slotnick, was one of the more prominent criminal defenders in the city. Kelner and Slotnick wanted to see a videotape of the statement Bernie had made in New Hampshire. There was constant speculation in the press as to whether Bernie would forgo immunity and appear before the grand jury.

ONE EVENING, I ENCOUNTERED BERnie in the lobby. He was peppy, and he rattled on about the grand jury. He said, "The only reason to appear is to show good faith." Then, perhaps out of concern for me, he spoke of the brown paper bag.

"Oh, by the way, Myra, when this thing settles down in a few days, uh, maybe, you, uh, the package, maybe you want to give it back," he said.

When I got back to my apartment, I was shaking. I had hoped somebody had told Bernie that I had been compelled to turn the guns over to the police. For several days, I agonized over what to do. One afternoon, I finally picked up the telephone. I told Bernie that I had something to tell him.

"Sure, come on up," he said.

Upstairs, I sat on his couch. He had restored the apartment to order, and he had removed the scuff marks the police had left on his kitchen floor. I again admired his mahogany chest. I told him that I had taped him. He said, "I know, it's all right." I said that I had surrendered the guns. He said, "I know, it's all right." As I left, I paused to talk about the shooting.

"Bernie, are you sorry?" I said.

"I'd rather not answer," he said.

I spoke of the young man who remained in a coma.

"I feel terrible for his mother," Bernie said.

On another visit, Bernie showed me two pieces of mail. One was a letter from an apparent sadomasochist. The note read, "I want to be your slave." Bernie said, "Can you *believe* this?" The other letter was from a pretty woman who had enclosed a photograph. Bernie smiled.

"This one I'm going to answer," he said.

On January 25, the grand jury handed down its decision. Bernie was indicted only for weapons possession. I wondered if the tapes had led the jury to conclude that Bernie had acted in self-defense. I telephoned upstairs. Bernie had apparently been cautioned by his lawyers not to speak about the case. We only discussed a petition he had posted about street peddling. I asked if he wanted the block association to mail it in.

"I've already taken care of it," he said.

**Upstairs, I sat on Bernie's couch. I told him I had taped him. He said, "I know, it's all right." I said that I had surrendered the guns. He said, "I know, it's all right."**


He talked angrily of the press and its "love" of headlines.

# People v Goetz,
# 68 N.Y.2d 96 (NY 1986)

Court of Appeals of New York.
The PEOPLE of the State of New York, Appellant,
v.
Bernhard GOETZ, Respondent.

July 8, 1986.

Defendant was indicted for criminal possession of a weapon, attempted murder, assault and reckless endangerment. The Supreme Court, Trial Term, New York County, 131 Misc.2d 1, 502 N.Y.2d 577, Crane, J., dismissed indictment and People appealed. The Supreme Court, Appellate Division, 116 A.D.2d 316, 501 N.Y.S.2d 326, affirmed and People appealed. The Court of Appeals, Wachtler, C.J., held that: (1) Penal Law recognizing defense of justification and permitting use of deadly force where actor "reasonably" believes use of such force is necessary does not establish subjective standard rather determination of reasonableness encompasses determination that defendant has requisite belief that deadly force is necessary and that such beliefs are reasonable, and (2) dismissal of indictment based on hearsay evidence that conflicted with part of grand jury witness' testimony was improper.

Reversed, dismissed counts of indictment reinstated.

West Headnotes

[1] Homicide 203 ⚿794

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k792 Apprehension of Danger
203k794 k. Actual belief in or apprehension of danger. Most Cited Cases
(Formerly 203k116(3))

Homicide 203 ⚿795

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k792 Apprehension of Danger
203k795 k. Reasonableness of belief or apprehension. Most Cited Cases
(Formerly 203k116(4), 203k116(3))

Penal Law permitting use of deadly force in self-defense only where the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery, and where actor reasonably believes use of deadly force is necessary to avert perceived threat, does not establish a solely subjective standard of whether a defendant's beliefs and reactions were reasonable to him, but rather, it must first be determined whether defendant had requisite belief that deadly force was necessary to avert imminent use of deadly force and then, whether in light of all the circumstances facing defendant a reasonable person could have had belief that use of deadly force was necessary. McKinney's Penal Law §§ 35.00 et seq., 35.15, 35.15, subds. 1, 2.

[2] Homicide 203 ⚿795

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k792 Apprehension of Danger
203k795 k. Reasonableness of belief or apprehension. Most Cited Cases
(Formerly 203k116(4))

The determination of reasonableness in Penal Law permitting use of deadly physical force only where actor "reasonably believes" that another person is using or about to use deadly physical force or is committing or attempting to commit enumerated felony, must be based on circumstances facing a defendant or his situation and thus reasonableness encompasses more than physical movements of potential assailant, and includes any relevant knowledge defendant had about potential assailant, physical attributes of all persons involved, including defendant, and any prior experiences defendant had which could provide a reasonable basis for his belief that another person's intentions were to injure or rob him or that use of deadly force was necessary under the circumstances. McKinney's Penal Law §§ 35.00 et seq., 35.15, 35.15, subds. 1, 2.

[3] Homicide 203 ⚷794

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k792 Apprehension of Danger
203k794 k. Actual belief in or apprehension of danger. Most Cited Cases
(Formerly 203k116(4), 203k116(3))

Homicide 203 ⚷795

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k792 Apprehension of Danger
203k795 k. Reasonableness of belief or apprehension. Most Cited Cases
(Formerly 203k116(4), 203k116(3))

In determining whether use of physical force was justified jury must first determine whether defendant had requisite belief that deadly force was necessary to avert imminent use of deadly force or commission of one of felonies enumerated therein and if the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable in light of all circumstances facing defendant. McKinney's Penal Law §§ 35.00 et seq., 35.15, 35.15, subds. 1, 2.

[4] Grand Jury 193 ⚷23

193 Grand Jury
193k23 k. Charge. Most Cited Cases

Prosecutor's instruction to grand jury that it had to determine whether under the circumstances, defendant's use of deadly force in self-defense was reasonable in his situation, although it did not elaborate the meaning of "circumstances" or "situation" or inform the grand jury that they could consider defendant's prior experiences, properly advised grand jury of existence and requirement of justification defense to allow jury to intelligently decide that there was sufficient evidence tending to disprove justification and necessitating trial of defendant. McKinney's Penal Law §§ 35.00 et seq., 35.15, 35.15, subds. 1, 2.

[5] Indictment and Information 210 ⚷10.2(8)

210 Indictment and Information
210II Finding and Filing of Indictment or Presentment
210k10 Finding of Grand Jury
210k10.2 Evidence Supporting Indictment
210k10.2(8) k. Particular offenses in general. Most Cited Cases

Indictment and Information 210 ⚷10.2(9)

210 Indictment and Information
210II Finding and Filing of Indictment or Presentment
210k10 Finding of Grand Jury
210k10.2 Evidence Supporting Indictment
210k10.2(9) k. Assault and rape. Most Cited Cases

Indictment and Information 210 ⚷10.2(12)

210 Indictment and Information
210II Finding and Filing of Indictment or Presentment
210k10 Finding of Grand Jury
210k10.2 Evidence Supporting Indictment
210k10.2(12) k. Homicide. Most Cited Cases

Counts of grand jury indictment charging defendant with attempted murder, assault in the first degree and criminal possession of weapon in second degree for having shot and wounded four youths on subway train after one or two of the youths approached him and asked for five dollars, should not have been dismissed based on hearsay evidence which came to light after grand jury indicted defendant, and which conflicted with part of testimony one of youths had given to grand jury, suggesting that youths had in fact planned on robbing defendant, in view of the fact that there was no basis for trial term to speculate as to whether such testimony was perjurious and defendant's own statements, together with testimony of passengers on subway, clearly supported elements of crime for which defendant was charged.

*98 ***20 **43 Robert M. Morgenthau, Dist. Atty. (Robert M. Pitler, Mark Dwyer and Gregory L. Waples, New York City, of counsel), for appellant.

*99 Mark M. Baker, Barry Ivan Slotnick and Michael Shapiro, New York City, for respondent.

OPINION OF THE COURT

Chief Judge WACHTLER.

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that the prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

I.

The precise circumstances of the incident giving rise to the charges against defendant are disputed, and ultimately it will be for a trial jury to determine what occurred. We feel it necessary, however, to provide some factual background to *100 properly frame the legal issues before us. Accordingly, we have summarized the facts as they appear from the evidence before the Grand Jury. We stress, however, that we do not purport to reach any conclusions or holding as to exactly what transpired or whether defendant is blameworthy. The credibility of witnesses and the reasonableness of defendant's conduct are to be resolved by the trial jury.

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed towards Chambers Street.

It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars". Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the ***21 shots were fired. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently*101 taken cover, also lying on the floor. Goetz told the conductor that the four youths had tried to rob him.

**44 While the conductor was aiding the youths, Goetz headed towards the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks and fled. Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier. Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had

successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine". Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars". Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me". Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed".

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible". When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run". Goetz then turned to his right to "go after the other two". One of these two "tried to run through the wall of the train, but * * * he had *102 nowhere to go". The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of". Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another' ", and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control * * * I would have put the barrel against his forehead and fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again."

II.

After waiving extradition, Goetz was brought back to New York and arraigned on a felony complaint charging him with attempted murder and criminal possession of a weapon. The matter was presented to a Grand Jury in January 1985, with the prosecutor seeking an indictment for attempted***22 murder, assault, reckless endangerment, and criminal possession of a weapon. Neither the defendant nor any of the wounded youths testified before this Grand Jury. On January 25, 1985, the Grand Jury indicted defendant on one count of criminal possession of a weapon in the third degree (Penal Law § 265.02), for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01), for possessing two **45 other guns in his apartment building. It dismissed, however, the attempted murder and other charges stemming from the shootings themselves.

Several weeks after the Grand Jury's action, the People, asserting that they had newly available evidence, moved for an order authorizing them to resubmit the dismissed charges to a second Grand Jury (*see,* CPL 190.75[3] ). Supreme Court, Criminal Term, after conducting an in camera inquiry, granted the motion. Presentation of the case to the second Grand Jury began on March 14, 1985. Two of the four youths, Canty and Ramseur, testified. Among the other witnesses were four passengers from the seventh car of the subway who had seen some portions of the incident. Goetz again chose not to *103 testify, though the tapes of his two statements were played for the grand jurors, as had been done with the first Grand Jury.

On March 27, 1985, the second Grand Jury filed a 10–count indictment, containing four charges of attempted murder (Penal Law §§ 110.00, 125.25 [1] ), four charges of assault in the first degree (Penal Law § 120.10[1] ), one charge of reckless endangerment in the first degree (Penal Law § 120.25), and one charge of criminal possession of a weapon in the second degree (Penal Law § 265.03 [possession of loaded firearm with intent to use it unlawfully against another] ). Goetz was arraigned on this indictment on March 28, 1985, and it was consolidated with the earlier three-count indictment.[FN1]

FN1. On May 14, 1985, Goetz commenced an article 78 proceeding in the Appellate Division seeking to prohibit a trial on the charges contained in the second indictment on the ground that the order allowing resubmission of the charges was an abuse of

discretion. The Appellate Division dismissed the proceeding on the ground that prohibition did not lie to review the type of error alleged by Goetz (111 A.D.2d 729, 730, 491 N.Y.S.2d 5), and this court denied a motion for leave to appeal from the Appellate Division order ( 65 N.Y.2d 609, 494 N.Y.S.2d 1028, 484 N.E.2d 671). The propriety of the resubmission order is not before us on this appeal.

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged (*see,* CPL 210.20[1][b] ), and that the prosecutor's instructions to that Grand Jury on the defense of justification were erroneous and prejudicial to the defendant so as to render its proceedings defective (*see,* CPL 210.20[1] [c]; 210.35[5] ).

On November 25, 1985, while the motion to dismiss was pending before Criminal Term, a column appeared in the *New York Daily News* containing an interview which the columnist had conducted with Darryl Cabey the previous day in Cabey's hospital room. The columnist claimed that Cabey had told him in this interview that the other three youths had all approached Goetz with the intention of robbing him. The day after the column was published, a New York City police officer informed the prosecutor that he had been one of the first police officers to enter the subway car after the shootings, and that Canty had said to him "we were going to rob [Goetz]". The prosecutor immediately disclosed this information to the court and to defense counsel, adding that this was the first time his office had been told of this alleged statement and that none of the police reports filed on the incident contained any such information. Goetz then orally expanded his motion to *104 dismiss, asserting that resubmission of the charges voted by the second Grand Jury was required under *People v. Pelchat,* 62 N.Y.2d 97, 476 N.Y.S.2d 79, 464 N.E.2d 447, because it appeared, from this new information, that ***23 Ramseur and Canty had committed perjury.

In an order dated January 21, 1986, Criminal Term 131 Misc.2d 1, 502 N.Y.S.2d 577, granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. The court, after inspection of the Grand Jury minutes, first rejected Goetz's contention that there was not legally sufficient evidence to support the charges. It held, **46 however, that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation". The court, citing prior decisions from both the First and Second Departments (*see, e.g., People v. Santiago,* 110 A.D.2d 569, 488 N.Y.S.2d 4 [1st Dept.]; *People v. Wagman,* 99 A.D.2d 519, 471 N.Y.S.2d 147 [2d Dept.] ), concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case. [FN2]

FN2. The court did not dismiss the reckless endangerment charge because, relying on the Appellate Division decision in *People v. McManus,* 108 A.D.2d 474, 489 N.Y.S.2d 561, it held that justification was not a defense to a crime containing, as an element, "depraved indifference to human life." As our reversal of the Appellate Division in *McManus* holds, justification is a defense to such a crime (*People v. McManus,* 67 N.Y.2d 541, 505 N.Y.S.2d 43, 496 N.E.2d 202). Accordingly, had the prosecutor's instructions on justification actually rendered the Grand Jury proceedings defective, dismissal of the reckless endangerment count would have been required as well.

Criminal Term also concluded that dismissal and resubmission of the charges were required under *People v. Pelchat (supra)* because the *Daily News* column and the statement by the police officer to the prosecution strongly indicated that the testimony of Ramseur and Canty was perjured. Because the additional evidence before the second Grand Jury, as contrasted with that before the first Grand Jury, consisted largely of the testimony of these two youths, the court found that the integrity of the second Grand

Jury was "severely undermined" by the apparently perjured testimony.

On appeal by the People, a divided Appellate Division, 116 A.D.2d 316, 501 N.Y.S.2d 326, *105 affirmedCriminal Term's dismissal of the charges. The plurality opinion by Justice Kassal, concurred in by Justice Carro, agreed with Criminal Term's reasoning on the justification issue, stating that the grand jurors should have been instructed to consider only the defendant's subjective beliefs as to the need to use deadly force. Justice Kupferman concurred in the result reached by the plurality on the ground that the prosecutor's charge did not adequately apprise the grand jurors of the need to consider Goetz's own background and learning. Neither the plurality nor the concurring opinion discussed Criminal Term's reliance on *Pelchat* as an alternate ground for dismissal.

Justice Asch, in a dissenting opinion in which Justice Wallach concurred, disagreed with both bases for dismissal relied upon by Criminal Term. On the justification question, he opined that the statute requires consideration of both the defendant's subjective beliefs and whether a reasonable person in defendant's situation would have had such beliefs. Accordingly, he found no error in the prosecutor's introduction of an objective element into the justification defense. On the *Pelchat* issue, Justice Asch noted the extensive differences between the Grand Jury evidence in that case and the case at bar and concluded that the out-of-court statements attributed to Cabey and Canty did not affect the validity of the indictment. In a separate dissenting opinion, Justice Wallach stressed that the plurality's adoption of a ***24 purely subjective test effectively eliminated any reasonableness requirement contained in the statute.

Justice Asch granted the People leave to appeal to this court. We agree with the dissenters that neither the prosecutor's charge to the Grand Jury on justification nor the information which came to light while the motion to dismiss was pending required dismissal of any of the charges in the second indictment.

III.

[1] Penal Law article 35 recognizes the defense of justification, which "permits the **47 use of force under certain circumstances" (*see, People v. McManus*, 67 N.Y.2d 541, 545, 505 N.Y.S.2d 43, 496 N.E.2d 202). One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person (Penal Law § 35.15). Penal Law § 35.15(1) sets forth the general principles governing all such uses of force: "[a] *106 person may * * * use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person" (emphasis added).[FN3]

FN3. Subdivision (1) contains certain exceptions to this general authorization to use force, such as where the actor himself was the initial aggressor.

Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force": "A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless (a) He *reasonably believes* that such other person is using or about to use deadly physical force[FN4] or (b) He *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery" (emphasis added).

FN4. Section 35.15(2)(a) further provides, however, that even under these circumstances a person ordinarily must retreat "if he knows that he can with complete safety as to himself and others avoid the necessity of [using deadly physical force] by retreating".

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met (*see*, Robinson, Criminal Law Defenses § 121[a], at 2). As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat.[FN5]

FN5. While the portion of section 35.15(2)(b) pertaining to the use of deadly physical force to avert a felony such as robbery does not contain a separate "retreat" requirement, it is clear from reading subdivisions (1) and (2) of section 35.15 together, as the statute requires, that the general "necessity" requirement in subdivision (1) applies to all uses of force under section 35.15, including the use of deadly physical force under subdivision (2)(b).

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in section 35.15 to the Grand Jury (*see,* CPL 190.25[6]; *People v. Valles,* 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50, 464 N.E.2d 418). The prosecutor properly instructed the grand jurors to *107 consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. He elaborated upon the prerequisites for the use of deadly physical force essentially by reading or paraphrasing the language in Penal Law § 35.15. The defense does not contend that he committed any error in this portion of the charge.

***25 When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes". The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation". It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "*he* reasonably believes", the appropriate**48 test, according to that court, is whether a defendant's beliefs and reactions were "reasonable *to him*". Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature, in enacting section 35.15, to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense (*see, e.g.,* 1829 Rev.Stat. of N.Y., part IV, ch. 1, tit. II, § 3; 1881 Penal Code § 205; *People v. McManus, supra,* 67 N.Y.2d at p. 546, 505 N.Y.S.2d 43, 496 N.E.2d 202). These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness. The 1829 statute, using language which was followed almost in its entirety until the 1965 recodification of the Penal Law, provided that the use of deadly force was justified in self-defense or in the defense of specified third persons "when there shall be a reasonable ground to apprehend*108 a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished".

In *Shorter v. People,* 2 N.Y. 193, we emphasized that deadly force could be justified under the statute even if the actor's beliefs as to the intentions of another turned out to be wrong, but noted there had to be a reasonable basis, viewed objectively, for the beliefs. We explicitly rejected the position that the defendant's own belief that the use of deadly force was necessary sufficed to justify such force regardless of the reasonableness of the beliefs (*id.,* at pp. 200–201).

In 1881, New York reexamined the many criminal provisions set forth in the revised statutes and enacted, for the first time, a separate Penal Code (*see generally,* 1937 Report of NY Law Rev Commn, Communication to Legislature Relating to Homicide, at 525, 529 [hereafter cited as Communication Relating to Homicide] ). The provision in the 1881 Penal Code for the use of deadly force in self-defense or to defend a third person was virtually a reenactment of the language in the 1829 statutes,[FN6] and the "reasonable ground" requirement was maintained.

FN6. The 1881 provision expanded the class of third persons for whose defense an actor could employ deadly force from certain specified persons to any other person in the actor's presence.

The 1909 Penal Law replaced the 1881 Penal Code. The language of section 205 of the 1881 code pertaining to the use of deadly force in self-defense or in defense of a third person was reenacted, verbatim, as part of section 1055 of the new Penal Law. Several cases from this court interpreting the 1909 provision demonstrate unmistakably that an objective element of reasonableness was a vital part of any claim of self-defense. In *People v. Lumsden*, 201 N.Y. 264, 268, 94 N.E. 859, we approved a charge to the jury which instructed it to consider whether the circumstances facing ***26 defendant were such "as would lead a reasonable man to believe that [an assailant] is about to kill or to do great bodily injury" (*see also, People v. Ligouri*, 284 N.Y. 309, 316, 317, 31 N.E.2d 37). We emphatically rejected the position that any belief by an actor as to the intention of another to cause severe injury was a sufficient basis for his use of deadly force, and stated specifically that a belief based upon "mere fear or fancy or remote hearsay information or a delusion pure and simple" would not satisfy the requirements of the statute ( 201 N.Y. at p. 269, 94 N.E. 859). In *109*People v. Tomlins*, 213 N.Y. 240, 244, 107 N.E. 496, we set forth the governing test as **49 being whether "the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked."

Accordingly, the Law Revision Commission, in a 1937 Report to the Legislature on the Law of Homicide in New York, summarized the self-defense statute as requiring a "reasonable belief in the imminence of danger", and stated that the standard to be followed by a jury in determining whether a belief was reasonable "is that of a man of ordinary courage in the circumstances surrounding the defendant at the time of the killing" (Communication Relating to Homicide, *op. cit.*, at 814). The Report added that New York did not follow the view, adopted in a few States, that "the jury is required to adopt the subjective view and judge from the standpoint of the very defendant concerned" (*id.*, at 814).

In 1961 the Legislature established a Commission to undertake a complete revision of the Penal Law and the Criminal Code. The impetus for the decision to update the Penal Law came in part from the drafting of the Model Penal Code by the American Law Institute, as well as from the fact that the existing law was poorly organized and in many aspects antiquated (*see, e.g., Criminal Law Revision Through A Legislative Commission: The New York Experience*, 18 Buff L Rev 213; Note, *Proposed Penal Law of New York*, 64 Colum L Rev 1469). Following the submission by the Commission of several reports and proposals, the Legislature approved the present Penal Law in 1965 (L.1965, ch. 1030), and it became effective on September 1, 1967. The drafting of the general provisions of the new Penal Law (*see*, Penal Law part I), including the article on justification (*id.*, art. 35), was particularly influenced by the Model Penal Code (*see*, Denzer, *Drafting a New York Penal Law for New York*, 18 Buff L.Rev. 251, 252; Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum L Rev 1425, 1428). While using the Model Penal Code provisions on justification as general guidelines, however, the drafters of the new Penal Law did not simply adopt them verbatim.

The provisions of the Model Penal Code with respect to the use of deadly force in self-defense reflect the position of its drafters that any culpability which arises from a mistaken belief in the need to use such force should be no greater than the culpability such a mistake would give rise to if it were made with respect to an element of a crime (*see*, ALI, Model *110 Penal Code and Commentaries, part I, at 32, 34 [hereafter cited as MPC Commentaries]; Robinson, Criminal Law Defenses, *op. cit.*, at 410). Accordingly, under Model Penal Code § 3.04(2)(b), a defendant charged with murder (or attempted murder) need only show that he "*believe[d]* that [the use of deadly force] was necessary to protect himself against death, serious bodily injury, kidnapping or [forcible] sexual intercourse" to prevail on a self-defense claim (emphasis added). If the defendant's belief was wrong, and was recklessly, or negligently formed, however, he may be convicted of the type of homicide charge requiring only a reckless or negligent, as the case may be, criminal intent (*see*, Model Penal Code § 3.09[2]; MPC Commentaries, *op. cit.*, part I, at 32, 150).

The drafters of the Model Penal Code recognized

that the wholly subjective test set forth in section 3.04 differed from the existing law in most States by its omission of any requirement of reasonableness (*see,* MPC Commentaries, *op. cit.,* part I, at 35; ***27 LaFave & Scott, Criminal Law § 53, at 393–394). The drafters were also keenly aware that requiring that the actor have a "reasonable belief" rather than just a "belief" would alter the wholly subjective test (MPC Commentaries, *op. cit.,* part I, at 35–36). This basic distinction was recognized years earlier by the New York Law Revision Commission and continues to be noted by the commentators (Communication Relating to Homicide, *op. cit.,* at 814; Robinson, Criminal Law Defenses, *op. cit.;* Note, *Justification: The Impact of the Model Penal Code on Statutory Reform,* 75 Colum L Rev 914, 918–920).

