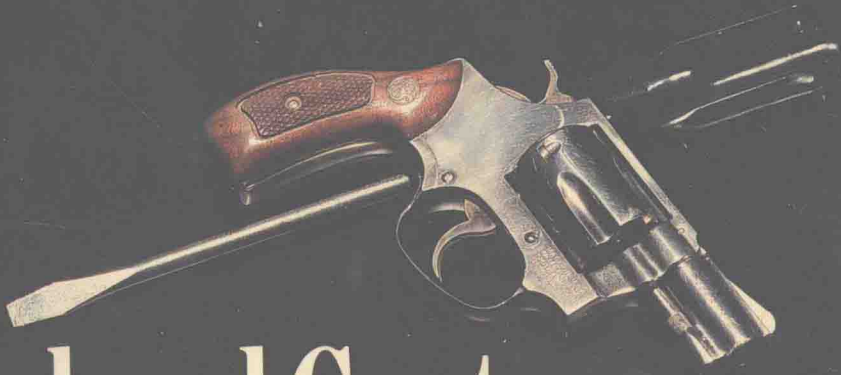
A CRIME OF SELF DEFENSE



Bernhard Goetz And The Law On Trial

GEORGE P. FLETCHER

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Preface

MANY portions of this book were written in places where people could look over my shoulder at the manuscript. Whenever anyone noticed that the subject was the Goetz case, I could count on a pointed and often passionate comment. Whether a stranger on an airplane or a passerby in a café, everyone had an opinion about the rights and wrongs of Goetz's shooting. Doormen and cab drivers became instant social philosophers. Nurses, dentists, shopkeepers, waiters—no one was at a loss for an opinion about what should be done in a case that touched our instinct to survive in an America ridden by violence and poverty.

While the facts of the Goetz case are clear in their basic outline, the social and moral implications of Goetz's shooting invite argument. The problems of crime and racial bigotry stand out in the foreground, but as the discussion deepens, we pass beyond these signposts of urban malaise and come upon troublesome questions of moral and legal responsibility. When and under what circumstances should individuals be able to defend themselves? Should the race of the feared assailants be relevant? Who is in a position to judge whether acting in self-defense should be punished as a crime?

These questions are not new to law teachers, who meet with students and colleagues in commodious university rooms to ponder the foundations of the legal system. I have written about these questions many times for audiences of academic lawyers and philosophers. It is rare, however, that the philosophical inquiries of the academic world have such a strong and direct bearing on the morality of interaction in the oppressive world of a filthy, graffiti-marred subway car. As the prosecution of Bernhard Goetz unfolded, it became clear to me that this was a case in which the theory of

criminal law was indispensable to a proper understanding of what was going on. For many, the pending trial of Bernhard Goetz loomed as a struggle between black and white, between crime victims and the law-enforcement establishment. For me, the trial presented itself rather as a gripping realization of moral and theoretical questions that have long been on my agenda.

When the prescreening of the jurors began in December 1986, Acting Justice Stephen G. Crane graciously welcomed me as an academic observer to the small group that would sit around a seminar table and talk privately to prospective jurors about their knowledge of the case and their possible biases. Gregory Waples, for the prosecution, and Barry Slotnick and Mark Baker, for the defense, also kindly consented to my presence in these often personal conversations with the candidates for the jury. As the jury selection progressed and the trial began, I developed admiration for these men who would seek, in the ritual of legal debate, to domesticate urban conflict within the bounds of civilized discourse. Of course, each of them made tactical and legal mistakes, and I point these out in this book. But given the pressures under which they were acting, given the number of tormenting decisions that had to be made every day of the trial, the performances of Crane, Waples, Slotnick, and Baker were of historical moment. Whatever their task—judging, prosecuting, or defending—they demonstrated how much lawyers have to offer in society's quest for the orderly resolution of fundamental conflict.

I have been aided in my observations and writing by research assistants whose passionate interest in the case paralleled my own. Charles C. Hwang observed portions of the prescreening and made useful observations. Suzanne D. Malmgren was in court every day during the public portion of jury selection. Her nonlegal wisdom and sensitivity proved to be invaluable. I am indebted to her, as well, for laboring as my secretary on various phases of the manuscript. Adam R. Kasanof came to the project after the trial was over, but having been a New York city peace officer before coming to law school, he was able to supplement my theoretical work with insights from the law of the streets.