**50 New York did not follow the Model Penal Code's equation of a mistake as to the need to use deadly force with a mistake negating an element of a crime, choosing instead to use a single statutory section which would provide either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force. The drafters of the new Penal Law adopted in large part the structure and content of Model Penal Code § 3.04, but, crucially, inserted the word "reasonably" before "believes".

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law § 35.15 evinced a legislative intent to conform to the subjective standard contained in Model Penal Code § 3.04. This argument, however, ignores the plain significance of the *111 insertion of "reasonably". Had the drafters of section 35.15 wanted to adopt a subjective standard, they could have simply used the language of section 3.04. "Believes" by itself requires an honest or genuine belief by a defendant as to the need to use deadly force (*see, e.g.,* Robinson, Criminal Law Defenses, *op. cit.* § 184(b), at 399–400). Interpreting the statute to require only that the defendant's belief was "reasonable to *him,*" as done by the plurality below, would hardly be different from requiring only a genuine belief; in either case, the defendant's own perceptions could completely exonerate him from any criminal liability.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. The plurality's interpretation, as the dissenters below recognized, excises the impact of the word "reasonably". This same conclusion was recently reached in Justice Levine's decision for a unanimous Third Department in *People v. Astle,* 117 A.D.2d 382, 503 N.Y.S.2d 175 [3d Dept.], in which that court declined to follow the First Department's decision in this case (*see, also, People v. Hamel,* 96 A.D.2d 644, 466 N.Y.S.2d 748 [3d Dept.] ).

The change from "reasonable ground" to "reasonably believes" is better explained by the fact that the drafters of section 35.15 were proposing a single section which, for the first time, would govern both the use of ordinary force and deadly force in self-defense or defense of another. Under the 1909 Penal Law and its predecessors, the use of ordinary force was governed by separate sections which, at least by their literal terms, required that the defendant was *in fact* responding to an unlawful assault, and not just that he had a reasonable ground for believing that such an assault was occurring (*see,* 1909 Penal Law §§ 42, 246[3]; *People v. Young,* 11 N.Y.2d 274, 229 N.Y.S.2d 1, 183 N.E.2d 319; 7 Zett, New York Criminal Practice ¶ 65.3). *112 Following the example of the ***28 Model Penal Code, the drafters of section 35.15 eliminated this sharp dichotomy between the use of ordinary force and deadly force in defense of a person. Not surprisingly then, the integrated section reflects the wording of Model Penal Code § 3.04, with the addition of "reasonably" to incorporate the long-standing requirement of "reasonable ground" for the use of deadly force and apply it to the use of ordinary force as well (*see,* Zett, New York Criminal Practice, § 65.3[1][2]; Note, *Proposed Penal Law of New York,* 64 Colum L Rev 1469, 1500).

**51 The conclusion that section 35.15 retains an objective element to justify the use of deadly force is buttressed by the statements of its drafters. The executive director and counsel to the Commission which revised the Penal Law have stated that the provisions of the statute with respect to the use of deadly physical force largely conformed with the prior law, with the only changes they noted not being relevant here (Denzer & McQuillan, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 35.15, p. 63 [1967] ). Nowhere in the legislative history is there any indication that "reasonably believes" was designed to change the law on the use of deadly force or establish a subjective standard. To the contrary, the Commission, in the staff comment governing arrests by police officers, specifically equated "[he] reasonably believes" with having a reasonable ground for believing (Penal Law § 35.30; Fourth Interim Report of the Temporary State Commission on Revision of the Penal Law and Criminal Code at 17–18, 1965 NY Legis Doc No. 25).

Statutes or rules of law requiring a person to act "reasonably" or to have a "reasonable belief" uniformly prescribe conduct meeting an objective standard measured with reference to how "a reasonable person" could have acted (*see, e.g.*, *People v. Cantor*, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872; *Donovan v. Kaszycki & Sons Contrs.*, 599 F.Supp. 860, 871; Klotter, Criminal Law, at 312; Fletcher, *The Right and the Reasonable*, 98 Harv L Rev 949; 57 Am Jur 2d, Negligence, §§ 67, 68). In *People v. Cantor (supra)*, we had before us a provision of the Criminal Procedure Law authorizing a police officer to stop a person "when *he reasonably suspects* that such person is committing, has committed or is about to commit [a crime]" (CPL 140.50[1]; emphasis added). We held that this section authorized "stops" only when the police officer had "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man *113 under the circumstances to believe criminal activity is at hand" (*People v. Cantor*, 36 N.Y.2d at pp. 112–113, 365 N.Y.S.2d 509, 324 N.E.2d 872, *supra*).

In *People v. Collice*, 41 N.Y.2d 906, 394 N.Y.S.2d 615, 363 N.E.2d 340, we rejected the position that section 35.15 contains a wholly subjective standard. The defendant in *Collice* asserted, on appeal, that the trial court had erred in refusing to charge the justification defense. We upheld the trial court's action because we concluded that, even if the defendant had actually believed that he was threatened with the imminent use of deadly physical force, the evidence clearly indicated that "his reactions were not those of a reasonable man acting in self-defense" ( *id.*, at p. 907, 394 N.Y.S.2d 615, 363 N.E.2d 340). Numerous decisions from other States interpreting "reasonably believes" in justification statutes enacted subsequent to the drafting of the Model Penal Code are consistent with *Collice*, as they hold that such language refers to what a reasonable person could have believed under the same circumstances (*see, e.g.*, *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 373–374; *Weston v. State*, 682 P.2d 1119, 1121 [Alaska] ).

The defense contends that our memorandum in *Collice* is inconsistent with our prior opinion in *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741, 349 N.E.2d 841. In *Miller*, we held that a defendant charged with homicide could introduce, in support of a claim of self-defense, evidence of prior acts of violence committed by the deceased of which the defendant had knowledge. The defense, as well as the plurality below, place great emphasis on the statement in ***29 *Miller* that "the crucial fact at issue [is] the state of mind of the defendant" ( *id.*, at p. 551, 384 N.Y.S.2d 741, 349 N.E.2d 841). This language, however, in no way indicates that a wholly subjective test is appropriate. To begin, it is undisputed that section 35.15 does contain a subjective element, namely that the defendant believed that deadly force was necessary to avert the imminent use of deadly force or the commission of certain felonies. Evidence that the defendant knew of prior acts of violence by the deceased could help establish his requisite beliefs. Moreover, such **52 knowledge would also be relevant on the issue of reasonableness, as the jury must consider the circumstances a defendant found himself in, which would include any relevant knowledge of the nature of persons confronting him (*see, e.g.*, *People v. Taylor*, 177 N.Y. 237, 245, 69 N.E. 534; Communication Relating to Homicide, *op. cit.*, at 816). Finally, in *Miller*, we specifically recognized that there had to be "reasonable grounds" for the defendant's belief.

Goetz's reliance on *People v. Rodawald*, 177 N.Y. 408, 70 N.E. 1, is *114 similarly misplaced. In *Rodawald*, decided under the 1881 Penal Code, we held that a defendant who claimed that he had acted

in self-defense could introduce evidence as to the general reputation of the deceased as a violent person if this reputation was known to the defendant when he acted. We stated, as emphasized by Goetz, that such evidence, "when known to the accused, enables him to judge of the danger and aids the jury in deciding whether he acted in good faith and upon the honest belief that his life was in peril. It shows the state of his mind as to the necessity of defending himself" ( 177 N.Y. at p. 423, 70 N.E. 1). Again, such language is explained by the fact that the threshold question, before the reasonableness issue is addressed, is the subjective beliefs of the defendant. Nowhere in *Rodawald* did we hold that the *only* test, as urged by Goetz, is whether the defendant honestly and in good faith believed himself to be in danger. Rather, we recognized that there was also the separate question of whether the accused had "reasonable ground" for his belief, and we upheld the trial court's refusal to charge the jury that the defendant's honest belief was sufficient to establish self-defense ( 177 N.Y. at pp. 423, 426–427, 70 N.E. 1).

[2] Goetz also argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus, require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation" *(see, e.g., People v. Ligouri,* 284 N.Y. 309, 316, 31 N.E.2d 37, *supra; People v. Lumsden,* 201 N.Y. 264, 268, 94 N.E. 859, *supra).* Such terms encompass more than the physical movements of the potential assailant. As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

[3] Accordingly, a jury should be instructed to consider this ***115** type of evidence in weighing the defendant's actions. The jury must first determine whether the defendant had the requisite beliefs under section 35.15, that is, whether he believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the felonies enumerated therein. If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider*****30** whether these beliefs were reasonable. The jury would have to determine, in light of all the "circumstances", as explicated above, if a reasonable person could have had these beliefs.

[4] The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge. It is true that the prosecutor did not elaborate on the meaning of "circumstances" or "situation" and inform the grand jurors that they could consider, for ****53** example, the prior experiences Goetz related in his statement to the police. We have held, however, that a Grand Jury need not be instructed on the law with the same degree of precision as the petit jury (*see, People v. Valles,* 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50, 464 N.E.2d 418; *People v. Calbud, Inc.,* 49 N.Y.2d 389, 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140; *compare,* CPL 190.25[6], *with* CPL 300.10[2] ). This lesser standard is premised upon the different functions of the Grand Jury and the petit jury: the former determines whether sufficient evidence exists to accuse a person of a crime and thereby subject him to criminal prosecution; the latter ultimately determines the guilt or innocence of the accused, and may convict only where the People have proven his guilt beyond a reasonable doubt *(see, People v. Calbud, Inc.,* 49 N.Y.2d, at p. 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140, *supra).*

In *People v. Calbud, Inc., supra,* at pp. 394–395, 426 N.Y.S.2d 238, 402 N.E.2d 1140, we stated that the prosecutor simply had to "provid[e] the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime". Of course, as noted above, where the evidence suggests that a complete defense such as justification may be present, the prosecutor must charge the grand jurors on that defense, providing enough

information to enable them to determine whether the defense, in light of the evidence, should preclude the criminal prosecution. The prosecutor more than adequately fulfilled this obligation here. His instructions were not as complete as the court's charge on justification should be, but they sufficiently apprised the *116 Grand Jury of the existence and requirements of that defense to allow it to intelligently decide that there is sufficient evidence tending to disprove justification and necessitating a trial. The Grand Jury has indicted Goetz. It will now be for the petit jury to decide whether the prosecutor can prove beyond a reasonable doubt that Goetz's reactions were unreasonable and therefore excessive.

IV.

[5] Criminal Term's second ground for dismissal of the charges, premised upon the *Daily News* column and the police officer's statement to the prosecutor, can be rejected more summarily. The court relied upon *People v. Pelchat*, 62 N.Y.2d 97, 476 N.Y.S.2d 79, 464 N.E.2d 447, *supra*, the facts of which, however, are markedly different from those here. In *Pelchat*, the defendant was one of 21 persons arrested in a house to which police officers had seen marihuana delivered. The only evidence before the Grand Jury showing that defendant had anything to do with the marihuana was the testimony of a police officer listing defendant as one of 21 persons he had observed transporting the drug. After defendant was indicted, this same police officer told the prosecutor that he had misunderstood his question when testifying before the Grand Jury and that he had not seen defendant engage in any criminal activity. Although the prosecutor knew that there was no other evidence before the Grand Jury to establish the defendant's guilt, he did not disclose the police officer's admission, and instead, accepted a guilty plea from the defendant. We reversed the conviction and dismissed the indictment, holding that the prosecutor should not have allowed the proceedings against defendant to continue when he knew that the only evidence against him before the Grand ***31 Jury was false, and thus, knew that there was not legally sufficient evidence to support the indictment.

Here, in contrast, Canty and Ramseur have not recanted any of their Grand Jury testimony or told the prosecutor that they misunderstood any questions. Instead, all that has come to light is hearsay evidence that conflicts with part of Canty's testimony. There is no statute or controlling case law requiring dismissal of an indictment merely because, months later, the prosecutor becomes aware of some information which may lead to the defendant's acquittal.**54 There was no basis for the Criminal Term Justice to speculate as to whether Canty's and Ramseur's testimony was perjurious *(see,* CPL 190.25[5] ), and *117 his conclusion that the testimony "strongly appeared" to be perjured is particularly inappropriate given the nature of the "evidence" he relied upon to reach such a conclusion and that he was not in the Grand Jury room when the two youths testified.

Moreover, unlike *Pelchat,* the testimony of Canty and Ramseur was not the only evidence before the Grand Jury establishing that the offenses submitted to that body were committed by Goetz. Goetz's own statements, together with the testimony of the passengers, clearly support the elements of the crimes charged, and provide ample basis for concluding that a trial of this matter is needed to determine whether Goetz could have reasonably believed that he was about to be robbed or seriously injured and whether it was reasonably necessary for him to shoot four youths to avert any such threat.

Accordingly, the order of the Appellate Division should be reversed, and the dismissed counts of the indictment reinstated.

MEYER, SIMONS, KAYE, ALEXANDER, TITONE and HANCOCK, JJ., concur.

Order reversed, etc.

N.Y.,1986.
People v. Goetz
68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18, 73 A.L.R.4th 971, 55 USLW 2107

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# People v Goetz, 116 A.D.2d 316 (First Department 1986)

116 A.D.2d 316, 501 N.Y.S.2d 326
(Cite as: 116 A.D.2d 316, 501 N.Y.S.2d 326)

Supreme Court, Appellate Division, First Department, New York.
The PEOPLE of the State of New York, Appellant,
v.
Bernhard GOETZ, Defendant-Respondent.

April 17, 1986.

Defendant was indicted in the Supreme Court, New York County, Crane, J., with criminal possession of a weapon, attempted murder, assault, and reckless endangerment, and nine counts of indictment were dismissed. State appealed. The Supreme Court, Appellate Division, Kassal, J., held that prosecutor improperly stated objective, rather than subjective, test for self-defense before grand jury.

Affirmed.

Kupferman, J.P., concurred and filed opinion.

Asch, J., dissented and filed opinion joined by Wallach, J.

Wallach, J., dissented and filed opinion.

West Headnotes

[1] **Grand Jury 193 ⚿23**

193 Grand Jury
193k23 k. Charge. Most Cited Cases

Prosecutor's instruction to grand jury which asked jurors to judge reasonableness of necessity to use deadly force by standard of reasonable person in defendant's situation and which omitted instruction to consider defendant's background, physical attributes, knowledge, and prior experiences imposed objective standard for self-defense in place of subjective test required by self-defense statute. McKinney's Penal Law § 35.15.

[2] **Assault and Battery 37 ⚿67**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-Defense. Most Cited Cases

Self-defense claim that defendant honestly and in good faith believes he is in imminent danger from deadly physical force from which defendant cannot retreat in complete safety requires consideration of defendant's viewpoint taking into account background, physical and mental condition, and knowledge and prior experiences. McKinney's Penal Law § 35.15.

[3] **Assault and Battery 37 ⚿67**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-Defense. Most Cited Cases

Self-defense claim that defendant justifiably believes that other person is committing or attempting to commit robbery requires consideration of circumstances from defendant's viewpoint taking into account background, physical and mental condition, and knowledge and prior experiences. McKinney's Penal Law § 35.15.

[4] **Assault and Battery 37 ⚿67**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-Defense. Most Cited Cases

Determination whether use of force is in excess of that reasonably necessary for self-defense requires consideration of subjective circumstances confront-

ing defendant as defendant perceives them, no matter how inaccurate perception may be. McKinney's Penal Law § 35.15.

[5] **Grand Jury 193 ⚿23**

193 Grand Jury
193k23 k. Charge. Most Cited Cases

Grand jury claim must be instructed on self-defense that operative test and standard is whether this defendant himself, subjectively, had reason to believe in neccssity and amount of force used and is not what some other person might have reasonably believed. McKinney's Penal Law § 35.15.

[6] **Assault and Battery 37 ⚿67**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-Defense. Most Cited Cases

Phrase "hc reasonably believes" under statute requiring reasonable belief in imminence of physical force and neccssity to respond with force for self-defense claim requires subjective, rather than objective, self-defense standard. McKinney's Penal Law §§ 35.15, 35.15, subd. 2(a)(i).

**326 *317 R.M. Pitler, New York City, for appellant.

M.M. Baker, New York City, for defendant-respondent.

**327 Before KUPFERMAN, J.P., and CARRO, ASCH, KASSAL and WALLACH, JJ.

KASSAL, Justice.

We agree with the thoughtful and incisive analysis of the issucs by Trial Term and affirm to the extent appealed from, essentially for the reasons stated by Justice Crane. However, in view of the importance of the issue, we would add the following:

This appeal poses a critical legal issue in a most significant criminal case-the proper legal standard to be employed in determining the defense of self-defense or justification in connection with the use of deadly physical force to repel a robbery and/or in response to the claimed threatened use of deadly physical force. The Justice at Trial Term dismissed nine counts of the indictment because of fundamental error by the prosecutor in his instructions to the Grand Jury, which, the court found to be so serious and prejudicial as to significantly impinge upon the integrity of the Grand Jury proceeding. Trial Term, however, did grant leave to the District Attorney to represent the charges to another Grand Jury. As a result, this appeal, on legal issues only, is not concerned with the underlying merits of any of the criminal charges, neither those dismissed by Justice Crane, which may be presented to another Grand Jury since leave to resubmit was granted, nor those charges not dismissed, which await trial.

Piercing the maze of confusion, the rhetoric and media sensationalism and the heat that have all surrounded this case, it is crucial to focus upon the limited question before us on this appeal. The sole issue is the propriety of the instructions by the assistant district attorney to the Grand Jury on justification. The charge basically employed an objective test, significantly different from the instructions given by another assistant district attorney to the first Grand Jury in this matter.

*318 The Grand Jury instructions presented here were in direct conflict with the subjective standard explicitly required by Penal Law § 35.15-"he reasonably believes"-and in contravention of a long line of appellate decisions on the issue. In this Department, 7 of the 14 present members of this Court have recently approved this subjective standard (*see, People v. Montanez*, App.Div., 499 N.Y.S.2d 689; *People v. Santiago*, 110 A.D.2d 569, 488 N.Y.S.2d 4). In the Second Department, 10 of the 15 members of that Bench came to the same conclusion (*see, People v. Powell*, 112 A.D.2d 450, 492 N.Y.S.2d 106; *People v. Swinson*, 111 A.D.2d 275, 277, 489 N.Y.S.2d 111 [Titone, J., concurring in part]; *People v. Long*, 104 A.D.2d 902, 480 N.Y.S.2d 514; *People v. Wagman*, 99 A.D.2d 519, 471 N.Y.S.2d 147; *People v. Desmond*, 93 A.D.2d 822, 460 N.Y.S.2d 619).

These decisions uniformly hold that the critical

inquiry under New York's justification statute is governed by a subjective standard, namely, whether *the defendant* reasonably believed the use of physical force or deadly physical force to be necessary under the circumstances, not the objective test espoused by the District Attorney and the dissent-whether a reasonably prudent man would have had that belief in that situation. In our view, the use of the objective standard improperly shifts the focus of attention from the subjective state of mind of this defendant, necessary to determine *his* mental state in terms of culpability and, in evaluating his moral culpability, substitutes the criterion of a fictitious, hypothetical person-the reasonable man-thereby using civil negligence concepts, in sharp contrast to the Penal Law definition of this defense.

Contrary to statements made at oral argument and in the District Attorney's brief, our prior holdings were not made in a "jurisprudential vacuum", but were carefully researched, considered and determined. There is no basis for the highly unusual, unfounded and incorrect assertion that this Court rendered decisions without considering the prior law. Appellant and our dissenting colleagues overlook the fact **328 that within the last few months, still fresh in mind, this precise issue had been raised and rejected in *Santiago* and in *Montanez* only after a thorough evaluation of the legal concepts, which had been fully presented in the briefs and at oral argument.

Justice Asch suggests that, when *Santiago* and *Montanez* were decided, we were not aware of and did not "discuss" the prior decisions of the Court of Appeals. To the contrary, *Santiago* expressly relied, in part, upon the Second Department memorandum decision in *Wagman*, which *319 followed that court's earlier decision in *Desmond*. *Desmond* had been based upon, *inter alia*, several earlier authorities- *People v. Lumsden*, 201 N.Y. 264, 94 N.E. 859; *People v. Governale*, 193 N.Y. 581, 86 N.E. 554, and *People v. Taylor*, 177 N.Y. 237, 69 N.E. 534. As a matter of fact, this last case, *Taylor*, has not been addressed, either by the District Attorney or the dissent. Moreover, in *People v. Gonzales*, 80 A.D.2d 543, 436 N.Y.S.2d 293, the District Attorney had conceded that the trial court erred in instructing the jury on the defense of justification by utilizing "the ordinary prudent man" standard. In any event, the suggestion that our prior decision in *Santiago* is "fatally flawed", and that those of the Second Department are "highly suspect" because they did not include citations of a greater number of decisions on the issue is as novel as it is wrong.

We approach the disposition of this case with a keen awareness of society's overriding concern that justice be done, but only in adherence with due process of law. The fundamental fairness, on which our system of justice is based, is designed to protect the individual rights of those accused as well as the interests of society. This mandates that presentment to a Grand Jury be done by way of adequate and proper legal instructions, without which, the Grand Jury-historically, the heart of our criminal justice system-must falter. As Trial Term aptly observed:

> This case for all concerned, including defendant, cries out for adjudication, not according to popular opinions, emotional reactions or political philosophy, but according to the evidence, properly and fairly admitted before the appropriate tribunal, and adjudicated in obeisance to the rules of law. Indeed, observance of rules of law is what makes our society stable; adoption and enforcement of these rules pursuant to our constitutions is what keeps us free.

II

In the early afternoon hours of December 22, 1984, newspapers throughout the nation carried sensational headlines that four youths had been shot by a man who appeared to have been victimized on a downtown IRT subway train and who, after the shooting, fled the scene onto the tracks and into a nearby subway tunnel. On December 31, 1984, nine days later, Bernhard Goetz voluntarily surrendered to the police in Concord, New Hampshire, identifying himself as the wanted subway gunman. After Miranda warnings had been given, in a lengthy, recorded interview, he explained his background in *320 terms of his two earlier experiences as a robbery victim and described his perceptions at the time of this subway confrontation, which he claims motivated and prompted his extraordinary response. He waived extradition and was returned to New York for arraignment.

The first Grand Jury proceeding, at which neither the defendant nor any of the youths testified, returned an indictment charging defendant with criminal pos-

session of a weapon in the third and fourth degrees but did not return a true bill on the other charges of attempted murder, assault and reckless endangerment. On March 12, 1985, the court granted the prosecutor's application, pursuant to CPL 190.75(3), for leave to resubmit the case to a second Grand Jury, at which two of the alleged "victims", testified. Following this, defendant was indicted for attempted murder, assault, reckless endangerment and criminal possession of a weapon in the second degree. At his arraignment on the second **329 indictment, both indictments were consolidated.

This appeal is from an order granting defendant's omnibus motion to dismiss nine counts in the second indictment based upon claimed erroneous instructions given to the Grand Jury on the critical defense of justification. In charging the Grand Jury on self-defense under Penal Law § 35.15, the prosecutor, in essence, initially told the grand jurors that, under the statute, a person may use deadly physical force, (1) when *he reasonably believes* that the other person is using or about to use deadly physical force but that he is not justified in doing so "if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating" or, (2) when *he reasonably believes* that the other person is committing or attempting to commit a robbery, in which case there is no duty of retreat. At the end of the charge, one of the grand jurors, still obviously unclear as to the full import of the instruction, sagely inquired as to the meaning of the word "reasonably" *in terms of assessing defendant's belief* on the issue of justification:

> You use the term reasonably with regard to the state of mind of the defendant. Are we to be concerned with psychiatric statement [sic] or whether we feel this was an insane act or irrational? You say if he believes in his mind that what he was doing-

At this point, the prosecutor interrupted him and offered the following supplemental instruction by way of clarification as to the key element of this defense:

> *321 Okay. I will reemphasize three elements of the defense of justification.
>
> The first element is that he must in fact believe in his own mind that he was in a situation which he feared that deadly physical force was about to be applied against him.
>
> The second element is that his response, assuming that he did actually so believe his response, was his response reasonable under the circumstances and *in determining whether it was reasonable under the circumstances you should consider whether the defendant's conduct was that of a reasonable man in the defendant's situation.*
>
> *So, there's both a subjective and objective element to this.* First of all, you have to determine whether the defendant, in his own mind, believed he was in the kind of peril that permitted him to use deadly physical force. You must also then determine whether his response was reasonable under the circumstances, *whether that was the action-the response was the action that he-that a reasonable man who found himself in the defendant's situation* and if it was unreasonably excessive or-or otherwise unjustifiable it-then the defense would not be made out and the third element is the question of retreat. (emphasis added)

III

[1] We agree with Trial Term that this instruction, equating the defendant's reasonable belief with that of the hypothetical, ordinary prudent man was error since it improperly substituted an objective standard for the subjective test required by Penal Law § 35.15.

Under the self-defense statute, the crucial factors are the defendant's subjective belief that the use of physical force or deadly physical force was necessary under the circumstances and whether that belief was reasonable *to him*, not whether a reasonable prudent man would share the belief. On that basis, as stated, it has been repeatedly and recently held, both in the First and Second Departments, that an instruction which substitutes an objective for the subjective standard is improper and constitutes reversible error. (*see, People v. Montanez, supra; People v. Santiago, supra; People v. Powell, supra; People v. Long, supra; People v. Wagman, supra; People v. Desmond, supra* ). The precise issue here was specifically and fully presented in each of those cases and was carefully considered. To the extent that the Appellate Division, Fourth *322 Department, **330 held otherwise in *People v. Comfort*, 113 A.D.2d 420, 496 N.Y.S.2d

857, its decision, which we decline to follow, is contrary to the established authority in this Department.

The imperative inquiries as to justification are the defendant's state of mind, in terms of his subjective belief as to the imminence and gravity of danger and, if so, whether that belief was reasonable to him under the circumstances. The dissent has misconstrued the holding in each of these cases as eliminating the statutory standard of reasonableness from the jury's consideration. To the contrary, we have never held that it is unnecessary to consider the reasonableness of defendant's subjective belief that he was about to be attacked and that the use of physical force to defend himself was necessary. However, this does not authorize resort to a standard based upon the abstract, ordinary prudent person. In a criminal prosecution, such an instruction to a Grand Jury or to a petit jury equating reasonableness with the belief or action of the reasonable man, improperly shifts the focus of attention from the state of mind and mental culpability of the defendant, critical for the *mens rea* required for criminal responsibility, to the moral culpability of the fictitious, ordinary prudent man. (*see, The Goetz Case Revives Issue of Self-Defense Standards,* Richard Singer, NYLJ, February 18, 1986, p. 1, cols. 3 and 4). This is improper and only serves to distract the jury from its assigned role in evaluating the mental culpability of the defendant.

The instruction to the second Grand Jury did not conform to the pattern criminal jury instructions on the issue of justification, adopted by the Committee on Criminal Jury Instructions of the State of New York, authorized and published by the New York State Office of Court Administration and, in adopting an objective test, was in direct conflict with it. The pattern charge is based upon the statute and reported decisions. In 1 CJI 35.15(2)(a), pp. 874-875, entitled "Defensive Use of Deadly Physical Force", the following jury charge is presented for self-defense and unmistakably imposes a subjective standard:

> As I stated earlier, a defendant may use in his own defense deadly physical force capable of causing death when: (1) The defendant "reasonably believes" that the victim is using, or is about to use, offensively deadly physical force against him, and (2) the defendant "reasonably believes" that the use of defensive deadly physical force is necessary to prevent the attack upon him by the victim.
>
> ***323** "Reasonably believes" is the test. If the defendant was justified in "reasonably believing" *it does not matter if in fact he was mistaken in his belief.* (emphasis added)
>
> The test the law requires you to use in deciding what this defendant was reasonably justified in believing is what *this defendant himself, subjectively, had reason to believe-not what some other person might reasonably believe.* You should place yourselves figuratively in the shoes of this defendant and, based on all the circumstances surrounding the encounter, as these, then and there, appeared to *this* defendant, you should decide whether or not this defendant in fact reasonably believed that the victim was about to use offensive deadly physical force against him, and that defensive deadly physical force was necessary to defend himself. (emphasis in original and added)

The same subjective standard is approved and repeated in each of the several recommended criminal jury instructions on self-defense (*see,* 1 CJI 35.15[1], 35.15[2][a], 35.15[2][b], 35.15[2][c], 35.20[1] and [2], 35.25 and 35.30). The CJI Committee's comments and explanatory notes, which precede the pattern instructions, clearly state that the statutory standard is based upon the subjective belief of the defendant and not that of a reasonable or prudent person:

> The statute, as well as the cases, makes it clear that the "reasonable belief" is *the subjective belief of the particular**331 defendant,* and *not the "belief" of the standard "reasonable" or prudent person.* [citations omitted] (emphasis added) (1 CJI 35.00, p 848)

The fatal flaw in the position of our dissenting colleagues is the assumption that "reasonably" in Penal Law § 35.15 cannot be defined without inquiry as to what a reasonably prudent man would have believed or done in the same situation. While we recognize that the element of reasonableness of both defendant's belief and his reaction is included in the statutory standard, the statute unquestionably establishes a subjective test which focuses upon the defendant, not a hypothetical third person. It is improper to resort to negligence principles which only serve to mislead the trier of the facts in its critical function of

assessing guilt.

[2][3][4][5] Thus, on the issue of self-defense, the jury should be instructed to examine the circumstances from the defendant's viewpoint and, considering his background, including his physical and mental condition, his knowledge and prior experiences, to determine whether the defendant, in the situation in *324 which he found himself, honestly and in good faith was justified in believing himself to be in imminent danger from deadly physical force from which he could not retreat in complete safety or, did he justifiably believe that the other person was committing or attempting to commit a robbery and was the degree of force used by him proper in the circumstances? Alternatively, was it in excess of that reasonably necessary for his own defense? The jury should be instructed to consider the subjective circumstances in which this defendant found himself and the situation as he then perceived it to be, no matter how inaccurate that perception may have been and, in that context and viewpoint, determine whether his belief and response were justified. In considering the issue, the jury must be instructed that the operative test and standard required by the statute is whether "this defendant *himself, subjectively,* had reason to believe-not what some other person might reasonably believe." (1 CJI 35.15[2][a], p 875).

In substance, this was the instruction given by the assistant district attorney to the first Grand Jury ("whether he had a right to believe, reasonably, under the circumstances"), but which was not followed by a different assistant district attorney in the second Grand Jury proceeding. Instead, the prosecutor instructed the second Grand Jury to determine the reasonableness of defendant's belief and his reaction by measuring it against the standard of an ordinary reasonable man and whether an ordinary prudent person would have believed himself to be in danger and would have reacted as defendant did. As stated, this was in direct conflict with the recommended pattern criminal jury instruction and the recent cases in this Department, as well as the Second Department, by what Justice [now Associate Judge of the Court of Appeals] Titone referred to as "[a]n unbroken line of authority". (*People v. Swinson, supra* 111 A.D.2d at 288, 489 N.Y.S.2d 11).

We find no rationale or any other basis to depart from our prior holdings that the instruction employing the reasonable prudent man standard is error. While Justice Asch refers to the "doubts" expressed by Justice Sandler in his concurring memorandum in our recent holding in *People v. Montanez, supra,* issued after publication of Trial Term's decision in this case, it is noteworthy that, notwithstanding the doubt expressed, Justice Sandler did concur in the result in that case, wherein we held this to be prejudicial error, *325 which "violated the defendant's fundamental right to a fair trial."

Both the District Attorney and the dissent strongly stress the uncontroverted holding of the Court of Appeals that "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law." ( *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140). The Court, in that case, recognized that "it would be unsound to measure the adequacy **332 of the legal instructions given to the Grand Jury by the same standards that are utilized in assessing a trial court's instructions to a petit jury." (*ibid.*) Nevertheless, the Court of Appeals, at the same time, in very clear and strong language, cautioned that this does not authorize erroneous or misleading instructions, especially in response to a request from the Grand Jury for clarification or amplification of a particular phrase. (*supra* at 395, n. 2, 426 N.Y.S.2d 238, 402 N.E.2d 1140) This rule is particularly applicable here, where the prosecutor, in responding to a specific inquiry from a grand juror on this very point, "clarified" self-defense by substituting the objective standard for the statutory subjective test.

Plainly, the prosecutor's charge to the second Grand Jury did not conform to the statutory subjective test. Nor did it satisfy the objective standard because the assistant district attorney did not include an instruction to take into consideration defendant's background, his physical attributes and mental condition, knowledge and prior experiences. These are all necessary for the jury to determine the reasonableness *to the defendant* of his belief and his reaction. Instead, the only instruction given to the second Grand Jury was to determine the reasonableness of defendant's conduct in relation to whether his response was that of "a reasonable man who found himself in the defendant's situation" at the time. The words "defendant's situation" clearly referred to the *physical predicament* in which the defendant found

himself at that point in time, reacting to a confrontation on the subway train, unrelated to his own background, knowledge and prior experiences. This was a fatal omission, even under the objective standard advocated by appellant and adopted by the dissent. Contrary to Justice Wallach's conclusion, the instruction was not a "fair" summary as to self-defense but instead, was incomplete and inadequate in material respects.

IV

In advancing a subjective-objective standard, the dissent *326 relies upon a host of early Court of Appeals opinions which had considered and decided the defense of justification on the basis of the then statute, which significantly and materially differed from the current provisions in Penal Law § 35.15. Our colleagues have not dealt with the fact that the prior New York statute had an entirely different standard, requiring objective "reasonable ground" that the person was in danger of inevitable and irreparable personal injury.

Thus, until the critical year of 1965, when the Penal Law was revised (Laws of 1965, chapters 1030 and 1039, effective September 1, 1967), the justification defense had been presented in three separate sections of the Penal Law, which remained essentially unchanged from 1829 through subsequent revisions, in 1881 (Laws of 1881, chapter 676) and 1909 (Laws of 1909, chapter 88). Self-defense as a defense in criminal cases was provided for in Penal Law §§ 42, 246 and 1055.

Section 42, entitled "*Rule when act done in defense of self or another*", provided:

> An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and the injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury.

Former Penal Law section 246, entitled "*Use of force not unlawful in certain cases*", provided:

> To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:
>
> 3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person * * * if the force or violence used is *not more than sufficient to prevent such offense* * * * (emphasis added)

**333 As to the defense of justification in homicide cases, section 1055, entitled "*Justifiable homicide*", provided in part:

> Homicide is also justifiable when committed:
>
> 1. In the lawful defense of the slayer * * * or of any other person in his presence or company, when there is *reasonable ground to apprehend a design* on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished * * * (emphasis added)

*327 V

While each of the former statutory provisions established what appears to be an objective standard, many of the earlier cases in this State, nevertheless, recognized the inherent subjective nature of the defense of justification. Thus, in *Shorter v. The People*, 2 N.Y. 193, 199, the Court of Appeals observed:

> [I]t is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, *the party suspects* that the felony is about to be immediately committed, *he will be justified*. (emphasis added)

However, inasmuch as the Court had before it a justification statute which required the jury to consider "reasonable ground" for apprehension and danger, it observed (at p. 201):

> It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

As I read the statute, it affirms the rule of the common law. The words are, homicide in self-defense is justifiable "when there shall be *a rea-*

*sonable ground to apprehend* a design to commit a felony, or to do some great personal injury, and there shall be *imminent danger* of such design being accomplished." (2 R.S. 660, § 3, sub. 2.) (emphasis in original)

In *People v. Taylor, supra,* 177 N.Y. 237, 245, 69 N.E. 534, a Court of Appeals opinion not addressed by the dissent, the Court, citing *Shorter,* stressed the inherent subjective nature of the defense in relation to the subjective belief of the defendant:

The homicide would be justifiable, whether *appearances to her* proved to be true or false; if they were such as to furnish *reasonable grounds for her entertaining an apprehension* of personal injury. [citing *Shorter v. The People, supra* ]. (emphasis added)

Similarly, in *People v. Rodawald,* 177 N.Y. 408, 70 N.E. 1, the Court considered defendant's honest and good faith belief that his life was in danger in terms of the defense of self-defense:

The character of the deceased with reference to violence, when known to the accused, enables him to judge of the danger and aids the jury *in deciding whether he acted in good faith and upon the honest belief that his life was in peril.* It shows the state of his mind as to the necessity of defending himself. It bears upon the question whether, in the language of the Penal Code, "there is reasonable ground to apprehend a design on the part of the person slain * * * to do some great *328 personal injury to the slayer * * * and there is imminent danger of such design being accomplished." (§ 205) * * * Evidence of general reputation for violence, however, is received not to show the state of mind of the deceased, but of the accused; not to show who was in fact the aggressor, but *whether the defendant had reasonable ground to believe that he was in danger of great personal injury.* Hence, it is obvious that whatever the reputation of the deceased for violence may be, it can have no bearing on what the defendant apprehended, unless he knew it. If he knew that the deceased was reputed to be violent, it might raise in his mind a fear of danger, but not otherwise. ( **334*id.* at 423-424 [70 N.E. 1] ) (emphasis added)

*People v. Lumsden, supra,* 201 N.Y. 264, 94 N.E. 859, which the dissent concludes explicitly approved an objective test and rejected a subjective standard, did not expressly so hold. In that case, the Court of Appeals found error in that the trial court had instructed the jury to determine whether defendant acted in self-defense, *based solely upon his belief* that the decedent was armed and that he was in great danger of attack, without considering whether there was "reasonable ground" for his belief, which was an express requirement of the former statute. Thus, Judge Hiscock, writing for the Court of Appeals, observed:

In the first place *the only basis* which the jury were required to find as a justification for the action of the deceased in attacking appellant *was his simple "belief" that the latter was armed and that he was in great danger.* There was no suggestion of any qualification that his belief must have rested upon some reasonable ground, but as charged it was a sufficient basis for the action of the deceased *even though a creation of mere fear or fancy or remote hearsay information or a delusion pure and simple and not rationally supported by any action or conduct of the appellant.* Of course a belief so developed or acquired would not satisfy the requirements of a justification for the conduct of the deceased.

In the second place the jury in effect were told that if the deceased was possessed of such belief, arising no matter how, he was justified in seeking to protect himself and to disarm the appellant, no limitation being placed on the force which might be used for that purpose. Again it is obvious that this is not the correct rule, but that even if deceased was protected by a justified and reasonable belief that appellant was armed and liable to attack and injure him, he was limited to the use of such force as might be reasonably necessary, and could not *329 indulge in wanton violence for alleged purposes of protection and disarmament. ( *id.* at 268-269, 94 N.E. 859) (emphasis added)

Thus, the holding in *People v. Lumsden, supra,* rejected "simple 'belief' " as the sole basis for justification. The decision has no bearing on the issue in our case, pertaining to the prosecutor's use of the hypothetical reasonable man as the standard to evaluate the reasonableness of defendant's belief and actions. Similarly inapposite is *People v. Tomlins,* 213 N.Y.

240, which involved an assault in a dwelling, where the Court of Appeals relying upon ancient law which always recognized that a man assailed in his own dwelling is not bound to retreat and may stand his ground. ( *id.* at 243). The present justification statute continues the same rule where the defendant is not the initial aggressor (Penal Law § 35.15[2][a][i] ).

VI

[6] To the extent the early New York cases set forth an objective standard, this flows directly from the express language of the prior statute, which, contrary to the position of the dissent, was significantly changed in language and substance by the revised Penal Law in 1965. Plainly, the view that the Legislature made no change when it repealed the former penal sections and enacted Penal Law § 35.15 is erroneous and unwarranted. The current statute now includes, in regard to the use of both physical force and deadly physical force, the clear and unmistakably subjective words "he reasonably believes".

This change in language is critical and must be viewed in light of the subjective standard in the Model Penal Code, adopted by the American Law Institute in 1962, which expressly affords a defense of justification to a defendant who honestly but unreasonably believes that he is acting in self-defense (Model Penal Code, § 3.04). The inclusion in the Model Penal Code of a purely subjective test, without considering whether defendant's belief and action were those of a reasonable man, does not detract **335 from the subjective nature of the standard contained in Penal Law § 35.15. Our current statute similarly provides for a subjective standard keyed to the state of mind of the defendant, obligating the jury to determine whether "this defendant *himself, subjectively,* had reason to believe-not what some other person might reasonably believe * * * that the victim was about to use offensive deadly physical*330 force against him, and that defensive deadly physical force was necessary to defend himself." (1 CJI 35.15[2][a], p. 875).

In contrast to the statutory language prior to 1965, the current Penal Law § 35.15 provides in part:

> 1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent *he reasonably believes* such to be necessary to defend himself or a third person from what *he reasonably believes* to be the use or imminent use of unlawful physical force by such other person * * *
>
> 2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
>
> (a) *He reasonably believes* that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; * * * or
>
> (b) *He reasonably believes* that such other person is committing or attempting to commit a * * * robbery * * * (emphasis added).

The conclusion by the dissent that the current statute provides the same standard as in the previous statutes overlooks the significant language changes in Penal Law § 35.15. The legislative intent is obvious; it intended a substantive change when, in 1965, it replaced the former objective references-"not more than sufficient" (Penal Law § 246) and "reasonable ground to apprehend" (Penal Law § 1055)-with the expressly subjective words, repeated several times in the statute-"[h]e reasonably believes", as the operative test for self-defense. In our view, the Legislature explicitly adopted an entirely different test-a subjective standard-which was further subject to the test of reasonableness. While Justice Asch suggests that the Legislature inserted "reasonably" into the statute to evince a legislative design to reject the Model Penal Code's subjective approach, this could have been accomplished explicitly and ignores the fact that reasonableness as one criterion of justification was always an element of New York's justification defense. Rather, the purpose was clearly to conform to the subjective approach in the Model Penal Code.

In measuring reasonableness, it is inappropriate to refer to the fictitious, reasonable man in assessing either the defendant's*331 belief or his reaction. Concededly, defendant's belief must be reasonably formed and his reaction must also be reasonable. This is embodied in the statutory subjective standard-*reasonable to him.* Our present statute establishes as the controlling standard, reasonableness to the defendant, vis-a-vis his belief and reaction-subjectively

judged in relation to him-not to the ordinary prudent person. As noted, although a Grand Jury instruction concededly requires less precision than a charge to a petit jury, this does not authorize erroneous or misleading instructions. The Grand Jury was entitled to receive proper and sufficient instructions on the applicable law. Consistent with our prior holdings, we conclude that the use of the reasonable prudent man standard was error.

The subjective nature of the justification defense is also fortified by *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741, 349 N.E.2d 841. Although the decision in *Miller* dealt with the admissibility of evidence of prior acts of violence of the decedent of which the defendant had knowledge (*see also, People v. Rodawald, supra* ), the Court of Appeals clearly referred to the **336 necessity of examining the defendant's own state of mind:

> However, the crucial fact at issue, where a claim of justification is presented, is not the character of the victim, *but, rather, the state of mind of the defendant.*
>
> Yet, a basic sense of fairness mandates that the defendant be permitted to substantiate his claim that the victim committed specific violent acts in the past because it enlightens the jury on *the state of the defendant's mind at the time of the difficulty,* and thereby enables them to decide *whether he acted rationally under the circumstances.* (*id.* at 551 and 552 [ 384 N.Y.S.2d 741, 349 N.E.2d 841] ] (emphasis added)

*People v. Collice*, 41 N.Y.2d 906, 394 N.Y.S.2d 615, 363 N.E.2d 340, does not lead to a different result and, contrary to the suggestion by the dissent, does not authorize the substitution of the mind of the ordinary reasonable person. In *Collice,* the trial court did not instruct the jury as to the defense of justification and all the Court of Appeals held was that "on no view of the evidence" had the evidentiary predicate for a justification defense been established-a result with no significance here.

VII

Further support for the subjective approach may be derived from an analysis of the language of the statute as to the legislative standard for justification ("he reasonably believes" *332 [Penal Law § 35.15] ), in comparison with the language employed in the defense of duress. Penal Law § 40.00(1), in regard to the defense of duress, explicitly adopts a reasonable man standard-"force or threatened force a person of reasonable firmness in his situation would have been unable to resist."

Had the Legislature intended a similar standard for the defense of justification, it would have expressly done so by incorporating in Penal Law § 35.15, reference to the "person of reasonable firmness", used in Penal Law § 40.00(1) for the defense of duress. The Legislature, however, did not elect to do so. Clearly, the omission and substitution are significant and evince a legislative intention that justification be determined subjectively,-reasonable to him-from the position and threatening situation in which the defendant found himself, considering, in terms of reasonableness, his background, physical and mental condition, knowledge and prior experiences-not that of the reasonable man. The Grand Jury instruction here failed to conform to that standard, a fatal omission.

While the dissent implies that it would be anomolous to adopt a standard as to justification different from the defense of duress, the distinction results directly from the statutory language and from the nature of the defense. Self-defense centers upon the subjective state of mind of the defendant, the critical consideration in criminal culpability.

Accordingly, the order, Supreme Court, New York County (Stephen J. Crane, J.), entered January 21, 1986, which dismissed nine counts of the consolidated indictment No. 1914-4 76/85 , should be affirmed to the extent appealed from for the reasons stated in the opinion by Justice Crane.

*345 Order, Supreme Court, New York County (Stephen J. Crane, J.), entered on January 21, 1986, affirmed to the extent appealed from for the reasons stated in the opinion by Justice Crane.

All concur except *344 KUPFERMAN, J.P., who concurs in a separate opinion.
ASCH, J., who dissents in an opinion.
WALLACH, J., who, in a separate dissenting opinion, concurs with the dissenting opinion by ASCH, J.

KUPFERMAN, Justice Presiding (concurring).

The various well-considered opinions in this

matter in this Court and at Trial Term demonstrate that reasonable people may differ.

While the justification defense is subjective, there must still be a reasonable response**337 by the subject, but if there is any doubt, the mythical reasonable person's approach cannot substitute for the reality of the subject's thinking.

In a matter where nuance is so important, I must come down on the side of an interpretation which recognizes the individual's own background and learning. The instruction to the Grand Jury was lacking in this regard, and so I would affirm.

ASCH, Justice (dissenting):

The only question before us is the *333 purely legal one of whether Justice Crane properly dismissed various counts of the indictment, rather than whether the defendant is guilty of any crime. The latter question must be decided by a jury trial.

In the order appealed herein, the Supreme Court dismissed nine counts of the indictment finding that the prosecutor's justification charge had impaired the integrity of the Grand Jury proceeding. The court held that the justification statute permitted the Grand Jury to consider only the defendant's *subjective* state of mind in evaluating the *reasonableness* of his conduct. Further, based upon a newspaper account of an interview of Darryl Cabey at St. Vincent's Hospital and an account by Police Officer Peter Smith of a statement made by Troy Canty immediately after the shootings, the court ruled that it appeared that both Canty and Ramseur had lied to the Grand Jury, and that this post-indictment assessment required dismissal of the counts of the indictment affected by their testimony. The majority of this court would affirm these rulings of Criminal Term. I disagree and would reverse the order and reinstate the dismissed counts of the indictment.

It must be emphasized that what we are concerned with is the legal validity of the indictment, that the actual events and resolution of the facts as they took place on the subway on December 22, 1984, must await the actual trial. The district attorney furnished a detailed and lengthy statement to the Grand Jury explaining the law. He closely followed the language of the statute, explaining that one could invoke deadly force if he "reasonably believed" that he was faced with deadly physical force and that it was necessary to use this force to repulse a threatened attack, or if he "reasonably believed" that he was about to be held up and that such deadly force was required to frustrate the threatened crime. Thereafter, a grand juror asked for an amplification of the term "reasonably" and the prosecutor gave the following answer:

> MR. WAPLES: Okay. I will reemphasize three elements of the defense of justification.
>
> The first element is that he must in fact believe in his own mind that he was in a situation [in] which he feared that deadly physical force was about to be applied against him.
>
> The second element is that his response, assuming that he did actually so believe his response, was his response reasonable under the circumstances and in determining whether it *334 was reasonable under the circumstances you should consider whether the defendant's conduct was that of a reasonable man in the defendant's situation.
>
> So, there's both a subjective and objective element to this. First of all, you have to determine whether the defendant, in his own mind, believed he was in the kind of peril that permitted him to use deadly physical force. You must also then determine whether his response was reasonable under the circumstances, whether that was the action-the response was the action that he-that [of] a reasonable man who found himself in the defendant's situation and if it was unreasonably excessive or-or otherwise unjustifiable it-then the defense would not be made out and the third element is the question of retreat.