Several of my colleagues, Bruce Ackerman and H. Richard Uviller, read portions of the manuscript and gave me encouragement and criticism. Gerard E. Lynch read it all and responded with detailed comments worthy of publication in their own right.

My editor, Joyce Seltzer, sustained this effort with encouragement

at the right moments and taught me to appreciate the beauty of the law as understood by the lay reader.

As I could not possibly satisfy all those who joined the discussion along the way, I am sure that this printed final version of my thoughts will provoke disagreement. The Goetz case has become a cultural monument precisely because it is so difficult to reduce the meaning of the case to a few words and determine, definitively, whether justice was done.

New York City
January 1988

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A Shooting in the Subway

DECEMBER 22, 1984, the Saturday before Christmas, about 1:00 P.M., Bernhard Goetz leaves his apartment at 55 West 14th Street and walks to the subway station at the corner of Seventh Avenue and 14th Street. He enters a car on the number 2 line, the IRT express running downtown, and sits down close to four black youths. The youths, seeming drifters on the landscape of the city, are noisy and boisterous, and the 15 to 20 other passengers have moved to the other end of the car. Goetz is white, 37 years old, slightly built, and dressed in dungarees and a windbreaker. Something about his appearance beckons. One of the four, Troy Canty, lying nearly prone on the long bench next to the door, asks Goetz as he enters, "How are ya?" Canty and possibly a second youth, Barry Allen, then approach Goetz, and Canty asks him for five dollars. Goetz asks him what he wants. Canty repeats: "Give me five dollars."[1] Suddenly, the moving car resounds with gunshots, one aimed at each of the young blacks.

At this point the story becomes uncertain. According to Goetz's subsequent confession, he pauses, goes over to a youth sitting in the two-seater by the conductor's cab at the end of the car, looks at him, and says, "You seem to be [doing] all right; here's another,"[2] and fires a fifth shot that empties his five-shot Smith & Wesson .38 revolver. The bullet enters Darrell Cabey's body on his left side, traverses the back, and severs his spinal cord. There are other interpretations of these events, particularly an argument that Goetz hit Cabey on the fourth rather than the fifth shot, but in the early days after

the shooting these alternative accounts are not widely disseminated.

Someone pulls the emergency brake and the train screeches to a halt. The passengers flee the car, but two women remain, immobilized by fear. Goetz says some soothing words to the fearful women, and then a conductor approaches and asks him whether he is a cop. The gunman replies, "They tried to rip me off." He refuses to hand over his gun and quietly walks to the front of the car, enters the platform between cars, patiently unfastens the safety chain, jumps to the tracks below, and disappears into the dark of the subway tunnel. Three young black kids lie bleeding on the floor of the train; Darrell Cabey sits wounded and paralyzed in the end seat.

A mythical figure is born—an unlikely avenger for the fear that both unites and levels all urban dwellers in the United States. If the four kids had mugged a passenger, newspaper reporters would have sighed in boredom. There are, on the average, 38 crimes a day on the New York subways. If a police officer had intervened and shot four kids who were hassling a rider for money, protests of racism and police brutality would have been the call of the day. This was different. A common man had emerged from the shadows of fear. He shot back when others only fantasize their responses to shakedowns on the New York subways.

Like the Lone Ranger, the mysterious gunman subdues the criminals and disappears into the night. If he had been apprehended immediately, the scars and flaws of his own personality might have checked the public's tendency to romanticize him. The analogy to Charles Bronson's avenging crime in *Death Wish* is on everyone's lips. The *Times* remains cautious, but the *Post,* from the beginning, dubs the unknown gunman the "subway vigilante." The police participate in this posturing of the case by setting up an "avenger hotline." They expect to receive tips leading to an arrest and eventually they get one, but at first they are swamped with calls supporting the "avenger." Though Mayor Ed Koch condemns the violence, he too inflates the incident by describing it as the act of a vigilante. No common criminal, this one. An everyman had come out of the crowd and etched his actions, right or wrong, in the public imagination.