The Supreme Court held, and the majority of this court agrees, that the district attorney erred seriously in his additional explanation, in that the defendant's conduct should have been judged by a strictly subjective standard, focusing only on the state of mind of the accused rather than **338 what a "reasonable" person might have done under the same circumstances.

I agree with what is the view of my colleagues-that the personal belief of a defendant is critical in deciding whether he was legally justified in using

# Assault

1st degree – On date of event, defendant intended to cause serious physical injury to another person. Acting with such intent, defendant caused such injury by means of a deadly weapon. NOT GUILTY

2nd degree – Defendant recklessly caused serious physical injury to another person by means of a deadly weapon. NOT GUILTY

# Reckless Endangerment

1st degree – Under circumstances evidencing a grave indifference to human life, defendant recklessly engaged in conduct which created a grave risk of death to another person. NOT GUILTY

2nd degree – Defendant recklessly engaged in conduct with created a substantial risk of serious physical injury to another. NOT GUILTY

# Justification Defense

From N.Y. Penal L. 35.15 (1965)

Provided a complete defense to murder, assault and reckless endangerment charges.

Generally, a person is permitted to use physical force upon another person when and to the extent he reasonably believes necessary to defend himself from what he reasonably believes to the use of imminent use of unlawful physical force by another person.

# Text of Penal Law

35.15(2) A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) [inapplicable]

# Justification 1 – Self-Defense

**A person may not use deadly physical force on another person, unless:**

**(a) The person reasonably believed that such other person was using or about to use deadly physical force on him.**

In determining whether defendant reasonably believed that the four individuals or any one of them were about to use deadly physical force against him, the jury must consider not only defendant's honest and sincere belief, but also what a reasonable person in defendant's circumstances would believe.

**Even in such case, however, that person may not use deadly physical force if he knew he could, with complete safety as to himself and others, avoid the necessity of doing do by retreating; or**

# Justification 2 – Robbery Prevention

**A person may not use deadly physical force on another person, unless:**

**(b) He reasonably believed that such other person was committing or attempting or attempting to commit a robbery and deadly force was necessary to prevent that crime.**

Robbery defined as forcible stealing, i.e., when, in the course of committing a larceny, a person uses or threatens the immediate use of physical force upon another person for the purpose of preventing or overcoming resistance to the taking of property. Robbery requires a request or demand for money together with an intent to steal and implicit or explicit threat of force.

The presence of someone who aids in the robbery is not only an ingredient of robbery (2nd degree), but also makes the aiders criminally responsible for the person who is aided in committing the robbery.

# Justification – Shot-by-Shot Analysis

(under the first instruction) Jurors were told they must conduct separate analysis re: reasonableness and ability to retreat for each shot fired.

(under second instruction) Jurors were told the legal right to employ deadly physical force to repel a robbery only continues for so long as the defendant reasonably believes that the person or persons are still attempting to rob him.

Thus, if any given shot was unnecessary or excessive response to the threat defendant reasonably perceived and/or if it was fired after the robbery was frustrated, then the defendants actions were not legally justified.

# Justification – Bottom Line

The people bear the burden of proving, beyond a reasonable doubt, that:

1. the defendant was not justifiably acting in self-defense to an eminent threat of deadly physical force (and unable to retreat) and

2. that the victims were not committing or about to commit a robbery or, that, if they were, that the use of deadly physical force was not necessary to prevent that robbery.

# N.Y. Penal Law Section 35.15 (Justification)

# Current Version

Mckinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part One. General Provisions
Title C. Defenses
Article 35. Defense of Justification (Refs & Annos)

McKinney's Penal Law § 35.15

§ 35.15 Justification; use of physical force in defense of a person

Effective: September 28, 2004

Currentness

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

Credits

(Added L.1968, c. 73, § 4. Amended L.1980, c. 843, § 30; L.2003, c. 264, § 3, eff. Nov. 1, 2003; L.2004, c. 511, § 2, eff. Sept. 28, 2004.)

Editors' Notes

PRACTICE COMMENTARY

2009 Main Volume

by William C. Donnino

*See* Practice Commentary at Penal Law § 35.00.

Notes of Decisions (396)

Current through L.2011, chapters 1 to 54 and 57 to 495.

# Version in Effect at Time of Goetz Trial

Mckinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)

Part One. General Provisions

Title C. Defenses
Article 35. Defense of Justification (Refs & Annos)

McKinney's Penal Law § 35.15

# § 35.15 Justification; use of physical force in defense of a person

Effective: [See Text Amendments] to October 31, 2003

Currentness

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor himself with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case his use of physical force is nevertheless justifiable if he has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) He reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; except that he is under no duty to retreat if he is:

(i) in his dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery; or

(c) He reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

**Credits**

§ 35.15 Justification; use of physical force in defense of a person, NY PENAL § 35.15

(Added L.1968, c. 73, § 4; amended L.1980, c. 843, § 30.)

PENAL LAW

Current through L.2011, chapters 1 to 54 and 57 to 495.

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TAB 9

# JURY NULLIFICATION

## by Julian Heicklen

Juries originally were introduced into England to protect the individual from the tyranny of government. The first case in which juries nullified a law was that of William Penn and William Mead in England in 1670 The jurors refused to convict the two Quaker activists charged with unlawful assembly. The judge refused to accept a verdict other than guilty, and ordered the jurors to resume their deliberations without food or drink. When the jurors persisted in their refusal to convict, the court fined them and committed them to prison until the fines were paid. On appeal, the Court of Common Pleas ordered the jurors released, holding that they could not be punished for their verdict.

Jury nullification was introduced into America in 1735 in the trial of John Peter Zenger, Printer of The New York Weekly Journal. Zenger repeatedly attacked Governor William Cosby of New York in his journal. This was a violation of the seditious libel law, which prohibited criticism of the King or his appointed officers. The attacks became sufficient to bring Zenger to trial. He clearly was guilty of breaking the law, which held that true statements could be libelous. However Zenger's lawyer, Andrew Hamilton, addressed himself to the jury, arguing that the court's law was outmoded. Hamilton contended that falsehood was the principal thing that makes a libel. It took the jury only a few minutes to nullify the law and declare Zenger not guilty. Ever since, the truth has been a defense in libel cases.

Several state constitutions, including the Georgia Constitution of 1777 and the Pennsylvania Constitution of 1790 specifically provided that "the jury shall be judges of law, as well as fact." In Pennsylvania, Supreme Court Justice James Wilson noted, in his Philadelphia law lectures of 1790, that when "a difference in sentiment takes place between the judges and jury, with regard to a point of law,...The jury must do their duty, and their whole duty; They must decide the law as well as the fact." In 1879, the Pennsylvania Supreme Court noted that "the power of the jury to be judge of the law in criminal cases is one of the most valuable securities guaranteed by the Bill of Rights."

John Jay, the first Chief Justice of the U. S. Supreme Court stated in 1789: "The jury has the right to judge both the law as well as the fact in controversy." Samuel Chase, U. S. Supreme Court Justice and signer of the Declaration of Independence, said in 1796: "The jury has the right to determine both the law and the facts. " U. S. Supreme Court Justice Oliver Wendell Holmes said in 1902: "The jury has the power to bring a verdict in the teeth of both law and fact." Harlan F. Stone, the 12th Chief Justice of the U. S. Supreme Court, stated in 1941: "The law itself is on trial quite as much as the cause which is to be decided."

In a 1952 decision (Morissette v United States), the U. S. Supreme Court recognized the powers of juries to engage in nullification. The court stated:

"Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges....They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter."

In a 1972 decision (U. S. v Dougherty, 473 F 2nd 1113, 1139), the Court said: "The pages of history shine on instances of the jury's exercise of its prerogative to disregard instructions of the judge."

Likewise, the U. S. Supreme Court in Duncan v Louisiana implicitly endorsed the policies behind nullification when it stated: "If the defendant preferred the common-sense judgment of the jury to the

[FN67]. Fletcher does not discuss this last possibility, or whether it was raised in the case, except to note that on the reckless assault charges, "there was not much question at the trial whether the risk was substantial" (p. 79). He does not discuss the depraved indifference requirement, or the way in which an assault conviction might be a more apt remedy for the jury's apparent discomfort with the legal definition of intention.

[FN68]. N.Y. Penal Law §§ 120.10, 120.25 (McKinney 1987). The New York Court of Appeals might well reject my interpretation, however. That court has held that "depraved indifference" is not a mental state at all, but an "objective" requirement of the crime that describes the enormity of the risk created. People v. Register, 60 N.Y.2d 270, 276, 457 N.E.2d 704, 707, 469 N.Y.S.2d 599, 601-02 (1983). The court held that intoxication was irrelevant to defendant's liability for "depraved indifference" murder, because that phrase is not a mens rea requirement, and intoxication can only rebut mens rea. Id. at 279, 457 N.E.2d at 708, 469 N.Y.S.2d at 603. The court's insistence that "depraved indifference to the value of human life" is not a mens rea requirement is understandable, for this surely is not an ordinary kind of mens rea. But a better approach would be to allow the jury to consider evidence of intoxication, because "depraved indifference" should invite a broad evaluative judgment of blameworthiness. See the dissent in Register for further exploration of these issues. Id. at 281-88, 457 N.E.2d at 709-14, 469 N.Y.S.2d 604-08 (Jasen, J., dissenting).

[FN69]. Under the defense, these factors could be relevant either to the reasonableness of the defendant's response or to whether he acted with an appropriately pure defensive motivation. The former is the more likely avenue, for self-defense does not usually explicitly require a defensive motivation. (It does, of course, usually require that the defendant have appropriate beliefs about the necessity, imminence, and severity of force.).

[FN70]. See, e.g., Gainer, The Culpability Provisions of the Model Penal Code, 19 Rutgers L.J. 575 (1988); Robinson, A Brief History of Distinctions in Criminal Culpability, 31 Hastings L.J. 815 (1980).

[FN71]. See supra note 30 and accompanying text.

[FN72]. The prosecutor agreed not to describe the four youths as "victims," and not to call Goetz's statements to the police "confessions" (p. 113).

[FN73]. Fletcher specifically mentions Waples's clever statutory argument that only actual necessity, not apparent necessity, is a defense to the reckless endangerment charge (pp. 81-82). Fletcher also explains Waples's subtle argument about how the fifth shot was fired—an argument, unfortunately, that the trial judge seems not to have understood (pp. 175-78, 191).

[FN74]. Fletcher suggests that the defense need not have asserted a broad necessity defense, for it could have emphasized the following facts peculiar to Goetz's situation: Goetz was well-trained in handling weapons; he had been victimized before; and he had not shown any tendency to use his gun in crimes against innocent victims (p. 165).

[FN75]. See p. 162 and N.Y.Penal Law § 400.00(2) (McKinney Supp.1989). A catch-all category permits the discretionary issuance of a license "when proper cause exists," id. § 400.00(2)(f), but a judicially-crafted necessity doctrine is probably inconsistent with that grant of administrative discretion. See also id. § 400.00(3) (applicant should present "such ... facts as may be required to show the good character, competency and integrity of [the applicant]").

Note, too, that Fletcher's proposed limiting principles (see supra note 74) would still permit Goetz to carry a concealed gun in public; yet the statute specifically authorizes such possession only by a much smaller class of persons, and a class with a much more compelling need—namely, bank messengers, judges, and prison employees. N.Y.Penal Law § 400.00(2)(c), (d), (e).

[FN76]. For Fletcher's discussion, see supra notes 40-41 and accompanying text.

[FN77]. See N.Y. Times, Jan., 23, 1989, at B1, col. 1; A Crime of Self Defense: Bernhard Goetz and the Law on Trial Colum.L.Observer, Fall 1988, at 6 ("There were enormous, systematic and covert appeals to racism throughout the course of the trial.").

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Book Review

# *1179 SELF-DEFENSE, MENS REA, AND BERNHARD GOETZ

A Crime of Self-Defense: Bernhard Goetz and the Law on Trial. By George P. Fletcher. The Free Press, 1988. Pp. xi, 253. $19.95.

Kenneth W. Simons [FNa]



What does the Bernhard Goetz verdict mean?

After the jury acquitted Goetz of the major felony charges arising out of his shooting four youths in a subway, several of the jurors reportedly flashed victory signs with their fingers as they departed the courthouse by bus. [FN1] But to some jurors, Goetz was "just a very frightened person," [FN2] and "rather a sad figure." [FN3] His emotional taped confessions "tore your heart out. We saw he was in so much pain at the time he gave himself up." [FN4] And one juror concluded: "We were not trying to send a message to the public. The verdict doesn't reflect our opinions about what Goetz did or about actions such as that. I hope the public understands that." [FN5]

The verdict was a victory for Bernhard Goetz, but which Bernhard Goetz? The courageous Goetz, justified in asserting a universal right of autonomy against aggression? The eccentric, almost paranoid Goetz, understandably excused for exploding with violence during a terrifying subway encounter? The malicious, vengeful Goetz, who confessed he wanted to " 'murder' " four dangerous youths, " 'to hurt them, to make them suffer as much as possible,' " (p. 118) [FN6] and who gave them what they deserved? Or the alleged white racist Goetz, who would not have shot the four black youths if they had been white?

Answering these questions requires resolution of important issues of fact and value. We know that two youths approached Goetz on a subway requesting money, and that Goetz responded by firing five shots at the two youths and their two companions. But at Goetz's trial, the parties disagreed about how close the youths were standing to Goetz, about whether Goetz fired a second shot at one of the youths in the back, about what Goetz believed, and about what motivated him to act as he did. Even more formidable are the problems of value. What *1180 can society rightly expect of someone in Goetz's situation? More affirmatively, what does someone in Goetz's situation have a right to do?

When I first learned that Professor George Fletcher, an eminent criminal law scholar, was attending the entire Goetz trial and planning to write a book about the case, I was eager to see what he would uncover. He has not disappointed. Fletcher gives a fascinating account of the progress of the trial, and nimbly intersperses his description with sophisticated commentary on many of the relevant legal and moral issues.

The book is discursive, almost to the point of being disjointed. Fletcher explores dichotomies of fact and value, justification and excuse, reason and passion, theory and popular sentiment. The discussion ranges from problems with lawyerly tactics to intricacies of doctrine, from social commentary to grand flights of criminal law theory, from the Bible to Shakespeare to Michel Foucault. Fletcher inspects many different facets of the Goetz case from a com-

parative law perspective, demonstrating the different Continental and Anglo-American approaches to the role of the jury (pp. 6-8), the rules of evidence (pp. 137-38), the culture of legal argument (p. 52), and the law of self-defense (p. 55). Though some readers may find fault here, I found the breadth and variety of topics that Fletcher covers more stimulating than confusing.

But the book has one major failing: a confusion of audiences. Fletcher seems to be speaking to an educated lay reader, for he frequently discusses legal history, legal institutions, and legal concepts that will be quite familiar to any law graduate. However, his doctrinal and theoretical discussions are probably too ornate, abstract and sophisticated for anyone not trained in the law. At the same time, the legal audience will be somewhat impatient with Fletcher's explanation of basic legal terms, and will find some of his analysis too simplified.

Apart from the audience problem, however, the book is a scintillating success. The analysis of doctrine and theory, the focus of this Review, is always intriguing and sometimes quite insightful. Fletcher not only applies his own earlier theories, but also makes a number of original contributions. Fletcher's analysis can be controversial, and I will controvert a number of points in the following pages. Despite these criticisms, however, the book is a powerful exploration of criminal law and theory. Part I of this review examines Fletcher's theoretical and doctrinal analyses of self-defense and mens rea. [FN7] Part II briefly reviews other aspects of Fletcher's discussion of jury deliberations and trial strategy.

## *1181 I. THEORIES OF SELF-DEFENSE AND MENS REA

What principles underlie the law of self-defense? And what principles most influenced the Goetz jury? To criminal law scholars, these are the most salient questions about the Goetz case. Fletcher's discussion of them is provocative and engaging, but at times incomplete or unpersuasive.

This section addresses three principal issues—theories of self-defense, the subjective/objective distinction in self-defense, and the relevance of defensive motivation to the defendant's mens rea for the crime. The third issue is also crucial in the Goetz case, for the jury reasoned in a way that will astonish most criminal law specialists. On the most serious count, attempted murder, the jury acquitted Goetz not because they concluded that he had a strong enough self-defense argument, but because they believed he lacked the requisite intent to kill. That the jury approached intent in this way raises profound doubts about whether contemporary law has yet resolved adequately one of the most basic criminal law issues, the proper definition of criminal intention.

### A. Theories of Self-Defense

Professor Fletcher frames his self-defense analysis in general terms as requiring a choice between "passion" and "reason" (ch. 2). "Passion" refers to a "punitive, ... vengeful response ... against those who deserve to suffer," while "reason" apparently refers to all other theories of self-defense (p. 19). This dichotomy is unfortunate. Although it may be meant to simplify legal issues for the lay reader, it does not do justice to the complexity of the various self-defense theories that Fletcher goes on to discuss. [FN8]

Fletcher carefully explains the basic elements of self-defense—imminence, necessity, proportionality, and defensive intention (pp. 19-27). [FN9] He points out one peculiarity of New York law that many observers have ignored, a peculiarity that is critical to the legality of Goetz's response: Deadly force may be used to defend not only against *1182 a serious assault, but also against an ordinary robbery (p. 22). [FN10] This is a remarkable loosening of the proportionality requirement; I wish that Fletcher had discussed it more thoroughly, especially in relation to underlying theories of self-defense. [FN11]

At a more theoretical level, Fletcher argues that although self-defense is usually considered a justification, a reasonable mistake in the use of defensive force is more aptly considered an excuse (pp. 26-27). [FN12] Fletcher

then distinguishes four underlying theories of self-defense that "reflect the confrontation between passion and reason in the law" (p. 27)—theories of private punishment, excuse, individual justification, and social justification.

The first theory is that the defender is imposing just punishment on the attacker. In the vernacular, Goetz's attackers "got what they deserved." Fletcher distinguishes two versions: just deserts based on the attacker's past character and lifelong behavior, and just deserts based on the attacker's specific acts of aggression (pp. 28-29). Both versions are objectionable, Fletcher asserts. "When our passions seek gratification, when our lust to avenge evil gains the upper hand, we don't always ponder the facts and weigh the gradations of evil and its fitting punishment" (p. 28). [FN13]

I do not understand why Fletcher denigrates this theory as an irrational expression of passion and vengeance. The retributive theory of *1183 public punishment is a "rational" and principled theory, and Fletcher himself is an adherent. [FN14] The first theory of self-defense simply proposes that a private individual is entitled to defend herself in a way that serves retributive goals. The real facts, the real culpability of the attacker, should be directly relevant to the scope of her entitlement.

In part, Fletcher may be expressing a legitimate concern: As a practical matter, can the "private" punisher assess the facts fairly? Our public criminal justice system tries to evaluate fact and value in a careful and disinterested manner, while a defender who purports to inflict "punishment" privately during a sudden, violent encounter cannot evaluate the circumstances in a remotely comparable way. Still, Fletcher's criticism of the theory is too facile. The theory should ask whether the victim's violent response actually did give the attacker his "just deserts," not whether the victim irrationally believed that her response was "just." Similarly, the retributive theory of public punishment should ask whether the state has actually given the offender his "just deserts" pursuant to some principled justification, not whether some segment of the public feels, perhaps irrationally, that the punishment avenges the crime. [FN15] If, because of her emotional involvement, a victim imposes undeserved punishment, she would simply lose the defense.

Also puzzling is Fletcher's claim that the institution of public punishment does not consider "general character" but only "whether a particular act constitutes a crime and merits punishment" (p. 28). This claim is largely true of the definition of crimes and defenses, but it is hardly true of sentencing. Since the private enforcer of "just deserts" both finds the aggressor "liable" and "sentences" him, she should, in theory, be entitled to consider character as well as acts.

The theory of self-defense as private punishment does have problems. For example, it might allow the defender to retaliate, even after the threat had subsided, contrary to current law. [FN16] Fletcher gives another telling criticism: the theory would entail a much stronger proportionality requirement than exists under current law. The death penalty is an unjustifiably severe public punishment for rape; thus, under the first theory, a defensive killing should be an unjustifiably severe private response to rape. [FN17] However, this is contrary to current law, which permits such a defensive killing (p. 29). Fletcher's point is important. *1184 Those who think the four alleged attackers "got what they deserved" have a frighteningly severe conception of just deserts. "Even if the four youths were about to subject Goetz to a fierce beating, they would hardly deserve a punishment of being shot, paralyzed, being brought to the edge of death" (p. 29). [FN18]

The second theory views self-defense "as an excuse, based on the defender's uncontrollable reaction to the spector of death" (p. 30). [FN19] The actor may not have done the right thing, but she cannot be blamed for acting as she did (p. 19). Fletcher seems to disparage this theory, too, as inconsistent with the demands of "reason." [FN20] Again, the criticism is perplexing. Perhaps Fletcher is simply using "reason" to stand for conduct that is justified (as opposed to excused). But his writing is open to a different interpretation, that excuse theory itself is not rational and is thus unprincipled—an interpretation Fletcher would certainly disavow. [FN21]

Fletcher claims that imminence and necessity would have to be strictly applied under this second theory of excuse. Otherwise, we cannot be sure that the defense is really "an involuntary response to the terror of the situation" (p. 30). [FN22] I am not convinced. On the contrary, if we focus, as excuse theory suggests we should, on the confusion and terror that the defender understandably feels, we might interpret imminence and necessity somewhat liberally. More precisely, we might allow the defender the excuse so long as she had a "reasonable" belief that she had to defend herself immediately, where "reasonable" means something like "understandable" or "a belief that many people would have in the situation."

The third theory views self-defense as a justified act by which the defender asserts her individual autonomy. Fletcher contrasts this individualist theory with a fourth, "social" theory of justified self-defense. The individualist theory is much more absolutist. It implies such doctrines as "a man's home is his castle," and it implies broad interpretations of imminence, necessity, and proportionality (p. 33). In comparison, the social theory "recogniz[es] the humanity of the aggressor"***1185** (p. 34). [FN23] Because it requires the defender to consider the aggressor's interests, the social theory implies a much more limited right to defend oneself, limited particularly by the requirement of proportionality.

The two theories differ significantly, Fletcher says, in how they allocate uncertain risks of personal violence. When Goetz was approached on the subway, he was not certain that he would be robbed or beaten, but he might have feared the possibility. According to Fletcher, the social theory requires that the defender accept such risks, while the individual theory permits him to respond to them (p. 36). If Fletcher is arguing that risks short of substantial certainty are irrelevant under the social theory, he is unpersuasive. In principle there is no reason why a social theory cannot consider such risks. If Goetz thought there was a very small risk that he would be attacked, for example, then brandishing his gun and alarming his putative attackers could be viewed as a proportionate response. Rather, what Fletcher should, and perhaps means to, argue is that the individual theory puts a strong thumb on the scales and gives the benefit of any doubt to the defender. The defender might even be entitled to view any perceptible risk of an attack as a certainty. The social theory, of course, would not go so far.

Fletcher points out that the social theory would most clearly limit Goetz's right of self-defense. It is therefore not surprising that Goetz's lawyers appealed only to the three other theories. But Fletcher further claims that only the social justification theory could lead a jury to conclude that Goetz's response was excessive (p. 37). [FN24] I demur. An excuse theory might also justify that conclusion. Perhaps Goetz did not in fact respond out of fear, or perhaps his response was too extreme and brutal to qualify as "reasonable." [FN25] Explanation of this point, however, requires analysis of the subjective/objective dimension of self-defense.