With no offender to bear down on, the press has only the four black kids to portray in the news; the picture they present is not attractive. Uneducated, with criminal records, on the prowl for a few dollars, they exemplify the underclass of teenage criminals feared by both blacks and whites. In October of the same year, Darrell Cabey, age 19, had been arrested in the Bronx on charges of armed

robbery. In 1983, James Ramseur, age 18, and Troy Canty, age 19, had both served short sentences for petty thievery. Barry Allen, age 18, had twice pled guilty to charges of disorderly conduct. James Ramseur and Darrell Cabey are found with a total of three screwdrivers in their pockets—the tools of their petty thievery. The few witnesses who come forward describe the behavior of the four youths before Goetz entered the car as "boisterous."

The emerging information supports the picture that frustrated New Yorkers want to believe in. Four stereotypical muggers who harass and hound a frail-looking middle-class "whitey." That he should turn out, against all odds, to be armed confirms the extraordinary nature of true, spontaneous justice. It is not often that things turn out right, and here in the season of religious miracles comes an event in which good triumphs over evil.

A willingness to accept a rumor of "sharpened screwdrivers" testifies to the widespread bias in favor of the romanticized gunman. The *Times* reported the day after the shooting that two of the victims were found with screwdrivers in their jackets. There was no suggestion that they were "sharpened." Somehow, however, the story got abroad that the screwdrivers were sharpened weapons rather than merely tools for opening sealed metal boxes. On the "Donahue" show, a week after the event, the discussion was of "sharpened" screwdrivers. In an article in the *Times* surveying the first week's events, the writer reports the supposed fact: "three of the youths were found to be carrying sharpened screwdrivers."[3] Some journalists resist the popular rumor that the screwdrivers were specially prepared weapons of assault.[4] On the whole, however, the press and the public want to believe the worst about the subway victims.

Goetz makes an effort to go underground. On the day of the shooting he rents a car and drives north to Vermont and New Hampshire. As he later describes it, "heading north, is the way to go if there's a problem."[5] The countryside in New England may remind him reassuringly of his early years in rural upstate New York.[6] He thinks "the system would interpret it as one more crime. I just figured I'd get away for two days, I wanted to come back."[7] When he does come back to New York a few days later, he learns that the police, acting on a tip that Goetz meets the description of the slight blond gunman, left notes for him in his mailbox and on his door. They want to talk to him, but they are far from having singled him out as a serious suspect. Nonetheless, he fears apprehension and returns to Vermont and New Hampshire. He agonizes for almost

two days and then walks into the police station in Concord, New Hampshire, shortly after noon on December 31.

He delivers several lengthy confessions. One two-hour interview with the New Hampshire police is recorded on audiotape; another of equal length, with New York authorities, is videotaped. Neither of these is fully disclosed to the public until after the trial begins. Goetz is turned over to the New York authorities on January 3, 1985, and spends a few days at Rikers Island prison. When he is released January 7 on $50,000 bail, his popular support is at its peak.

From the very beginning, the Goetz proceedings are caught in a political dialectic between the rush of popular support for the "subway vigilante" and the official attitude of outrage that anyone would dare usurp the state's task of keeping law and order. While the public calls into the newly established police hotline to express support for the wanted man, public officials, ranging from President Reagan to black leaders to Mayor Koch, come out strongly against "vigilantism" on the streets. The general public might applaud a little man's striking back against uncontrolled violence, but the President speaks of the "breakdown of civilization" when people like Bernhard Goetz "take the law into their own hands." Hazel Dukes of the NAACP calls Goetz a 21st-century version of a Ku Klux Klan "nightrider."

These pitted, hostile forces eventually find their way into well-prepared channels of legal argument and customary patterns of legal maneuvering. The legal system converts our ill-understood rage into a stylized mode of debate about broader issues of criminal responsibility and fair procedure. The "breakdown of civilization" never comes to pass, precisely because the issue of defending oneself against a threat in the subway can be formulated as a question beyond passion and instinctual conflict.

The tension in these background forces causes Goetz's public image and legal position to fluctuate wildly. On January 25, a first grand jury convenes and hears the taped confessions and the few witnesses that have come forward. None of the victims testifies against Goetz. The grand jury refuses to indict Goetz for anything more serious than three counts of illegal gun possession.[8] Apparently, the 23 laypeople on the grand jury assume that Goetz has such a persuasive claim of self-defense that there is no point in indicting him for assault, attempted murder, or even reckless endangerment.