B. The Subjective/Objective Distinction in Self-Defense

The choice between a subjective and an objective test is important not only in defining the mental state required for a crime, but also in delimiting the scope of a defense. In self-defense law, the choice has ***1186** often been framed in terms of mistake: If a defendant makes an honest mistake in believing that he is being unlawfully attacked, is he nevertheless entitled to use defensive force? [FN26] If the answer is an unqualified "yes," the law adopts a subjective test. If the answer is a qualified "yes"—specifically, if his honest mistake must be "reasonable" in order to provide a defense—then the law adopts an objective test. [FN27]

In Chapter 3, "Tolerant Reason," Fletcher offers some intriguing perspectives on the subjective/objective dimension. He begins by underscoring American law's remarkable preoccupation with concepts of "reasonableness," a preoccupation that is not limited to criminal law and that contrasts sharply with Continental law's emphasis on the "Right." [FN28] Fletcher then moves to a much more concrete problem the litigants faced in the Goetz case—the confusion in New York law about whether self-defense is judged from a "subjective" or "objective" perspective, and about what those two terms mean. In light of that confusion, the prosecutor, Gregory Waples, faced an ethical and tactical quandary in deciding how to instruct the grand jury. [FN29] Waples instructed***1187** on the objective test, despite recent pronouncements by the intermediate appellate courts that the test is subjective. But his gamble paid

off. Goetz's lawyers appealed the issuance of the indictment and ultimately lost when the New York Court of Appeals upheld the objective test. As Fletcher perceptively notes, Goetz's lawyers erred in appealing; if they had not, the trial judge might well have instructed on the subjective test, and such an instruction would have given Goetz a great advantage at trial (p. 46). [FN30]

Fletcher provides an admirably clear analysis of most of the doctrinal issues surrounding objective and subjective tests. He points out that the objective test, in classic form, is all-or-nothing: "If Goetz's act was not that of a reasonable person under the circumstances, he merited no defense at all; he was to be treated as though he had gone out with the purpose of shooting the first four street kids he could find" (p. 54). By contrast, Fletcher explains, the Model Penal Code developed an "ingenious" compromise: an unreasonable mistake in using defensive force does not lead to full liability, but only to liability for any lesser form of the crime for which negligence suffices (pp. 54-55). [FN31] For example, one who intentionally kills in self-defense, and who makes a negligent mistake in believing that his attacker is about to use deadly force, can only be liable for negligent homicide.

But the Model Penal Code solution breaks down, Fletcher lucidly explains, when the substantive crime cannot be committed negligently (p. 40). [FN32] There is then no "lesser" crime of negligence that roughly corresponds to the defendant's negligent mistake in using defensive force. And attempted murder, with which Goetz was charged, cannot *1188 be committed negligently. Purpose or intent to kill is required; there is no lesser crime of "negligent attempted murder." So if the jury concluded that Goetz made an unreasonable mistake in shooting, then even under the Code, they should acquit him of attempted murder. In short, as applied to attempted murder, the Code is indistinguishable from a pure subjective test.

It is possible, however, to patch up the Code approach by means of the crime of reckless endangerment—a crime that is less serious than attempted murder and that also does not require a harmful result. [FN33] New York recognizes such a crime, in two degrees. [FN34] In practical effect, this crime might serve as a lesser included offense to attempted murder; if an actor makes an unreasonable and reckless [FN35] mistake in using deadly force and in trying to kill an attacker, she might satisfy the definition of reckless endangerment in the second degree. [FN36]

In any event, the New York legislature did not adopt the Code's "ingenious compromise," but instead simply required that a person invoking self-defense reasonably believe that defensive force is necessary, and reasonably believe that (among other things) she was about to be seriously attacked or robbed. [FN37] The New York Court of Appeals interpreted these self-defense provisions as reflecting an "all-or-nothing" approach to mistake. An unreasonable mistake leads to full liability; a reasonable mistake, to none. [FN38]

Fletcher concludes his discussion of the objective/subjective dimension with a succinct but powerful defense of the objective test. It is not the case, he explains, that only a subjective test is sensitive to the blameworthiness of the defender. A defender who honestly believes he is justified in using defensive force might nevertheless be blameworthy. "The basis for all blaming is not the offender's thoughts, but our judgment about whether he could and should have acted otherwise under the circumstances" (p. 61). If Goetz could have been more attentive, *1189 he can be blamed for ignoring the evidence before him and overreacting.

Fletcher's doctrinal and theoretical analysis of the objective/subjective dimension is rigorous and provocative, as far as it goes. It is surprising, however, that he does not discuss more fully the meaning of the "objective" test, in light of the dramatic facts in the Goetz case and in light of the theories of self-defense that he set forth earlier. For example, how "objective" is the objective test? Should the jury examine whether a reasonable person who has been victimized before would react as Goetz did? If they should, what should they consider? Whether the "reasonable crime victim" can more accurately perceive risks than an unvictimized person? Or whether the "reasonable crime victim" would also be in a jumpy, nervous emotional state? At what point does the "reasonable crime victim" become a "reasonable paranoid" who does not deserve a defense? The New York Court of Appeals touched briefly on such issues in its opinion, [FN39] but I do not know the extent to which the trial judge instructed, and the parties argued, about these issues. And what is Fletcher's opinion?

Fletcher does give a thoughful, though brief, analysis of one important aspect of this issue—whether the racial identity of the four victims is relevant to the reasonableness of Goetz's response. In Fletcher's view, individuals will inevitably, and not irrationally, consider racial identity among other factors in judging whether someone is dangerous. [FN40] But he believes that a judge or juror should not be permitted to take race into account (p. 204). These are plausible judgments. But again, I wish that Fletcher had explored them more fully. Why is it "rational" for someone in the shoes of Bernhard Goetz to consider the attackers' racial identities? Because, in our society, the defender sometimes has factually valid grounds for especially fearing an interracial crime? Or because, to put it bluntly, he cannot be expected to do better than the average white racist? Moreover, while I agree that legal recognition of racial sterotypes in self-defense law is dangerous, Fletcher fails to consider whether fairness to the defendant requires such recognition.

A more practical question about the Goetz case is whether the jurors were actually swayed by racial considerations. Fletcher addresses this question sensitively and finds no clear answer. He notes that on ***1190** the verbal level, the trial was color-blind (p. 206). And two of the jurors were black. But Fletcher exposes as racially inflammatory one of the defense's tactics—having four T-shirted black youths reenact the roles of the shooting victims (pp. 128-30). [FN41] He also argues that the defense employed a covert racial appeal by its repeated, virulent references to the victims as "predators," "vultures," and "savages" (p. 206). On the question of whether Goetz himself acted from a racist motive, Fletcher cautiously concludes that he did not, for his rambling confessions contain virtually no evidence of such a motive (p. 205).

A second issue about the meaning of an "objective" test is deeper. Does "reasonableness" have different meanings, depending on the underlying theory of self-defense? Consider the following statement: "Although Goetz honestly believed that he was entitled to use deadly force in self-defense, he was mistaken, and a reasonable person in Goetz's shoes would not have so believed or acted." [FN42] Do the four theories of self-defense suggest distinct conceptions of what the reasonable person "in Goetz's shoes" would believe or do? Fletcher does not explore this issue, [FN43] but the inquiry seems quite important. Under the punitive theory, "reasonableness" might demand that the defender have a solid factual foundation for his assessment of the attacker's just deserts. Under an excuse theory, "reasonableness" might demand that the defender's perceptual mistakes or his overreaction be of the type that many or most persons would make in the circumstances. Or, negatively, it might demand that the overreaction not be due to some culpable character defect. [FN44] Under an individualist justification theory, "reasonableness" could mean that the defender is entitled to ignore any risk of error and to proceed as if a slight risk of harm is a certainty. [FN45] And under a social justification theory, giving consideration to ***1191** the attacker's interests might mean universalizing or normalizing the definition of "reasonableness."

Alternatively, perhaps "reasonableness" does not change its meaning depending on the underlying theory. The underlying theory might distinctly identify the contours of the legal requirements of imminence, necessity, and proportionality, and yet a uniform analysis might apply to the question whether an individual defendant reasonably perceived the situation as "imminent" or "necessary" or "proportional" in the relevant sense. For example, an individualist justification theory, unlike a social justification theory, might eliminate any requirement to retreat, but each theory might employ the same test for whether one "reasonably" believed he was under attack.

These speculations are just that. And it may not be reasonable to expect Professor Fletcher to widen the scope of his already broad discussion. To his credit, Fletcher has established an incisive framework for analyzing these tantalizing issues.

Nevertheless, a few points concerning self-defense deserve fuller discussion, including the trial judge's exact instructions on self-defense, and the jury's reasoning on that topic. Although Fletcher discusses the jury's reasoning with regard to Goetz's shooting of Darrell Cabey, [FN46] he says nothing about its reasoning with regard to the shooting of the other three. It is therefore difficult to tell whether the lawyers' debates over the objective versus subjective test of self-defense were, in the end, much ado about nothing.

Moreover, Fletcher says little about the defense's argument that Goetz was on "automatic pilot" after the initial shot. The trial judge strongly supported the argument in an instruction (pp. 189-90), yet the argument is probably legally unsound. The metaphor suggests that Goetz was acting involuntarily and could not be responsible for the later shots, no matter how excessive or brutal. At best, the argument seems to fit crudely within the excuse theory of self-defense. Fletcher does not say whether the prosecutor objected to this argument, nor does he offer his own view.

C. Mens Rea for the Crime and Defensive Motivation

If someone uses force to defend herself, and if she kills her attacker, does she have the requisite mental state for murder? If she seriously wounds her attacker, as Goetz did, does she have the requisite mental state for attempted murder? For assault?

Fletcher nicely explains some of the conundrums surrounding these issues. Attempted murder requires a true purpose or intention to kill. [FN47] Awareness that one's conduct might, or even certainly will, [FN48] kill *1192 is not enough, if killing was not one's design. Fletcher gives a memorable illustration: When Lee Harvey Oswald tried to kill President Kennedy and one of his shots struck Governor Connally as well, he did not intend to kill Connally, even if he knew there was a good chance that the bullet would strike and kill Connally (pp. 76-77). By contrast, "intentional assault includes knowingly causing harm as a side effect" (p. 77). [FN49] On this broader concept of intention, Oswald would be liable for assaulting Connally even if he did not desire to cause him harm. [FN50]

Thus, while Goetz could not be liable for attempted murder if he did not plan or want to kill the four youths, he could be liable for assault if he knew that his shooting would cause them harm, or if he was reckless as to causing them harm, even if he did not desire to harm them. [FN51]

*1193 How does a defensive motivation affect this analysis? If Goetz shot directly at the four youths for the purpose of preventing them from harming him, does that demonstrate that he did not act for the purpose of killing them? Or can one have both purposes simultaneously?

The law assumes that one can have both purposes. Self-defense is a defense, after all. A defense would never come into play if the facts underlying it always rebutted the requisite intent for the crime. More specifically, the law assumes that one can intend to kill or harm another, not necessarily for its own sake, but for the further purpose of protecting oneself.

Thus, one way to explain the relevance of defensive motivation is to distinguish intending something as an end in itself from intending something as a means. Perhaps defensive killings are situations in which one intends a death or harm only as a necessary means to protecting oneself. One might regret having to harm an attacker, but one might deliberately shoot to harm him in order to disable him from continuing the attack. Indeed, nondefensive killings also have further motivations, yet the more immediate motivation suffices for liability. If I kill you only as a means to get your money, or only to facilitate my escape from a crime, the fact remains that I have intentionally killed you.

Whatever the precise explanation, criminal law assumes that a defensive act can reflect both an intent to kill or harm and also an intent to defend oneself. Yet the jury in the Goetz case had a radically different view. They concluded that Goetz lacked the intent to kill because he believed, in good faith, that he was justified in defending himself. As Fletcher perceptively explains, this reasoning effectively adopts the subjective test of self-defense "by the back door" (p. 187). For, under this view, if Goetz actually believed that he was about to be robbed or that he was in mortal, immediate danger, then no matter how objectively unreasonable the belief, he lacked the intent to kill.

The jury's approach was surprising, but Fletcher makes a commendable effort to understand and even justify it. As he explains, one who intends to kill in the simple sense of desiring to bring about another's death is not necessari-

ly culpable. If that intent is in service of the nonculpable goal of defending oneself, then the intent is not culpable at all. The jury was simply refining the concept of intention to accord with a plausible sense of moral culpability (pp. 186-87). [FN52] (This also helps to explain how the jury was able to find that Goetz had the *1194 requisite intent for assault; "perhaps the intent to injure is morally more neutral" than the intent to kill (p. 192)).

The problem, of course, is that this approach turns the objective test of self-defense into a subjective test. [FN53] If the prosecutor and trial judge had had any inkling that the jury would reason this way, the judge would have instructed that defensive motivation is a separate issue from, and does not necessarily rebut, intent.

And yet scholars should not simply dismiss the jury's reasoning on this issue as revealing a misunderstanding of the law. The jury can also be praised for noticing, and trying to correct, artificiality in the law of criminal intent. Under New York law, Goetz could only be convicted of attempted murder if he had the "conscious objective" to "cause [the] result" of death. [FN54] And he could only be convicted of first degree assault if he had the "conscious objective" to "cause serious physical injury." [FN55] But how do these standards apply to the facts? Two youths approach Goetz in a subway. He reacts by aiming a gun at the two (and at two others) and firing. If one disregards his later confession that he intended to kill them, [FN56] what was his mental state towards their death or injury? In the suddenness of the encounter, his mind may have been a blur. Did he therefore lack the "conscious" object of killing them?

Moreover, how do we decide whether death or serious injury was Goetz's "object"? This is a surprisingly complex inquiry. Would Goetz have been disappointed if the four victims had not died or been injured? Or would he have rejoiced in such a lucky fate, pleased that he was able to defend himself without inflicting harm? Even if, in some sense, he "preferred" that they not suffer, does the manner and severity of his response suggest that he gave much less weight to their interests than he should have? Should the latter count as "intending" to kill or harm? These difficult, hypothetical, and evaluative questions might *1195 be critical in deciding whether Goetz had the necessary purpose or intention. [FN57]

Contrary to Fletcher (p. 186), I do not find it absolutely clear that Goetz literally "intended" to kill or wound the four, even though he deliberately aimed at their midsections. For it is not clear either that Goetz planned to kill or wound them, or that bringing about their death or injury was Goetz's motive in acting. [FN58] Perhaps, in his anger, he simply wanted to do everything possible to get them out of his way; if they then miraculously survived without injury, he would not have been disappointed. Indeed, it might be a surprisingly rare case in which a jury can be sure that the defendant literally "desired," "planned," or "intended" to kill or harm another. [FN59]

This problem—the narrow scope of "intent" when construed literally—is less pronounced when "knowledge" or "belief" as well as intent suffices for liability. One would then ask whether Goetz believed that the four youths would die or suffer serious injury as a result of Goetz's acts, and the answer may well be "yes." [FN60] The problem is also less pronounced when a state employs the malleable mental state of "recklessness," especially in its "depraved indifference" formulation, as I will explain.

Goetz was charged with the felony of reckless endangerment in the first degree. [FN61] As Fletcher explains, the crime of reckless endangerment is a recent innovation, focusing on the risks that a defendant creates, even if he causes no more tangible harm, and requiring only awareness of a risk, not intent to harm or endanger (pp. 65-66, 79-82). In New York, it is a misdemeanor to create a "reckless" (substantial and unjustifiable) risk of serious physical injury to another, [FN62] and it is a felony to recklessly create a grave risk of death to another with "depraved indifference to human life" (pp. 79-80). [FN63] The prosecutor in the Goetz case chose to treat the reckless endangerment count as addressing the *1196 potential harm Goetz created to innocent bystanders, not to the four youths Goetz claimed were about to rob him (p. 80). No doubt the prosecutor was hoping that the jury would have more sympathy for the terrified train passengers than for the four putative attackers, so this might have been wise strategy. [FN64]

But if the prosecutor wished to have the jury convict Goetz based on Goetz's reckless, but not necessarily intentional, mental state towards harming the four youths, a better avenue than reckless endangerment existed. Goetz might have been convicted of the more serious crime of first degree assault, on the ground that he displayed "a depraved indifference to human life" and "recklessly ... create[d] a grave risk of death to another." [FN65] To satisfy the latter clause, Goetz need only have been aware that he was creating a grave risk of death; [FN66] he need not have intended to kill or seriously injure. That might have been a more defensible course for the jury than distorting the meaning of "conscious object" to cause harm. [FN67]

Finally, if one gives a strict and narrow interpretation to the mental state of intention but a more liberal interpretation to the amorphous mental states of "recklessness" and "depraved indifference," then defensive motivation might become relevant to the mental state for the crime as well as to the scope of the defense. When Goetz shot the four youths, he may have believed their deaths were likely, or he may have wanted to wound them severely, because he thought that was necessary for self-defense. But he may also have wanted to hurt them as much as possible, to err on the side of punishing them as well as protecting himself.*1197 Under Fletcher's view, if Goetz was acting in reasonable self-defense, then "even if in the fear of the moment his defensive act included an aggressive and hostile component, he would still be acting within his rights" (p. 119). Yet the scenario described above might qualify as "recklessness" and "depraved indifference," which are sufficient mental states both for first degree assault and for first degree reckless endangerment. [FN68] To be sure, Fletcher is correct that the law should not look at events only as the actor does; thus, Goetz's feelings of guilt about his actions need not incriminate him in a court of law (p. 119). But if the jury believed that Goetz was willing to exploit the situation, they might sensibly consider his malevolence or viciousness relevant to the requisite mental state for the crime as well as to the scope of self-defense. [FN69]

Proponents of the Model Penal Code and other modern codes, including New York's, are rightfully proud of their progress from the traditional muddled concepts of mens rea. [FN70] But the modern concept of intention has at best an artificial precision, while the modern concepts of recklessness and "depraved indifference" may be too elastic. The Goetz verdict, and Professor Fletcher's probing analysis, show us how much farther we have to go.

## II. TRIAL STRATEGY AND JURY DELIBERATIONS

Fletcher immerses the reader in the facts of the Goetz case, effectively probing the strategic choices of the advocates, the rulings of the trial judge, and the reasoning of the jury. He points out, for example, that the defense lawyers erred in appealing the issuance of the indictment. [FN71] *1198 However, they were quite effective in securing favorable rulings from the trial judge and in obtaining rhetorical concessions from the prosecutor. [FN72] The prosecutor, Fletcher reveals, had some acute insights into the law and facts, but he made two potentially grave errors in his closing argument. First, he suggested that Goetz might not have actually said to Cabey, "You seem to be doing all right; here's another" (p. 175), [FN73] a suggestion that subtly undermined the most powerful evidence of excessive force (p. 196). Second, he criticized Goetz for choosing to sit next to the four youths. Not surprisingly, the jury's reaction was that Goetz had a right to sit where he chose (p. 179). Although Fletcher respects the trial judge for his patient and thoughtful manner, he also believes that the judge was unduly concerned about equalizing the number of favorable rulings between the two sides and capitulated too much to the defense (pp. 151-52, 191).

I did find one of Fletcher's points about trial strategy implausible. With some vehemence, Fletcher criticizes the defense for not asserting the right to bear arms in connection with the gun possession charge. That right could be relevant to either of two arguments—first, that "the official law of New York was truncated and insensitive to the larger moral issues at stake" (p. 157); and second, that Goetz came within the terms of the explicit necessity defense (pp. 159-69). But both of these arguments, as Fletcher begrudgingly recognizes (pp. 157, 169, 210-11, 216), would be risky strategy, for they could alienate an otherwise sympathetic jury. Moreover, it would be a rare judge who would accept the first argument and openly transcend positive law. From Fletcher's description, the cautious trial judge was unlikely to take that step. And the second argument, even if confined somewhat, [FN74] would also stretch the necessity doctrine beyond its limits. New York law already regulates gun possession with a detailed set of

rules, [FN75] rules that a free-*1199 floating right to own a gun in self-protection would swallow.

Why did the jury decide as it did? Fletcher's book suggests that there is no simple answer. The jury verdict reflects several legal and factual conclusions. On the attempted murder charge, the jury found that Goetz lacked an intent to kill; the jury interpreted intent in a common sense way as requiring a blameworthy attitude towards causing death. On most of the other charges, the jury had well-grounded factual doubts about the prosecution's case and applied the "beyond a reasonable doubt" test faithfully and strictly. Perhaps the defense's emotional appeals, and victim James Ramseur's hostility during questioning, influenced the jury in subtle and not so subtle ways. Still, Fletcher is warranted in concluding: "To speak of a right to shoot someone who asks for or demands five dollars on the subway grossly misinterprets both the law and the jury's verdict of not guilty in Goetz's case" (p. 202).

Why didn't the jury judge Goetz more harshly in light of his tape-recorded and videotaped confessions? Goetz admitted that he wanted to hurt his victims as much as possible (p. 118, n. 7). He also admitted that after he shot Darrell Cabey, he paused, said, "You seem to be [doing] all right; here's another," and shot Cabey again (p. 1). Fletcher has an intriguing and imaginative explanation that rests on Thomas Kuhn's famous paradigm-shift argument. Although the jury provisionally accepted Goetz's confessions as the basic explanation (or "paradigm") of his motives and actions, Fletcher suggests, ultimately it rejected the confessions once they seemed to produce too many factual discrepancies (or as Kuhn would say, "anomalies") (p. 172).

Fletcher gives less prominence to the racial issues in Goetz than might seem warranted in light of how large segments of the public reacted to the case (p. 202). [FN76] This relative deemphasis is defensible, however. First, the Goetz case raises a number of important issues apart from race. Second, Fletcher's conclusion that race probably did not motivate Goetz's actions is credible, though I tend to the opposite view. And Fletcher's uncertain conclusion about whether race affected the jury is honest and lucidly explained. (In interviews since the publication of the book, however, Fletcher has suggested that he is now more inclined to believe that race was a factor in each of these respects. [FN77]).

## *1200 CONCLUSION

The Goetz case fascinates because Bernhard Goetz's character and motivations are as complex as the theoretical perspectives that might justify, excuse, or condemn his actions. The record provides some evidence of each of the Goetz personae I sketched at the outset—the courageous, the pathetic, the vengeful, the racist. But the justice of the verdict depends on how we generalize from these ambiguities.

The victory sign that some jurors displayed after the verdict may disclose their belief that Goetz justifiably fired in self-defense. Other jurors' statements that they felt sorry for him suggest their belief that he was only excused. But this, too, oversimplifies. The jurors were simultaneously judging fact and value. They were judging what happened, and why, and what could and should have been. They were listening, and thinking, and feeling, and judging. But in the end, they could only utter a crude and opaque legal judgment about guilt. In his impressive study of their efforts, of the trial, of criminal doctrine, and of criminal theory, Professor Fletcher reveals these complexities and makes an important incident in the history of the criminal law sparkle with life.

[FNa]. Professor of Law, Boston University School of Law.  I thank Eric Blumenson, Stan Fisher, Maria Hylton, and Paul Wallace for helpful comments.

[FN1]. Goetz is Cleared in Subway Attack; Gun Count Upheld, N.Y.Times, June 17, 1987, at A1, col. 5 & B6, col. 1.

[FN2]. Goetz Jurors Found Both Sides' Evidence Difficult to Accept, N.Y.Times, June 17, 1987, at A1, col. 6 & B6, col. 4 (Mark Lesly).

[FN3]. Id. (Michael Axelrod).

[FN4]. Id. at B6, col. 3 (Diana Serpe).

[FN5]. Id. at B6, cols. 4-5 (Diane Serpe).

[FN6]. Quoting transcript of tape-recorded confession, p. 12.

[FN7]. Also noteworthy are Fletcher's discussions of the following topics, which are not discussed in this review: the theory of possession offenses (pp. 71-76), the risks covered by reckless endangerment (pp. 79-81), the popular sentiment that fortuitous harm should matter to criminal liability (pp. 82-83), various evidence doctrines (pp. 107, 138), and jury nullification (pp. 154-59).