Goetz's legal team celebrates. The mayor pronounces the judg-

ment "Solomonic" (forgetting, presumably, that Solomon did not actually compromise and slash the baby in two). But the relief proves to be premature. Goetz becomes a media celebrity, and every appearance seems to generate more skepticism about New York's "folk hero." He urges distribution of an additional 25,000 guns to properly trained private citizens. His lawyer says on "Face the Nation" that the subway gunman feels no remorse about the near killings.

In February 1985 Goetz's fortunes begin to turn. His neighbor Myra Friedman publishes an article in *New York* magazine which attributes to him overtly racist views about cleaning up the "spics and niggers" on 14th Street. Two of the victims, Troy Canty and Darrell Cabey, file lawsuits for tort damages against him. Backed by civil rights lawyer William Kunstler, Cabey demands $50 million in damages. The N.Y. District Attorney, Robert Morgenthau, comes under increasing criticism for not having made a better case to the first grand jury. He could, after all, have offered immunity to the four youths, thereby securing testimony that they intended merely to panhandle, not to molest or mug.

On February 26, Rudolph W. Giuliani, U.S. Attorney in Manhattan, makes it clear that he will not take the pressure off the local prosecutors. There will be no federal prosecution against Goetz for having deprived the four youths of their civil rights (the only basis for federal intervention); apparently, there is insufficient evidence that the shooting expressed a racial motive. Significantly, of the two women that Goetz sought to soothe with his comments after the shooting, one was black.

The following day, Morgenthau's office releases a police report from New Hampshire that creates a new and far more incriminating scenario of the fifth shot that paralyzed Darrell Cabey. For the first time the public learns of the line that would resonate through the case: "You seem to be [doing] all right; here's another."[9] The defense protests that the disclosure makes its client look like the aggressor, but the judge presiding over the trial, Acting Justice Stephen Crane, makes the police report part of the public record.

A week later the District Attorney petitions the judge for permission to resubmit the assault and attempted murder charges to a second grand jury. Crane concurs.[10] When the grand jury convenes, Morgenthau makes a maximum effort. He appoints a top assistant, Gregory Waples, to present the case. He grants immunity to two of the four victims, Troy Canty and James Ramseur. Neither could be prosecuted for any crimes he might concede in reporting his behav-

ior leading up to the shooting. Both reportedly testify that Goetz picked the fight. This time the 23 laypeople are less convinced of Goetz's claim of self-defense. On March 27, 1985, they indict him on every possible charge of aggressive violence in shooting the four.[11] The 10 new charges join the 3 gun-possession counts from the first indictment for a composite indictment of 13 counts.

For the next year and a half, Goetz's fortunes continue to fluctuate. Waples's explanation of self-defense to the second grand jury prompts Justice Crane, in April 1985, to disclose relevant portions of the otherwise secret grand jury minutes to the defense, which thereupon petitions Crane to dismiss all charges affected by the allegedly improper stand on the theory of self-defense. On January 16, 1986, Crane dismisses nine counts of the indictment, leaving only the charges of gun possession and reckless endangerment of the other passengers on the train. An appellate battle ensues, resulting finally in a decision by the Court of Appeals in July 1986 that Waples's theory of self-defense was correct after all.* The remaining nine counts of the indictment are reinstated and the path cleared for the long-awaited trial on the rights and wrongs of the subway shooting.

After these highs and lows of 1985 and 1986, one can imagine the relief of Goetz and his lawyers when Justice Crane declares the trial officially opened on December 12, 1986. But this proves to be a beginning in name only. The first several months are devoted to "prescreening" the jurors, namely filtering out potential jurors who are able to serve and who are not obviously biased for or against Goetz. After the screening of over 300 Manhattanites, the public *voir dire* (or formal phase of the jury selection) begins on March 23, 1987. After both sides agree on the 12 who will serve, the jury is impaneled on April 6, and finally on April 27, after a two-week break for the Easter and Passover holidays, in a packed courtroom at 111 Centre Street, the moment arrives. Gregory Waples approaches the jury box and, shaking nervously after over two years of preparation, begins his opening argument in the case of the People of the State of New York versus Bernhard Hugo Goetz.