[FN8]. The dichotomy does accurately capture one theme in Fletcher's analysis: that emotions should not have much relevance to self-defense. But that theme is itself controversial and inadequately explained (see, e.g., p. 16). The excuse theory of self-defense certainly makes relevant one's capacity for self-control, one's ability to rein in hostile emotions and to channel vengeful ones in a socially acceptable way.

[FN9]. Fletcher acknowledges that this last element, defensive intention, is controversial (pp. 25-26). Although the element is probably legally required, see, e.g., 1 W. LaFave & A. Scott, Criminal Law § 5.7(c) (2d ed. 1986), some commentators, most notably Paul Robinson, argue that the unknowingly justified defendant should not be punished. 2 P. Robinson, Criminal Law Defenses § 122(b)(1) (1984). On the latter view, if Goetz shot the four youths maliciously, believing that they were not threatening him, but if the youths later confessed to an intention to rob or to severely beat him, Goetz would nevertheless receive the defense. Or, on a more plausible reconstruction of the Goetz case, if Goetz honestly believed that he was being attacked and that belief was unreasonable, he would still be entitled to the defense if, as it turned out, he was indeed being attacked. One's belief that something is true can be unreasonable even though correct.

Under the concept of defensive intention, Fletcher actually discusses two mental states—awareness that one is being attacked, and intention to repel the attack (p. 25). The analysis of these two mental states might differ, though Fletcher does not distinguish them. See 2 P. Robinson, supra, § 122(b)(1) & (2).

[FN10]. See N.Y.Penal Law § 35.15(2)(b) (McKinney 1987).

[FN11]. This robbery provision seems more consistent with an excuse or an individualist justification theory of self-defense than with a punitive or social-justification theory. See infra notes 12-25 and accompanying text.

[FN12]. The Commentary to the Model Penal Code gives a helpful explanation of the general distinction between justification and excuse:

> To say that someone's conduct is "justified" ordinarily connotes that the conduct is thought to be right, or at least not undesirable; to say that someone's conduct is "excused" ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it.

Model Penal Code and Commentaries, Part I (Introduction to Article 3), at 3 (1985). Fletcher's claim that a reasonable mistake should be considered an excuse is controversial. See id. at 2-3; Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, 32 UCLA L.Rev. 61, 92-95 (1984); Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum.L.Rev. 1897, 1907-11 (1984); see also Morawetz, Reconstructing the Criminal Defenses: The Significance of Justification, 77 J.Crim.L. & Criminology 277, 289-90 (1986), who places reasonable mistake in the category, not of justification or excuse, but of "justified wrongs."

[FN13]. Fletcher believes that the act version of this theory is more amenable to calibration, but he concludes that this version does not justify the severity of defensive response that the law in fact allows (p. 29).

[FN14]. See G. Fletcher, Rethinking Criminal Law § 6.3.2 (1978).

[FN15]. See, e.g., M. Moore, Law and Psychiatry 235-36 (1984); H. Packer, The Limits of the Criminal Sanction 37-39 (1968).

[FN16]. I say "might" and not "would allow" because the private punishment theory might have this corollary: private punishment cannot be imposed if public punishment is a practical alternative. However, if such a corollary is interpreted broadly, i.e., if a defender should strongly presume that the legal system will be able to impose public punishment, then a defender could only rarely invoke the private punishment theory.

[FN17]. Coker v. Georgia, 433 U.S. 584, 597-600 (1977).

[FN18]. If a "just deserts" theory is based on the four youths' assumption of the risk, perhaps proportionality is irrelevant. (I thank Eric Blumenson for this point.) But I am assuming, with Fletcher, that "just deserts" theory is a private analogue to the retributive theory of public punishment.

[FN19]. Fletcher's use of the language "uncontrollable" and "involuntary" can mislead. Strictly speaking, the defender has the ability to choose otherwise, but in the self-defense context, that ability is understandably and nonculpably compromised. Fletcher is much clearer about this point in his criminal law treatise. G. Fletcher, supra note 14, § 10.5.1.

[FN20]. The theory "springs more from compassion for the predicament of the trapped defender than from a passion for justice or the dictates of reason" (p. 30).

[FN21]. See G. Fletcher, supra note 14, § 10.3.

[FN22]. See also id. § 10.5.1.

[FN23]. Fletcher here restates, and amplifies slightly, his earlier analysis. Id. §§ 10.5.2, 10.5.3. For a more comprehensive account of justification theories of self-defense, see Dressler, Justifications and Excuses: A Brief Review of the Concepts and the Literature, 33 Wayne L.Rev. 1155, 1164 (1987) (distinguishing forfeiture, rights, lesser harm, and public benefit theories).

[FN24]. A caveat: If interpreted logically, the first, punitive theory should also have strict proportionality limits. But as Fletcher notes, most adherents interpret the theory more broadly (p. 29).

[FN25]. The prosecutor as well as the defense abjured the excuse theory. Indeed, prosecutor Waples emphasized Goetz's irrationality in order to demonstrate that he was not acting "reasonably" in self-defense (pp. 102-04). But Waples's tactic might have backfired. The post-trial statements of some jurors suggest that they felt sorry for Goetz and might (in effect) have believed that he was excused.

[FN26]. See generally 2 P. Robinson, supra note 9, §§ 131, 184; Singer, The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense, 28 B.C.L.Rev. 459 (1987). The issues of honest belief and reasonable or unreasonable mistake also may arise with respect to other elements of self-defense, such as the degree of harm threatened and the necessity of the immediate use of force. See 2 P. Robinson, supra, §§ 131, 184.

[FN27]. My summary glosses over two complexities. First, the so-called "objective" test is usually a combined subjective and objective test. For example, the defendant must have an honest, subjective belief that he is being unlawfully attacked, and that belief must also be "objectively" reasonable. A defendant could satisfy the purely "objective" but not the "subjective" test if a reasonable person would believe he was in danger, but the defendant subjectively believed that he was not in danger. See generally 2 P. Robinson, supra note 9, § 122 (discussing the "unknowingly justified actor").

Second, the subjective/objective distinction matters even in situations when the defendant is not "mistaken." If the defendant's honest belief that he is being attacked is unreasonable, yet the belief happens to be correct, then we might say he is not "mistaken," because the facts are as he believes them to be. Yet we still must decide whether the unreasonableness of his belief should preclude the defense. The actor is "unreasonably justified," if you will. The Goetz case itself could exemplify this situation. Based on the evidence, a juror could have drawn the following three conclusions: Goetz honestly believed he was about to be robbed; Goetz's belief was unreasonable in light of what Goetz had seen; yet the four youths really were planning to rob Goetz. Consider the widely-reported evidence that screwdrivers were discovered in the pockets of the four youths after the shooting. That evidence helps support the conclusion that Goetz was about to be robbed, but since Goetz was unaware of the existence of the screwdrivers when he fired, that evidence does not directly support his claim that he reasonably believed he was about to be robbed.

This category of "unreasonably justified" conduct should probably be treated in the same manner as "unknowingly justified" conduct. See supra note 9. But I do not pursue the issue here.

[FN28]. See generally Fletcher, The Right and the Reasonable, 98 Harv.L.Rev. 949 (1985).

[FN29]. But I think Fletcher overstates the jurisprudential difficulties here. According to Fletcher, Waples had to decide what the law "was." Was it what the most recent opinions of the intermediate appellate courts said it was, namely, a subjective standard? Or was it "enduring principles that the courts (and even the legislatures) sometimes get wrong" (p. 43)? But Waples did not really face this dilemma. He could plausibly argue, in a more positivist vein, that the law "was" what the New York Court of Appeals would say it was when the court first got the chance; and that he had good reason to think that the court would support the objective test (as it ultimately did).

[FN30]. The trial judge might have instructed on the subjective test because recent cases of the intermediate appellate courts had upheld the subjective test, while the New York Court of Appeals had not been clear on the matter.

[FN31]. Fletcher's explanation of the Model Penal Code's compromise oversimplifies. Mistakes can be negligent or reckless; in the latter case, the actor has a mistaken belief, but is also aware of a substantial risk that he might be wrong. If a lesser crime of recklessness exists, then that is the appropriate punishment for a reckless mistake in self-defense. Thus, if one believes he is entitled to kill but is aware of a substantial chance that he is not really being attacked or that he is using excessive force, he might be reckless, and thus liable for reckless manslaughter if he kills in self-defense. See Model Penal Code §§ 3.04, 3.09 (1962).

Fletcher also overstates the originality of the Model Penal Code approach. Prior to the Code, many courts adopted a similar, intermediate approach to mistake in self-defense: if the mistake was reasonable, the defendant's "imperfect" self-defense would reduce the crime from murder to manslaughter. See J. Dressler, Understanding Criminal Law § 18.02[C] (1987); W. LaFave & A. Scott, supra note 9, § 7.11(a).

[FN32]. Or recklessly. See supra note 31.

[FN33]. Fletcher notes the existence of the crime in passing during this discussion (p. 55 n. 40), but he does not examine whether it furthers the Code approach to negligent and reckless mistakes.

[FN34]. N.Y.Penal Law §§ 120.20, 120.25 (McKinney 1987). See pp. 79-80 for Fletcher's discussion.

[FN35]. See supra note 31.

[FN36]. N.Y.Penal Law § 120.20 (McKinney 1987) (requiring that actor "recklessly engage[ ] in conduct which creates a substantial risk of serious physical injury to another person"). Such an actor is probably not liable for reckless endangerment in the first degree, because that more serious crime requires a "depraved indifference to human life." Id. § 120.25. One who honestly believes she is justified probably lacks "depraved indifference." See People v. Webb, 67 A.D.2d 890, 413 N.Y.S.2d 703 (1979) (mem.).

However, New York has no crime of "negligent endangerment"; thus, no corresponding crime covers an actor who makes a negligent but nonreckless mistake.

[FN37]. N.Y.Penal Law § 35.15 (McKinney 1987) (emphasis added).

[FN38]. People v. Goetz, 68 N.Y.2d 96, 111, 497 N.E.2d 41, 50, 506 N.Y.S.2d 18, 27 (1986).

[FN39]. Goetz, 68 N.Y.2d at 111, 114-15, 497 N.E.2d at 50, 52, 506 N.Y.S.2d at 27, 29 (1986).

[FN40]. In Fletcher's words:

> Given the tragic disproportion of crimes committed by black youth, ordinary sensible people cannot avoid considering race, along with youth, gender, dress, and apparent educational level, in making a judgment about whether a group of youths on the subway bespeaks danger.... This is, of course, a form of racial stereotyping.... We might all be fairer to each other if there were no such cues based on generalized experience, but how much can we expect of the ordinary person when he picks his seat on the subway? (pp. 203-04)

[FN41]. As Fletcher discovered, the defense specifically asked the Guardian Angels to send four blacks (p. 129).

[FN42]. This statement simplifies the elements of self-defense somewhat. To be more precise and pedantic, the statement should read: "... honestly believed that he was in danger of an imminent and deadly attack, that no [reasonable] alternative existed, and that his force was proportionate to that attack...."

[FN43]. Fletcher does claim, quite generally, that mistaken self-defense is a matter of excuse rather than justification. He might, therefore, believe that the excuse theory of self-defense is the pertinent framework for analyzing the reasonableness of mistake. But I think the issues are distinct. Mistaken self-defense might be considered a matter of "excuse" in the sense that the "attacker" is privileged to resist the "defensive" force, for example, but it might be considered a "justification" in the sense that the "defender" acted properly and reasonably, in light of the information available to him.

[FN44]. Note that in modern formulations, duress and provocation are complete or partial defenses only if the defendant acted "reasonably," yet these defenses are quintessential excuses. See N.Y. Penal Law §§ 40.00(1) (duress), 125.25(1)(a) (extreme emotional disturbance, the modern counterpart to provocation) (McKinney 1987); Model Penal Code § 2.09(1) (1985) (duress); id. § 210.3(1)(b) (extreme emotional disturbance) (1985).

[FN45]. See supra note 23 and accompanying text.

[FN46]. The prosecution claimed that after Goetz shot the four youths including Cabey, he paused and then gratuitously shot the wounded Cabey again (p. 125).

[FN47]. In the following pages, when I refer to a "purpose" or "intention" to do or cause something, I mean to include a plan, desire, or conscious object to do or cause that thing. This is the Model Penal Code interpretation, see

Model Penal Code § 2.02(2)(a)(i) (1985), which Fletcher seems to follow. Although further distinctions among these concepts are valuable for some purposes, see Simons, Rethinking Mental States 48-50 (unpublished manuscript on file at Columbia Law Review), the distinctions are unnecessary in the present context.

[FN48]. Fletcher tends to distinguish categorically between, on the one hand, intention or purpose in the sense of design, and, on the other hand, reckless creation of risk. He assimilates knowing creation of a harm to reckless creation of a risk. Fletcher's approach is sensible insofar as it underscores the broad distinction between committing oneself to a result and acting in a way that one foresees might cause the result. However, the approach ignores the distinctive significance that many modern codes give to "knowledge" as compared to "recklessness." Thus, under the Model Penal Code, "knowingly" causing the death of another is murder, while "recklessly" causing his death is manslaughter. Model Penal Code §§ 210.2(1)(a), 210.3(1)(a) (1985). But see infra note 50 (New York law does not recognize the mental state of "knowingly" causing a result).

[FN49]. Fletcher here refers briefly to the famous doctrine of double effect of Catholic theology: one truly intends only what one desires to bring about, not what one knows will occur as a side effect or as a further consequence of what one intends. Absolute responsibility attaches only to what one truly intends. See, e.g., Boyle, Toward Understanding the Principle of Double Effect, reprinted in The Right and Wrongs of Abortion 20 (M. Cohen, T. Nagel & T. Scanlon eds. 1974); H.L.A. Hart, Punishment and Responsibility 122-23 (1968); G. Williams, The Sanctity of Life and the Criminal Law 321-22 (1957).

[FN50]. Fletcher might have added that intentional murder, too, often includes knowingly causing harm; as he explains, it is the inchoate nature of attempted murder that restricts the requisite mental state to purpose, not knowledge (p. 77).

Interestingly, New York law does not distinguish between intent (in the sense of purpose) and knowledge with respect to a result. Intent is defined narrowly as "conscious objective," N.Y.Penal Law § 15.05(1) (McKinney 1987), that is, purpose; knowledge is not given any meaning with respect to the result of conduct. Id. § 15.05(2). Apparently the drafters decided that the Model Penal Code's distinction between knowingly and purposely causing a result was "highly technical or semantic." Denzer & McQuillan, Practice Commentary to § 15.05, McKinney's Penal Law (1967), reprinted in 39 McKinney's Consol. Laws of New York Ann. 34 (1987).

[FN51]. I add the qualification about reckless creation of harm because New York law does not define "intentional" assault to include knowing creation of harm. See supra note 50. Rather, New York distinguishes various categories of "intentional" and "reckless" assault. N.Y.Penal Law §§ 120.05, 120.10 (McKinney 1987). Fletcher states that the common law interpreted "intent" in assault to include "knowledge" (p. 77), but he fails to clarify that New York has a different interpretation.

[FN52]. Moreover, Fletcher asserts, the jury might have expressed the plausible view that the defendant must intend death as an end in itself to be morally blameworthy for attempted murder (p. 188). I find this a much less tenable construction of the jury's view of culpability. The Goetz jury would certainly convict a contract killer who killed only for the large fee he would obtain. Killing would be only a means to an end for such a killer, but his pecuniary motivation would only deepen his culpability.

[FN53]. If the jurisdiction has a subjective test of self-defense, this approach is much less problematic. Still, it is confusing and duplicative to treat as a defense evidence that should negate the mens rea element of the crime. Also, if the defense should have at least the burden of production of evidence to sustain self-defense, then treating such evidence as relevant to the elements of the crime contradicts that policy.

[FN54]. N.Y.Penal Law §§ 15.05(1), 110.00, 125.25 (McKinney 1987). The Model Penal Code's definition of "purposely" is almost identical: The actor must have the "conscious object" of causing the relevant result. Model Penal Code § 2.02(2)(a)(i) (1985).

[FN55]. N.Y.Penal Law §§ 15.05(1), 120.10(1) (McKinney 1987). I oversimplify. A person could also be convicted of first degree assault if he had an intent to disfigure or if he caused serious injury (even unintentionally) in the course of a felony. Id. § 120.10(2), (4). And, most relevant in the Goetz case itself, he could be convicted if, "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury...." Id. § 120.10(3). See infra text accompanying note 65.

[FN56]. The jury in fact disregarded much of the confession (pp. 196-97).

[FN57]. For further analysis of these issues, see Simons, supra note 47, at 39-41. I conclude that the last criterion, giving much less weight to a victim's interests than one should, is better described as recklessness or depraved indifference, not as intent to harm.

[FN58]. See id. at 48-50 (describing concepts of intention-as-plan and motive).

If the prosecution had convincingly shown that Goetz paused and maliciously fired a second shot at the non-threatening Cabey, then an intent to kill or wound Cabey would be clear. But the jury had a reasonable doubt about that scenario (pp. 192-97).

[FN59]. As one juror put the point:

> It was obvious that if you shoot someone, you run the risk of killing someone. [Goetz] was aware of that possibility but I don't think he identified that one thing as what he wanted by shooting them.

P. 186.

[FN60]. But see supra note 50 (New York does not recognize the mental state of "knowingly" creating a harm).

[FN61]. N.Y.Penal Law § 120.25 (McKinney 1987).

[FN62]. Id. § 120.20.

[FN63]. Id. § 120.25.

[FN64]. However, I think Fletcher overstates the legal (as opposed to the strategic) advantages of the prosecutor's approach. In Fletcher's view: "That [Goetz] was justified relative to four apparent aggressors does not mean that he was justified in scaring the daylights out of the 15 or 20 passengers in the car" (p. 81). On the contrary, the justification will carry over in all but the rarest circumstances. If the force a defender uses when under attack is reasonable with respect to the attackers, it will ordinarily be reasonable with respect to any additional risk of injury it creates to third parties. The additional risk is only likely to make a difference if the defender has a realistic chance to appreciate it, and if it greatly exceeds the risks that the attackers are imposing on the defender. (In the Goetz case, imagine that innocent passengers were crowded around the four youths, and that Goetz used a shotgun.).

[FN65]. N.Y.Penal Law § 120.10(3) (McKinney 1987). Such an assault conviction also requires proof of serious physical injury. Id.; see also supra note 55.

[FN66]. New York law, which is similar in this respect to the Model Penal Code, declares that "[a] person acts recklessly with respect to a result ... when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur...." N.Y.Penal Law § 15.05(3) (McKinney 1987). The relevant "result," in "depraved indifference" first degree assault, is probably the creation of a grave risk of death to another person, not serious physical injury.

# People v Goetz,
# 131 Misc.2d 1 (NY County 1986)

131 Misc.2d 1, 502 N.Y.S.2d 577
(Cite as: 131 Misc.2d 1, 502 N.Y.S.2d 577)

P

Supreme Court, New York County, New York,
Trial Term, Part 81.
The PEOPLE of the State of New York
v.
Bernhard GOETZ, Defendant.

Jan. 16, 1986.

Proceeding was instituted on pretrial matter concerning dismissal and re-presentation of charges to a third grand jury. The Supreme Court, Trial Term, New York County, Crane, J., held that omission in instruction to second grand jury on defense of justification, that it was necessary for defendant to have reasonably believed that unlawful physical force was about to be used against him, was prejudicial error and, when combined with developments concerning one or more of the "victims" necessitating a superseding indictment, required an order dismissing and permitting re-presentation to a third grand jury of certain serious charges pending against defendant.

Charges dismissed and re-presentation ordered.

Order affirmed 501 N.Y.S.2d 326.

West Headnotes

[1] **Criminal Law 110 ⚿38**

110 Criminal Law
110II Defenses in General
110k38 k. Compulsion or Necessity; Justification in General. Most Cited Cases

Term "reasonably believes," within statutory provisions governing defense of justification, does not countenance the substitution of the mind of the ordinary reasonable person or reasonable juror but relates solely to defendant's own state of mind and to whether the defendant believes that another person is about to commit a robbery and that it is necessary for him to use deadly physical force in order to defend himself. McKinney's Penal Law § 35.15, subd. 2(a, b).

[2] **Indictment and Information 210 ⚿144.1(2)**

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(2) k. Grand or Petit Jury Irregularities. Most Cited Cases

Omission in instruction to second grand jury on defense of justification, that it was necessary for defendant to have reasonably believed that unlawful physical force was about to be used against him, was prejudicial error and, when combined with developments concerning one or more of the "victims" necessitating a superseding indictment, required an order dismissing and permitting re-presentation to a third grand jury of certain serious charges pending against defendant. McKinney's Penal Law § 35.15, subd. 2(a, b).

[3] **Assault and Battery 37 ⚿69**

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k69 k. Defense of Property. Most Cited Cases

**Indictment and Information 210 ⚿144.1(2)**

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(2) k. Grand or Petit Jury Irregularities. Most Cited Cases

Defense of justification in use of physical deadly force to repel an invader was not a defense to charge of reckless endangerment, first degree, and error in instruction to grand jury on defense of justification did not require dismissal of charge for re-presentation to another grand jury. McKinney's Penal Law § 35.15, subd. 2(a, b).

[4] **Criminal Law 110 ⚿1166(2)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error

131 Misc.2d 1, 502 N.Y.S.2d 577
(Cite as: 131 Misc.2d 1, 502 N.Y.S.2d 577)

110k1166 Preliminary Proceedings
110k1166(2) k. Organization and Proceedings of Grand Jury. Most Cited Cases

Refusal of prosecutor to accept defendant's offer to testify under a limited waiver did not so impair the integrity of grand jury as to have prejudiced the defendant when the offer was ill-tailored to accomplish its purpose and was so overbroad that it would have only precluded the prosecutor from inquiring into various aspects of the case. McKinney's CPL §§ 190.45, subd. 4, 190.50, subd. 5(c), 190.75, subd. 3.

[5] Indictment and Information 210 ⚷144.2

210 Indictment and Information
210IX Motion to Dismiss
210k144.2 k. Hearing and Determination. Most Cited Cases

Trial court was not precluded from exercising its discretion to order a third presentation once defendant was vindicated by the first grand jury on the charges handed down by the second given prejudicial omissions in instructions to second grand jury on defense of justification and developments occurring with one or more of the "victims" necessitating a superseding indictment. McKinney's CPL §§ 190.75, subd. 3, 210.20, subd. 4.

[6] Grand Jury 193 ⚷37

193 Grand Jury
193k37 k. Examination of Accused. Most Cited Cases

On resubmission of case to a third grand jury following dismissal of charges by reason of omissions contained in instructions to second grand jury on defense of justification with respect to subway shooting, defendant was to be accorded an opportunity to testify under a limited waiver, thus precluding prosecutor from interrogating defendant about his purchases of handguns for his friends. McKinney's CPL §§ 190.45, subd. 4, 190.50, subd. 5(c), 190.75, subd. 3.

**578 *2 Robert M. Morgenthau, Dist. Atty., New York County (Robert M. Pitler and Gregory L. Waples of counsel), for the People.

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[Edited for publication]

STEPHEN G. CRANE, Justice.

By this decision the court is dismissing and permitting re-presentation to a third grand jury of certain serious charges pending against defendant, Bernhard Goetz, because of a prejudicial error in instructing the second grand jury on the defense of justification and due to developments concerning one or more of the "victims" necessitating a superseding indictment.

The case presents a challenging question. Is there an irreconcilable conflict between the right of an individual to resort to self-protection and the need of society to enforce its laws? Any right-thinking person would condemn an indiscriminate shooting in a public place. Yet, an individual is justified in using deadly physical force when he reasonably believes that he is being robbed. Strong emotional reactions stem from the prosecution of a person who shoots another individual about to rob him. In an ordered society, however, justification must be tested in accordance with the processes of the law so that justice may be done for all concerned and, equally, so that all concerned may perceive justice being done. To respond to public opinion of the **579 moment or to capitulate to popular emotions, then, defeats the ends of justice and commits the rule of law to the whims of majority (or vocal minority) dictates.

I. PROCEDURAL HISTORY

In this context comes one of the most difficult criminal cases of our generation. In the early afternoon of December 22, 1984, a man on an IRT subway galvanized the world by shooting four youths who, he said, were attempting to rob him. Nine days later Bernhard Goetz entered a police station *3 in Concord, New Hampshire, claiming to be the subway gunman. He was interviewed at length on videotape and audiotape and then was returned to New York City.

The District Attorney presented charges of attempted murder, second degree, and assault, first degree, as to each of the four youths, and reckless endangerment, first degree, criminal possession of a weapon, second degree, criminal possession of a weapon, third degree (the gun in the subway) and two

counts of criminal possession of a weapon, fourth degree (involving two guns he left with a neighbor on December 30, 1984). The defendant did not testify before the grand jury hearing these charges although his lengthy recorded statements were placed in evidence and played back for this presentation. Of the four youths who were shot, three were brought before the grand jury, but upon their refusal to waive immunity they were excused. On January 25, 1985, the grand jury saw fit to dismiss all but the third and fourth degree weapons possession charges.

Later, an application pursuant to CPL 190.75(3) was granted for resubmission of the charges the first grand jury had dismissed. An Article 78 proceeding to overturn this order was dismissed. *Matter of Goetz v. Crane*, 111 A.D.2d 729, 491 N.Y.S.2d 5, *leave app. denied* 65 N.Y.2d 609, 484 N.E.2d 671. The new grand jury indicted Mr. Goetz on the charges that the first grand jury had dismissed. After his arraignment on March 28, 1985, this indictment was consolidated with the indictment on the third and fourth degree weapons charges that the original grand jury had voted.

## II. MOTION TO DISMISS SECOND INDICTMENT

### A. *Justification*

In charging the second grand jury on the law, the assistant district attorney gave two sets of instructions on justification or self-defense that he said applied to all the charges.[FN1] *4 One set pertained to the use of deadly physical force in response to what defendant reasonably believed to be the threat of deadly physical force against him. In these circumstances, the defendant is not justified if he knows he can safely retreat. (Penal Law § 35.15[2][a].) After tracking the statute, the assistant repeated the elements. In doing so, he omitted the requirement that the defendant reasonably believe that unlawful physical force was about to be used against him. But defendant does not complain of this omission because it benefitted him. Continuing, the prosecutor charged that the defendant's reactive use of deadly physical force, considered**580 separately for each shot fired, did have to be reasonable. This was basically faithful to the statutory language. Then, the prosecutor reiterated the duty to retreat without reference to the defendant's knowledge that he can retreat in safety. This was error [FN2] of which defendant makes no specific complaint. Summarizing, the assistant repeated the instructions using a test of "whether the evidence creates reasonable cause to believe that any shot he fired was not a reasonably necessary response" to what he had perceived.

FN1. Penal Law § 35.15 as applicable to these instructions reads:

> (1) A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent *he reasonably believes* such to be necessary to defend himself ... from what *he reasonably believes* to be the use or imminent use of unlawful physical force by such other person ...
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> (2) A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
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> (a) *He reasonably believes* that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if *he knows* that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; ... or
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> (b) *He reasonably believes* that such other person is committing or attempting to commit a ... robbery...." [Emphasis added]
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> The underscored portions of this statute are the focus of the intense debate between the parties regarding the correctness of the prosecutor's final instructions on this topic.

FN2. It is paradoxical to speak in terms of error in a charge that should not have been given in the first place. ( *Shorter v. The People*, 2 N.Y. 193; *People v. Stridiron*, 33 N.Y.2d 287, 292, 352 N.Y.S.2d 179, 307 N.E.2d 242.) After all, there was no evidence that any of the youths was about to use deadly physical force on defendant. In this circumstance, the entire charge was a benefit to defendant. (*Cf. People v. Mungin*,

106 A.D.2d 519, 483 N.Y.S.2d 54.) Thus, the error in the passage on retreat ( *People v. La Susa*, 87 A.D.2d 578, 579, 447 N.Y.S.2d 738) is somewhat academic. It receives attention in this opinion because it sets the stage for a de-emphasis of the subjective test in the second portion of instructions on justification under Penal Law § 35.15(2)(b).

The second set of instructions concerned the use of deadly physical force where the actor reasonably believes he is about to be robbed. In this defense retreat plays no role. Penal Law § 35.15(2)(b); *People v. Ligouri*, 284 N.Y. 309, 31 N.E.2d 37. In staking out these instructions, the assistant district attorney correctly explained that defendant must have reasonably believed that a robbery was about to occur. This reasonable belief, he said, *5 had to be analyzed as to each of the four youths and as to each shot he fired.

When he had concluded his charge, one of the grand jurors asked the perceptive question at the very core of this entire case:

"You use the term reasonably with regard to the state of mind of the defendant. Are we to be concerned with psychiatric statement [sic] or whether we feel this was an insane act or irrational? You say if he believes in his mind that what he was doing-"

At this point the assistant rendered supplemental instructions:

"I will reemphasize three elements of the defense of justification.

The first element is that he must in fact believe in his own mind that he was in a situation which he feared that deadly physical force was about to be applied against him.[FN3]

FN3. Here again the assistant omitted the statutory requirement that the defendant's perception be reasonable. This, of course, was to defendant's benefit. (See pp. 579-580, *supra.*)

The second element is that his response, assuming that he did actually believe [3] his response, was his response reasonable under the circumstances and in determining whether it was reasonable under the circumstances you should consider *whether the defendant's conduct was that of a reasonable man in the defendant's situation.*

So there's both a subjective and objective element to this. First of all, you have to determine whether the defendant, in his own mind, believed [3] he was in the kind of peril that permitted him to use deadly physical force. You must also then determine whether his response was reasonable under the circumstances, whether that was the action-the response was the action that he-that a *reasonable man who found himself in the defendant's situation* and if it was unreasonably excessive or-or otherwise unjustifiable it-then the defense would not be made out and the third element is retreat." [Emphasis added.]

These were the final instructions of substance the jurors heard on this or any other legal matter.

Before turning to the contentions of the litigants, it should be noted that the quoted, final instructions on justification seemed to be limited to defendant's response to deadly physical force, an academic instruction on the facts presented to the second grand jury. (See footnote 2, *supra.*) The prosecutor does not seize upon this circumstance to urge this court **581 to avoid *6 deciding the merits of any claimed error in this justification charge. He might have argued that any error was harmless since defendant was not entitled to the charge in the first place. Nevertheless, we cannot discern which of the sets of instruction on justification the grand juror was concerned with because the assistant cut off his or her question. Moreover, because the same phrase-"he reasonably believes"-is involved in both sets (Penal Law § 35.15[2][a] and [2][b] ), the parting instruction of the assistant must, of necessity, have had an effect in the grand jurors' understanding of each charge on justification. *Cf.* *People v. Rodriguez*, 81 A.D.2d 513, 514, 437 N.Y.S.2d 346.

The defendant argues that the underlined portions of the supplemental instructions portrayed an objective standard. This offends the rule requiring a purely subjective charge. The People argue that a subjective test pertains only to the perceptions of a defendant but an objective test measures his reactions. Thus, they urge the court to adopt a hybrid rule.

Upon oral argument, they expanded their hybrid concept by arguing for a subjective-objective test for the phrase "he reasonably believes" in assessing both the defendant's perception and his reaction.

The first approach by the People is without merit. There is no distinction between a defendant's perception of being threatened and his reaction to the threat. Each requires that he reasonably believe: He must reasonably believe that another person is about to commit a robbery, and he must reasonably believe that the deadly physical force he used was the extent of force necessary to defend himself. The objective test to determine the justification of a defendant's reaction has been rejected in *People v. Powell*, 112 A.D.2d 450, 492 N.Y.S.2d 106; *People v. Santiago*, 110 A.D.2d 569, 488 N.Y.S.2d 4; *People v. Long*, 104 A.D.2d 902, 480 N.Y.S.2d 514; *People v. Wagman*, 99 A.D.2d 519, 471 N.Y.S.2d 147 and *People v. Desmond*, 93 A.D.2d 822, 460 N.Y.S.2d 619, among recent cases.

The more difficult question is whether a hybrid test is applicable to determine what an actor "reasonably believes" in both his perception and his reaction. It is unnecessary to trace the history of the justification defense. As early as 2 N.Y. 193 in *Shorter v. The People*, the Court of Appeals recognized the essential subjective essence of the justification defense.

> "... [I]t is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, *7 he will be justified." 2 N.Y. at 199.

That court, thus, stressed the circumstances as they appeared even though they proved to be false.[FN4] See also, *People v. Taylor*, 177 N.Y. 237, 245, 69 N.E. 534.

> FN4. Compatibly, the United States Supreme Court in *Brown v. United States*, 256 U.S. 335, 343, 41 S.Ct. 501, 502, 65 L.Ed. 961 wrote:
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> > "Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense.... Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."

The modern day Court of Appeals has put any controversy to rest in *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741, 349 N.E.2d 841. There, the court held that proof of the victim's prior acts of violence known to defendant was admissible because the crucial issue in assessing the justification claim is defendant's state of mind. ( *Id.* at 548, 551, 384 N.Y.S.2d 741, 349 N.E.2d 841.)

Nevertheless, the People rely on a case two volumes later in the New York Reports, *People v. Collice*, 41 N.Y.2d 906, 907, 394 N.Y.S.2d 615, 363 N.E.2d 340. **582 There, the court affirmed a conviction where the trial court had rejected a request to charge the defense of justification at all. It held that "on no view of the evidence" had justification been established. The court wrote that even if defendant believed he was threatened "his reactions were not those of a reasonable man acting in self-defense." Though it was cited in Collice's brief to the Court of Appeals, the memorandum of affirmance made no mention of *People v. Miller, supra.*

In *Collice*, the court was in no way receding from the subjective-defendant's state of mind-test of *Miller*. It was simply applying the well settled guide to appellate review, urged in the prosecutor's brief to that court, that under no view of the evidence, considered in a light most favorable to defendant, was he entitled to a justification charge. (See *People v. Stridiron*, 33 N.Y.2d 287, 292, 352 N.Y.S.2d 179, 307 N.E.2d 242; *People v. Watts*, 57 N.Y.2d 299, 301, 302, 456 N.Y.S.2d 677, 442 N.E.2d 188.) This is the unvarying interpretation given by every case subsequently citing *Collice*. *People v. Figueroa*, 111 A.D.2d 765, 766, 490 N.Y.S.2d 24 (where the court varied the language from *Collice*, viz., "Defendant's reactions were clearly not those of a man acting in self-defense"); *People v. Pabon*, 106 A.D.2d 587, 483 N.Y.S.2d 92; *People v. Gutierrez*, 105 A.D.2d

754, 481 N.Y.S.2d 405; *People v. Alston*, 104 A.D.2d 653, 480 N.Y.S.2d 115; *People v. Jenkins*, 93 A.D.2d 868, 461 N.Y.S.2d 378; *8*People v. Frazier*, 86 A.D.2d 557, 446 N.Y.S.2d 287. The Appellate Division authorities on which Goetz relies are, therefore, not undermined by *People v. Collice*. Unlike *Collice*, which upholds the refusal to charge justification at all, these authorities address the content of justification charges [FN5] that have been rendered to trial juries.

> FN5. Instructive also is a comparison of the language of the charge Goetz now attacks ("You should consider whether the defendant's conduct was that of a reasonable man in the defendant's situation"), with the language of the charge given to the first grand jury ("You must examine the circumstances from defendant's viewpoint as it appeared reasonably to him.") In contrast to the charge in the first grand jury that defendant does not in fact have to turn out to be correct, the charge in the second grand jury omitted any similar language. This reveals another aspect of the reduced emphasis on the subjective state of defendant's mind in the second grand jury. Remember, the first grand jury voted no true bill on the counts as to which justification was charged.

The hybrid concept embraced by the People for interpreting the phrase "he reasonably believes" is virtually repudiated by some of the Appellate Division cases. (See, *e.g.*, *People v. Santiago*, 110 A.D.2d 569, 570, 488 N.Y.S.2d 4; *People v. Long*, 104 A.D.2d 902, 903, 480 N.Y.S.2d 514; *People v. Wagman*, 99 A.D.2d 519, 520, 471 N.Y.S.2d 147; and *People v. Desmond*, 93 A.D.2d 822, 823, 460 N.Y.S.2d 619.) Nor does *People v. Casassa*, 49 N.Y.2d 668, 427 N.Y.S.2d 769, 404 N.E.2d 1310, *cert. den.*, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 50, lay a foundation for a hybrid test of the justification defense. *Casassa* scrutinized the affirmative, mitigating defense of extreme emotional disturbance.[FN6] The court rejected defendant's construction of an entirely subjective measurement for this affirmative defense. Instead, it concluded that a two-part test is described by the statute: (1) whether in fact defendant acted under extreme emotional disturbance-a subjective matter-and (2) whether there was a reasonable explanation or excuse for this disturbance-an objective test applied "by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse for his emotional disturbance was reasonable...." ( **58349 N.Y.2d at 679, 427 N.Y.S.2d 769, 404 N.E.2d 1310.) This analysis was motivated in large measure by the nature of this affirmative defense: "... [W]e believe ... the Legislature intended ... to allow the *9 finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, *appears to them* to have caused an understandable weakness in one of their fellows." ( *Id.* at 680, 427 N.Y.S.2d 769, 404 N.E.2d 1310.) (Emphasis added.)

> FN6. This defense to a charge of intentional murder applies where
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> > "The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." (Penal Law § 125.25[1][a].)

By contrast, justification is an ordinary defense which the People must disprove beyond a reasonable doubt. (Penal Law § 25.00[1].) Moreover, the statutory language of the affirmative defense of extreme emotional disturbance accomplishes just what is omitted in the language of the ordinary defense of justification. In the former, reasonableness is determined from the viewpoint of a person in defendant's situation. This differs from language resting on defendant's own viewpoint as we find repeatedly formulated in Penal Law § 35.15 ("*he* reasonably believes"). This linguistic shift demonstrates how the justification charge, placing the ordinary reasonable man into defendant's situation or shoes, is appropriately condemned by the many cases that have reviewed it. If the Legislature had intended for the justification defense what the People at bar are urging, it had the opportunity to incorporate in Penal Law § 35.15 the language it employed in Penal Law § 125.25(1)(a). (See also the affirmative defense of

duress in Penal Law § 40.00(1) where, unlike justification, the language steps away from the defendant's state of mind in favor of "a person of reasonable firmness in his situation.")

The court is, nonetheless, concerned with the grand juror's curiosity about the concept of reasonableness in the justification context. After all, the word "reasonable" implies some kind of standard. The inquiring grand juror was groping for a description of it. He or she seemed reluctant to attach the label "reasonable" to the beliefs of a person acting irrationally or delusionally. Where *Casassa* speaks of a reasonable explanation or excuse for the emotional disturbance, justification authorities mention a defendant's reasonable ground to believe ( *Shorter v. The People*, 2 N.Y. 193), or reasonable grounds of apprehension ( *Brown v. United States*, 256 U.S. 335, 342, 41 S.Ct. 501, 501, 65 L.Ed. 961) or what defendant had a right to believe under the circumstances ( *People v. Calvin of Oakknoll*, 110 A.D.2d 1044, 1045, 489 N.Y.S.2d 132). In *People v. Rodawald*, 177 N.Y. 408, 423, 70 N.E. 1, the court focused on defendant's good faith and honest belief that his life was in danger. In the defendant's brief to the Appellate Division in *People v. Santiago, supra,* the argument was advanced that "he reasonably believes" means that "the actor honestly believes himself to be in imminent danger of serious *10 physical harm and that there be a reasonable basis for that belief." (App.Br. 37.) The prosecutor in that case phrased it "in terms of of [sic] what is an acceptable belief to society under the circumstances" and not on the basis of "purely fantastic [belief] ... unsupported by relevant circumstances." (Resp. Br. 16.) That prosecutor went on, however, to argue that this test may only be made by replacing defendant with the ordinary reasonable man. The *Santiago* court rejected this conclusion. In *People v. Long,* the charge (not revealed in the decision) included the instruction that a belief "founded upon pure imagination, unsupported by relevant circumstances ... is not the reasonable belief contemplated by the penal law." (Tr. 261.)[FN7]

> FN7. The New York Defender Digest, Inc. publishes "Defendant's Request to Charge-Justification." It offers the following language:
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> "The test the law requires you to use in deciding what this defendant was reasonably justified in believing is what this defendant *himself, subjectively,* had reason to believe-not what yourself or some other person might reasonably believe." [Emphasis in original.]

[1] We have in these cases formulations of reasonableness in what the defendant actually believes. These formulations all describe the defendant's own state of mind **584 which is the crucial issue. ( *People v. Miller*, 39 N.Y.2d 543, 551, 384 N.Y.S.2d 741, 349 N.E.2d 841.) As case after case has demonstrated, however, the application of these tests does not countenance the substitution of the mind of the ordinary reasonable person or reasonable juror. The second grand jury in the case at hand was instructed otherwise, and this was error.

[2] What is the effect of this error? *People v. Calbud, Inc.*, 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140, teaches us that a grand jury need not be charged as punctiliously as the petit jury. Yet, this does not license obscure or erroneous instructions. More to the point, though, is footnote 2 in *Calbud* (*id.* at 395, 426 N.Y.S.2d 238, 402 N.E.2d 1140). There the court cautioned that a disapproval of an imprecise charge might stem from erroneous or misleading instructions in response to a pointed question from the grand jury. This footnote squarely embraces the situation at bar. Moreover, the circumstance that the instruction came at the very conclusion of the presentation gave "a predominant trend to [the grand jurors'] thoughts and ... led them to enter upon their deliberations with a false test." ( *People v. Lumsden*, 201 N.Y. 264, 269-270, 94 N.E. 859.) Finally, the instruction went to the very heart of the case, and the error influenced the essential character of that instruction. Consequently, the error impaired the integrity of the second grand jury and prejudiced defendant.

*11 B. *People v. Pelchat*

After the second grand jury indicted defendant for the more serious crimes, additional information came to light. For example, on November 27, 1985, Police Officer Peter Smith reported that Canty, while still in the subway car where he had been shot, indicated that "we were going to rob" Goetz. In a press interview in November, the paralyzed Darryl Cabey, the last youth to be shot, remembered that his companions were bent on robbing Goetz. Relying on

*People v. Pelchat*, 62 N.Y.2d 97, 476 N.Y.S.2d 79, 464 N.E.2d 447, defendant contends, in an oral expansion of his motion, that the District Attorney should have moved to resubmit the counts handed down by the second grand jury. He argues that these later developments demonstrate that the youths who testified committed perjury before the second grand jury. Indeed, he implies that these recent developments conspire with the allegedly prior inconsistent statements of the youths who testified, and the statements of like tenor taken from those who did not testify to mandate a re-presentation.[FN8]

FN8. Of course, it is basic that out-of-court statements, even if exculpatory of Goetz, by witnesses who never testified, would be inadmissible unless they qualify as a hearsay exception, and, prior inconsistent statements of the youths who did testify may not be used as evidence-in-chief. Richardson, *Evidence* § 501 (10th ed. 1973).

In *People v. Pelchat, supra,* the officer who testified in the grand jury had misunderstood the presenting prosecutor's question. The answer was the only evidence connecting Pelchat to the crime. Later, on cross-examination of the same witness at the trial of codefendants, it became clear that the officer had not intended to implicate Pelchat. The Court of Appeals held that the District Attorney, knowing of this infirmity in his case against Pelchat, should not have stood by while Pelchat pleaded guilty. Instead, the prosecutor should have sought "a superseding indictment on proper evidence or ... disclose [d] the facts and [sought] permission from the court to resubmit the case (see CPL 200.80, 210.20, subd 4)." ( 62 N.Y.2d at 107, 476 N.Y.S.2d 79, 464 N.E.2d 447)

Naturally, the *Pelchat* grand jury would not have had legally sufficient evidence to indict had they understood the intended testimony of the officer. By contrast, there would have existed at bar legally sufficient evidence to indict Goetz on the more serious crimes without testimony from any of the youths. The case at bar is placed in a unique light, however, because the major difference between the first presentation, **12 where the grand jury dismissed **585 the more serious charges, and the second where it voted to indict on those charges, was the testimony from the two youths. If that testimony, going to the heart of the justification defense, was perjured, the integrity of the second grand jury was severely undermined, to say the least. Though this technical defect may differ from *Pelchat,* the policy to be vindicated is identical.[FN9]

FN9. Judge Simons, writing for the unanimous court in *Pelchat,* said, in the context of that case:

> "The cardinal purpose of the Grand Jury, however, is to act as a shield against prosecutorial excesses and this protection is destroyed and the integrity of the criminal justice system impaired if a prosecution may proceed even after the District Attorney learns that jurisdiction is based upon an empty indictment." ( 62 N.Y.2d at 108, 476 N.Y.S.2d 79, 464 N.E.2d 447)

[3] For these reasons, as well, the indictment voted by the second grand jury should be dismissed, except for the count charging reckless endangerment, first degree. Justification is not a defense to this charge. *Cf. People v. McManus,* 108 A.D.2d 474, 489 N.Y.S.2d 561; but see *People v. Boute,* 111 A.D.2d 398, 399, 489 N.Y.S.2d 605.

C. *Limited Waiver*

The remaining argument in support of dismissal is that the refusal to permit defendant to testify under a limited waiver impaired the integrity of the second grand jury. He offered to testify under a waiver of immunity as to the events of December 22 and December 30, 1984, because he wanted to avoid incriminating himself as to collateral charges that were not, in any event, part of the scope of the order for resubmission pursuant to CPL 190.75(3). Cf. *People v. Coppola,* 123 Misc.2d 31, 36, 472 N.Y.S.2d 558. Defendant's attorneys were particularly concerned that questions be avoided about the purchase by Goetz of additional weapons for some friends. As a result of the prosecutor's refusal to limit his waiver of immunity, defendant was not heard. Consequently, he argues, the second grand jury heard a one-sided version of the events from one or more of the victims who received full immunity despite their prior criminal history. This, he says, undermined the integrity of the second grand jury.

[4] The People misconstrue defendant's argument by referring to the five-day limitation in CPL

190.50(5)(c) governing the defendant's statutory right to testify. Rather, defendant is raising a question of fairness in the exercise of the prosecutor's discretion to confer immunity. This discretion is reviewable for abuse. ( *People v. Adams*, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902, 423 N.E.2d 379). Upon *13 such review, this court is unpersuaded that the District Attorney abused his discretion (CPL 190.45[4] ) in rejecting defendant's offer of a limited waiver. It was ill-tailored to accomplish its purpose. Its overbreadth would have created a minefield for the assistant district attorney who would have been precluded from inquiring into many aspects of the events subsequent to the subway shootings but clearly relevant to them.

With the proffer of too tight-fitting a waiver the defendant himself is responsible for his nonappearance. Thus, there is no cause to dismiss because the prosecutor rejected this waiver.

III. RESUBMISSION

It is familiar to all by now that when a *grand jury dismisses* a charge it may be resubmitted again pursuant to court order. If the *grand jury dismisses* again, it may not be resubmitted. (CPL 190.75[3].) On the other hand, when the *court dismisses,* as in the case at bar on motion of the defendant, discretion remains for the court to allow resubmission without limitation as to frequency. (CPL 210.20[4].) Goetz argues that since he was vindicated by the first grand jury on the charges handed down by the second, this court should withhold discretion and forbid a third presentation. He analogizes to principles of double jeopardy. This argument, if adopted, accomplishes what the legislature refrained from doing. It would incorporate the single resubmission limitation of CPL 190.75(3) into CPL 210.20(4). The latter subdivision,**586 however, stands in stark contrast to the former; CPL 210.20(4) has no numerical limitation.

[5] Neither does the court perceive any reason on the merits to refuse authority to resubmit. There is not a murmur of any bad faith in the error of the assistant on the justification charge. The very length of discussion in this opinion and in the various memoranda of the parties reveals the difficulties presented by this area of the law. Moreover, dismissal on the *Pelchat* branch of the omnibus motion is divorced from any activity by the People in the second grand jury. For example, the prosecutor was as surprised as the defense by the revelation in November by Officer Smith. (See p. 584, *supra.*)

Finally, neither the goal of justice nor the appearance of justice being done will be accomplished by refusing leave to resubmit. This case for all concerned, including defendant, cries out for adjudication, not according to popular opinions, *14 emotional reactions or political philosophy, but according to the evidence, properly and fairly admitted before the appropriate tribunal, and adjudicated in obeisance to the rules of law. Indeed, observance of rules of law is what makes our society stable; adoption and enforcement of these rules pursuant to our constitutions is what keeps us free.

[6] Thus, discretion will be exercised to permit resubmission of the counts being dismissed. Since this is an exercise of discretion it may be conditioned in an appropriate case. The condition in this case is that defendant be accorded an opportunity to testify under a limited waiver. (*Cf. People v. Scott*, 124 Misc.2d 357, 361-362, 476 N.Y.S.2d 999.) This waiver will not be as broad as the one Goetz tendered in March. Rather, it will be tailored to meet his sole concern that he not be interrogated about his purchases of handguns for his friends. On all other subjects he will waive immunity.

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131 Misc.2d 1, 502 N.Y.S.2d 577

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# People v Goetz –
# Summary of Jury Charge

# Criminal Possession of a Weapon

2nd degree – defendant possessed a loaded firearm with intent to use same unlawfully against another. NOT GUILTY

3rd degree – defendant possessed a loaded firearm outside a home or business. GUILTY.

4th degree – defendant possessed a firearm (re: two pistols left at neighbor's house). NOT GUILTY

# Attempted Murder

(combines murder and attempt portions of penal code)

2nd degree - On date of event, defendant intended to cause (victims') death. Acting with such intent, defendant engaged in conduct which tended to effect the commission of such crime. NOT GUILTY

deadly force to protect himself. After this initial agreement with them, I must part company. They would apply a purely subjective test, considering only the personal belief of the defendant. It follows that they would reject a standard which would take into account whether the defendant's actions were based on neurotic fears or a distortion of the situation with which he was confronted, although such perception was not reasonable under the circumstances presented.

Logic, public policy and the law mandate a two-pronged inquiry. First, it is clear that if a defendant is not afraid that he is threatened by deadly physical force or about to be robbed, then he has no legal defense of justification. If he did have such a subjective apprehension, then the second inquiry which the statute imposes is whether he "reasonably" believed that he was about to be robbed and that deadly force was necessary to prevent the crime. In short, what is called for is a two-step test-subjective belief on the part of the defendant that he is threatened and then, this belief is measured by what a reasonable person would believe in the defendant's situation.

*335 Since 1829, New York's penal statutes have required a reasonable belief that one's life is in imminent peril before one could use deadly physical force in self-defense. Thus, the Revised Statutes of 1829 justified homicide "when committed in the lawful defense of such person ... when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there should be imminent danger of such design being accomplished".

Twenty years later, in Shorter v. People, 2 N.Y. 193 (1849), the Court of Appeals held the "reasonable ground" of the 1829 statute to be the same as the belief of "any reasonable man". Id. at 197.

Upon the revision of the penal law in 1881, the language of the 1829 statute was continued in section 205 of the Penal Code of 1881. By its continuance of the earlier language, the Legislature obviously ratified the Court of Appeals' interpretation of the 1829 statute requiring an objective standard of a "reasonable man". See, Lucenti v. Cayuga Apts., 48 N.Y.2d 530, 541, 423 N.Y.S.2d 886, 399 N.E.2d 918. The words of section 205 were subsequently accepted, *in haec verba,* into section 1055 of the Penal Law of 1909.

In People v. Lumsden, 201 N.Y. 264, 94 N.E. 859 (1911), the Court of Appeals, construing this language, approved the following instruction, again requiring the objective standard of a "reasonable man":

> Under the provisions of the [justification] statute, in case a person makes an assault or attack upon another *under such circumstances as would lead a reasonable man* to believe that he is about to kill or to do great bodily injury, and there is imminent danger of his doing so, then the person attacked has a right to kill and if under such circumstances he did kill it would be justifiable in law. Id. at 268, 94 N.E. 859 (emphasis added).

In People v. Tomlins, 213 N.Y. 240 (1914), Judge Cardozo once more enunciated the reasonable man standard:

> We think that if the situation justified the defendant *as a reasonable man in believing that he was about to be murderously attacked,* he had the right to stand his ground. Id. at 244 (emphasis added).

In People v. Ligouri, 284 N.Y. 309, 31 N.E.2d 37 (1940), the Court of Appeals was unequivocal, using the following language:

> If the circumstances justified the belief on his part that he is in danger of inevitable and irreparable injury, although it should turn out he was mistaken, *an ordinarily prudent man under the same circumstances would be justified in doing what he did,* if he thinks he is in danger of death.... but he could not do more than necessary, *more than **339 what an ordinarily prudent man under *336 the same circumstances would be justified in doing.* Id. [284 N.Y.] at 316 [31 N.E.2d 37] (emphasis added). *See also,* People v. Cherry, 307 N.Y. 308, 310, 317 [121 N.E.2d 238] (1954).

In 1965, the penal law was again revised. Section 35.15 of the present Penal Law, however, continues the requirement of an objective standard by authorizing a person to use deadly physical force only "when and to the extent he reasonably believes such to be necessary to defend himself" and when "he reasona-

bly believes that such other person is using or about to use deadly physical force", or when he "reasonably believes that such other person is committing or attempting to commit ... a robbery". Thus, the reasonable objective standard set forth in prior statute and case law was approved once more by the State Legislature. *Lucenti v. Cayuga Apts., supra* 48 N.Y.2d at 541, 423 N.Y.2d 886, 399 N.E.2d 918.

The Model Penal Code, adopted by the American Law Institute, propounded a purely subjective definition for the defense of justification. It rejected any requirement for a test of reasonableness. By doing so, it sanctioned the resort to deadly force when the actor only "*believes* that such force is immediately necessary to protect himself against death, or serious bodily injury." (emphasis added). Model Penal Code § 3.04(2)(a)(ii)(c); *see also,* Explanatory Note at 32, Comment at 35-37.

The New York State Legislature rejected such a purely subjective approach. Clearly with the intent to conform the current statute to the previous law, it inserted the term "reasonably" into section 35.15, obviously repudiating the subjective standard of the justification defense which the Model Penal Code uses. It is extremely difficult for me to believe that the Revisers of 1965 would deliberately engraft the word "reasonably" on to the definition of justification without intending to alter the purely subjective test of the Model Penal Code.

For the last 20 years, virtually every jurisdiction which has considered its code of criminal law has turned down the purely subjective justification standard as advanced by the Model Penal Code. Instead, most of the states have accepted the reasonable person test as the basis for the defense of justification. *See,* Note, *337*Justification: The Impact of the Model Penal Code on Statutory Reform,* 75 Colum.L.Rev. 914, 919-20 (1975); *see also, The Goetz Case Revives Issue of Self-Defense Standards,* Richard Singer, N.Y.L.J., Feb. 18, 1986, p. 1, cols. 3 & 4.

After the 1965 revision, the Court of Appeals, in *People v. Collice,* 41 N.Y.2d 906, 394 N.Y.S.2d 615, 363 N.E.2d 340 (1977), ratifying its interpretation of over a century and a half, wrote that:

> Even if defendant had actually believed that he had been threatened with the imminent use of deadly physical force, and there is no evidence that he had so believed, *his reactions were not those of a reasonable man acting in self-defense* (Penal Law, § 35.15) .... Hence, defendant's conduct could not be reasonably perceived to have been useful in evading danger, let alone "necessary to defend himself." *Id.* at 907, 394 N.Y.S.2d 615, 363 N.E.2d 340 (emphasis added).

Even in this, its latest case on the subject, the Court of Appeals, interpreting Penal Law § 35.15, has continued to construe the language "reasonable man acting in self-defense" the same as "reasonably", the critical word in the justification statute. *Accord, People v. Comfort,* 113 A.D.2d 420, 496 N.Y.S.2d 857 (4th Dept.1985).

Penal Law § 40.00(1) provides:

> In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, *which force or threatened force a person of reasonable firmness in his situation would have been unable to resist* (emphasis added).

Criminal Term was influenced by this duress statute, which expressly defines **340 reasonableness in objective terms, while at the same time the justification statute simply alludes to reasonable belief. It is not difficult to explain this apparent incongruity. The source of the duress statute is the Model Penal Code, which had a test that was virtually the same. *See,* Model Penal Code § 2.09. To the contrary, as discussed before, the Model Penal Code's justification defense enunciated a totally subjective test. It did not contain any mandate for reasonableness. The New York legislative revision of the Penal Code, however, expressly turned down the purely subjective test when it incorporated the word "reasonably" into section 35.15. By so doing, it continued in the criminal law the principle that had been the statutory law since 1829.

In applying section 35.15's "reasonable" person filter to the purely subjective belief of the actor, the trier of fact is not foreclosed from considering the specific circumstances and the *338 background and knowledge of the particular defendant. *See, People v.*

*Hamel*, 96 A.D.2d 644, 645, 466 N.Y.S.2d 748 (3rd Dept.1983); Prosser & Keeton, *The Law of Torts* (5th ed) § 32, at 175-85.

Indeed, in the very instruction before us, the Grand Jury was twice told to examine the reasonableness of defendant's conduct by reference to a "reasonable man in the defendant's situation". Although a trial court would no doubt give an instruction with much greater particularity, "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law". *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980).

*People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741, 349 N.E.2d 841 (1976), provides no support for the majority view herein. Although the Court of Appeals noted that a defendant's "state of mind" was "critical to a claim of justification" ( *id.* at 548, 384 N.Y.S.2d 741, 349 N.E.2d 841), that case cannot be extended to support the view that the defendant's subjective state of mind is the only basis upon which all justification claims rest.

*People v. Santiago*, 110 A.D.2d 569, 488 N.Y.S.2d 4 (1985), the only First Department case relied upon by Criminal Term, is subject to serious doubt. This court's opinion does not discuss the relevant Court of Appeals decisions in *Collice, Tomlins, Lumsden* or *Ligouri*. It thus seems likely that the *Santiago* opinion, which was rendered almost a month after the Grand Jury charge in this case, is fatally flawed.

Thus, Justice Sandler, in *People v. Daniel Montanez*, App.Div., 499 N.Y.S.2d 689, although joining in the result, concurred separately and stated the law to be essentially as expressed in this dissent because of his expressed "doubts as to the correctness of the principle set forth in the memorandum opinion in *Santiago* and here reaffirmed" and because he believed "the question of sufficient importance to merit a more detailed judicial analysis than it has so far received". *Id.*

It seems significant, as well, that Justice Sandler, in concurring, stated also:

> Notwithstanding that which I have said in regard to the instruction, I am comfortable with the result that has been reached in this case. This is one of those unusual cases which left me with very strong doubts as to whether the jury's verdict was in fact justified by the evidence.

The same appears true of *People v. Gonzalez*, 80 A.D.2d 543, 436 N.Y.S.2d 293 (1st Dept.1981), where this court's decision did not reflect any awareness of the many contrary precedents of the Court of Appeals.

*339 The Second Department decisions have also failed to distinguish, or even discuss, the many contrary Court of Appeals precedents, and therefore the correctness of those rulings is also highly suspect. Moreover, these First and Second Department cases deal with charges given by the trial court and, as noted, there is no need for the same precision in charging a Grand Jury. *See, People v. Calbud, Inc., supra*, 49 N.Y.2d at 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140.

**341 Criminal Term also ruled that out-of-court statements by two of the youths shot by the defendant, which only became known to the prosecutor and defense counsel eight months after the second indictment, constituted exculpatory evidence necessitating dismissal of nine counts of that indictment.

However, "[t]he Grand Jury is not, of course, charged with the ultimate responsibility of determining the guilt or innocence of the accused". *People v. Calbud, Inc., supra*, at 394, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (citations omitted).

The limited role of the Grand Jury is to determine whether there is reasonable cause to believe that the accused has committed a crime for which he should stand trial. *People v. Valles*, 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50, 464 N.E.2d 418 (1984).

When potential exculpatory evidence comes to the attention of the district attorney only after an indictment, there is no need to represent the case to the Grand Jury. *People v. Friedman*, 97 A.D.2d 738, 739, 469 N.Y.S.2d 9 (1st Dept 1983).

The second Grand Jury heard nearly seven full days of testimony. This included some evidence which impeached the testimony of James Ramseur

and Troy Canty, two of the wounded youths. That Grand Jury nevertheless found reasonable cause to indict the defendant. The additional information, which is yet legally unverified, was made available to the defendant by the prosecutor. The defendant, of course, can use this information, if he so chooses, at his trial. Likewise, there was actual impeachment of Canty before the Grand Jury in the testimony of Detective Penelton, who interviewed Canty shortly after the shooting.

In *People v. Pelchat*, 62 N.Y.2d 97, 476 N.Y.S.2d 79, 464 N.E.2d 447 (1984), the Court of Appeals held that a prosecutor, upon learning that the only evidence supporting an indictment was mistaken, should have obtained a superseding indictment or sought permission to represent the case. Here, however, there was no admission that any Grand Jury testimony was false or mistaken. Criminal Term inferred such falsity from a prior inconsistent statement of one Grand Jury witness and a newspaper report appearing *340 eight months after the indictment based upon an interview with a victim suffering from grave neurological injury.

The prosecutor here had no knowledge of this information at the time of the presentment before the Grand Jury. Therefore, the integrity of that proceeding was not compromised.

Most significantly, in *Pelchat*, there was no other incriminating evidence before the Grand Jury. *See*, 62 N.Y.2d at 99, 476 N.Y.S.2d 79, 464 N.E.2d 447, 407. Here, there was sufficient evidence, apart from the testimony of Ramseur and Canty, tending to show a lack of justification on the part of defendant in his act of shooting four youths. Indeed, Criminal Term's decision expressly acknowledged the legal sufficiency of this other evidence. Moreover, the defendant made statements which themselves were damaging, seemingly inconsistent with his defense of justification. Since the Grand Jury could, therefore, have disregarded the testimony of Canty and Ramseur and still voted the indictment, Criminal Term was not justified in holding that the integrity of the proceeding was fatally impaired by the post-indictment legally unverified information about Cabey and Canty.

There are few cases in which both the legislative history and the principles enunciated by the Court of Appeals have presented such a unanimity of construction with respect to the meaning of the statute as they have with respect to the reasonable person standard for justification.

The historic reason for this consistency is compelling. The subjective test which the majority seeks to make the law of this state would serve to give legal excuse to any hot-tempered individual, fearful neurotic,**342 or simply excessively self-righteous person who rashly uses deadly force. If the subjective standard is adopted by us, it may provide any citizen, whether sensible or not, with a justification to shoot or kill, although the circumstances do not reasonably warrant such drastic action. We have come a long way from the law of the jungle, and section 35.15 of the Penal Law and the considered decisions of the Court of Appeals were promulgated to preclude this sort of dangerous and indiscriminate deadly force.

WALLACH, Justice (concurring in dissent).

I concur in the dissent of my colleague, Justice Asch. But because it would be no light thing to depart from our recent decisions in *People v. Santiago*, 110 A.D.2d 569, 488 N.Y.S.2d 4, and *People v. Montanez*, App.Div., 499 N.Y.S.2d 689, and, to a somewhat lesser extent, from the holdings of the Second Department decisions in *341*People v. Powell*, 112 A.D.2d 450, 492 N.Y.S.2d 106; *People v. Swinson*, 111 A.D.2d 275, 277, 489 N.Y.S.2d 111, [Titone, J., concurring in part]; *People v. Long*, 104 A.D.2d 902, 480 N.Y.S.2d 514; *People v. Wagman*, 99 A.D.2d 519, 471 N.Y.S.2d 147; *People v. Desmond*, 93 A.D.2d 822, 460 N.Y.S.2d 619, I am constrained to add a few observations of my own.

As I see it, the central issue determinative of the outcome here turns upon the construction of the words "he reasonably believes" used four times in Penal Law § 35.15 as applied to the conduct of one who seeks to justify the use of deadly force upon another, either to defend his own person or to resist robbery. The error in the *Desmond-Santiago* line of cases cited *supra* (understandably relied upon by Criminal Term) was, by focusing exclusively upon the subjective state of mind of the actor, to rewrite the statute and to substitute the term "genuinely" for "reasonably". No one, not even defendant himself, argues that absent a state of mind that he genuinely apprehended the use of unlawful deadly force against him, the defense of justification would be available to him. Surely, however, something more is required than simply his own deep-dyed convictions, however

honestly held, that he was imminently threatened with robbery or deadly peril. To hold otherwise, it seems to me, is to fail to give adequate force and effect to the element of reasonableness so clearly inserted in the statute.

The history of the Court of Appeals decisions which have considered the necessary elements of the defense of justification, beginning with *Shorter v. People*, 2 N.Y. 193 in 1849 and terminating with *People v. Collice*, 41 N.Y.2d 906, 394 N.Y.S.2d 615, 363 N.E.2d 230 in 1977, lends considerable support for the view that a jury, in considering a claim of self defense, must be instructed that some objective measure or community standard must be added to the actor's personal apprehensions, before his use of deadly force is justified. Beyond that, the broad contours of the Penal Law itself demonstrate the validity of that proposition. When recourse is had to other sections of the Penal Law it becomes manifest that this legislation draws articulate distinctions, in appropriate situations, for the application of a subjective versus an objective test to the particular conduct under review.

At one end of the spectrum on the objective side may be found the affirmative defense of duress (Penal Law § 40.00[1] ), providing that criminal conduct may be excused if the defendant is coerced into the unlawful activity by force exercised upon him or a third person "which force or threatened force a person of reasonable firmness in his situation would have been unable to resist." At the other end of the spectrum the ***342** legislature has provided for the application of a purely subjective standard in defining when there is a duty to retreat (Penal Law § 35.15[2][a] ), *i.e.* "the actor may not use deadly physical force if he *knows* that he can with complete safety as to himself and others avoid the necessity of doing so by retreating...." (emphasis added). In between these perimeters, the ****343** statute has fashioned the hybrid partial affirmative defense of "extreme emotional disturbance" which will operate to reduce the crime of murder in the second degree to manslaughter in the first degree, where it can be shown that defendant's distressed mental state was one "for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." (Penal Law § 125.25[1][a] ).

At least one authority has, in a reprise of Justice Cardozo's Law and Literature (pp. 100-101), criticized this statute as a "mystifying cloud of words" (Byrn, Homicide Under the Proposed New York Penal Law, 33 Fordham L.Rev. 173, 179; *see, People v. Shelton*, 88 Misc.2d 136, 144, 385 N.Y.S.2d 708). Such difficulty notwithstanding, in *People v. Casassa*, 49 N.Y.2d 668, 427 N.Y.S.2d 769, 404 N.E.2d 1310, the Court of Appeals (at p. 676) clarified the test to be applied by the trier of fact as a hybrid one: (1) the extreme emotional disturbance is subjective; *e.g.*, "it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore" (citing *People v. Patterson*, 39 N.Y.2d 288, 303, 383 N.Y.S.2d 573, 347 N.E.2d 898), but, "The ultimate test, however, is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance" (at 49 N.Y.2d p. 679, 427 N.Y.S.2d 769, 404 N.E.2d 1310, quoting Comments to the Model Penal Code § 201.3).

Undoubtedly *Casassa* has laid to rest the argument that no jury can be realistically asked to sift the actions of a defendant in a homicide case utilizing on the one hand the totally subjective standard of extreme emotional disturbance and, having been satisfied as to that, then to assess, in "hybrid" fashion, the objective reasonableness of defendant's conduct, giving adequate consideration to the manner in which the total situation impacted upon a psyche imbalanced by that same extreme emotional disturbance. And most pertinent to the issue before us now, the suggestion has already been judicially advanced that a similar hybrid test should be used in assessing the justification defense set up in Penal Law § 35.15 (*see*, concurring opinion of Sandler, J.P. in ***343***People v. Montanez*, App.Div., 499 N.Y.S.2d 689). Indeed, in the self defense case, the jury's task in applying the "hybrid" test to the second branch of the inquiry would appear to be somewhat simpler: they must assess the impact of the total situation not upon a mind encumbered with extreme emotional disturbance, but rather upon a rational mentality affected merely by individual history and experience.[FN1] And surely, if the community has an interest in requiring the satisfaction of an objective standard of reasonableness in permitting the reduction of criminal liability from murder to manslaughter, it has a more com-

pelling interest in insisting upon a similar objective standard of reasonableness before ratifying a total exoneration of all liability in the context of a claim of self defense. And it is just that community interest which finds expression in the words of the justification statute when it refers not simply to what defendant "believes," but rather to that which "he reasonably believes."

> FN1. It should be emphasized that the use of this "hybrid" approach in no way resurrects the "reasonable person" test familiar in the *Law of Torts,* see *Prosser and Keeton,* 5th Ed.1984, § 32, and in so doing avoids the objection of one commentator that use of the objective standard in isolation is unacceptable since it fails to distinguish between the culpable versus the negligent killer (Singer, the Goetz Case Revives Issue of Self-Defense Standards, N.Y.L.J. February 18, 1986, p. 1, cols. 2-3). Thus there is no foundation for the anxieties expressed by my colleague, Justice Kassal, that a reversal here will import the negligence standard of the ordinary prudent man into the inquiry.

It is in light of the foregoing considerations that we must examine the instructions to the grand jury furnished by the **344 presenting assistant district attorney set forth *in extenso* by the majority and by Justice Asch. In defining the objectivity test Mr. Waples twice directed the grand jurors to consider "whether the defendant's conduct was that of a reasonable man *in the defendant's situation* ..." (emphasis added).

In all likelihood this truncated *caveat* fell far short of what will be demanded of the judge at trial, who in instructing the petit jury may well, depending upon the evidence adduced, be required to expand upon what "defendant's situation" really was, particularly with reference to prior traumatic episodes of his life during which he was robbed and injured, as well as his close relationship with others who fell victim to savage street crime encounters. Such evidence, if offered, will of course be germane not only to defendant's perception of his peril, but also to what a person with defendant's background and experience would reasonably perceive and do. (*see,* *People v. Hamel,* 96 A.D.2d 644, 466 N.Y.S.2d 748). However the assistant's directions were a fair if terse summary of the law of justification and in any event are not to be measured by the standard required to be applied at trial. In *People v. Calbud, Inc.,* 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140, an obscenity prosecution, the district attorney failed to instruct the grand jurors upon the appropriate "statewide" standard in determining whether the offending materials were in fact obscene. Despite this omission even to mention the standard by which the grand jury was to assess the evidence at the core of the prosecutor's case, the Court of Appeals, reversing both lower courts, reinstated the indictment with the following observation (at p. 394), 426 N.Y.S.2d 238, 402 N.E.2d 1440). "We deem it sufficient if the District Attorney provides the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime." The Court supplemented this observation with a footnote that "[i]n the ordinary case, this standard may be met by reading to the Grand Jury from the appropriate sections of the Penal Law [citations omitted]." Defendant concedes, as he must, that legally sufficient evidence to sustain the indictment was placed before this second grand jury, and it also appears that this body was provided in the assistant's main charge with all the necessary statutory elements pertaining to the nine counts of the indictment which Criminal Term dismissed.

It is unnecessary to add further to the reasons set forth by Justice Asch for rejecting defendant's contentions that a third grand jury must be convened simply for the purpose of evaluating allegedly impeaching evidence with respect to the witnesses Ramseur and Canty. The substance of most of this impeachment was before the grand jury; indeed the Assistant District Attorney was rather scrupulous in calling the grand juror's attention to the fact that the witness Ramseur had been charged with reporting to the police a lurid and false scenario of his imaginary kidnapping and that this falsehood should be considered in evaluating Ramseur's testimony.

For the foregoing reasons the order of Criminal Term dismissing the indictment with leave to submit to a third grand jury should be reversed and the indictment reinstated for further proceedings in accordance with law.

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