The adversary system of trial, sometimes called the sporting approach to the truth, recalls our commitment to democracy as the least corruptible form of government. The system requires that two equally matched lawyers, a prosecutor and a defense counsel, joust

* This debate is discussed in detail in Chapter Three.

in open court. Each lawyer makes the best case and fights as hard as he can for his client, whether he thinks his client is morally right or wrong. The fight that the lawyers undertake encompasses not only the questions of guilt and innocence, but the range of evidence that the jury should be allowed to hear. The adversary system differs radically from the neutral, objective inquiry of scientists and historians, who consider all the evidence and who come to a decision only when they are convinced that the evidence supports their hypothesis.

In a criminal trial, two pitted advocates urge contradictory perspectives on the truth, and a neutral judge presides over the battle; the 12 members of the jury must come to a verdict one way or another. Unlike scientific investigators, the jury cannot postpone its decision and request additional research that would clarify unresolved factual questions. A trial leads to a day of judgment. The defendant must be found guilty or not guilty—for all time. The pressure of reaching a decision skews the scales of justice toward the defense; if the prosecution fails to prove guilt beyond a reasonable doubt, at least on most issues,[12] the jury is supposed to decide for the defense.

This preference for the defense is expressed in the maxim that it is far better than ten (some say a hundred) guilty defendants go free than that one innocent person be convicted. If Goetz were falsely convicted, his case would probably be forgotten as he disappeared behind bars. There would be no ongoing process of inquiry about his guilt as there would be about the validity of a scientific claim. And even if the error were subsequently discovered, there would be no way to replace the lost years in prison and to correct the insult of having treated him as a criminal. Trial and error may be a salutary way of refining our sense about what works in the world, but in resolving accusations of crime, our greatest fear is a trial ending in error.

The adversary system may not be ideal, but our experience teaches us that it poses the fewest risks of error. The opposition between prosecutor and defense counsel insures that both sides of the story are aired. Another distinctive feature of the system, separating the jury's function of deciding the facts from the judge's role of resolving questions of law, minimizes bias in the jury room as well as on the bench. Vesting the final power of judgment in laypeople, whose careers are not affected by their rejecting the state's position, contributes to an independent decision on guilt or innocence.

Further, if the jury and not the judge makes the decision about

guilt or innocence, the lawyers remain free to argue to the judge as zealously as they like about issues of law without fear that if they alienate the judge, they will thereby influence a determination on the ultimate issue of guilt or innocence. The adversary system has resulted, therefore, in a practice of criminal defense that is characteristically more vigorous than that displayed by lawyers in European legal systems that function without vesting final authority in a jury of laypersons. No one likes the thought that justice for the People or for the defendant depends, in part, on the skill of combative lawyers. But the distortions of competition are less serious than the potential for corruption when the power of judgment is concentrated in a judge who, like the inquisitorial judge of the European past,[13] claims the final word on the accusation, the facts, and the law. If, as Lord Acton said, power corrupts and absolute power corrupts absolutely, the safest way to run a criminal trial is to bifurcate the power of presenting the evidence between prosecution and defense and to divide the power of decision between judge and jury.

The functioning of the adversary system depends obviously on the people who take up these shares of power. No two lawyers would prosecute or defend Goetz exactly the same way. District Attorney Morgenthau replaced Susan Braver with Gregory Waples because he expected Waples would bring to the case the high level of competence that he displayed in securing a conviction in the complicated CBS murder case. Goetz replaced his first lawyer, Frank Brenner, appointed by the court to insure representation in the early stages of the case, with Barry Slotnick because Goetz apparently preferred Slotnick's commitment to try the case on the issue of self-defense. The perspectives on the truth that would emerge from the Goetz trial depended in large part on the styles as well as the strengths and weaknesses of Waples and Slotnick.

It is hard to imagine two gifted lawyers with a greater divergence of personal and rhetorical style than the two adversaries. Their personal styles would invariably have an impact on the jury. Waples generated an image of modesty in dress and insouciant casualness. He almost made a point of showing off his orange backpack that he used to carry legal materials as he jogged from the Upper West Side of Manhattan to the courthouse downtown in Foley Square. Slotnick presented himself in impeccably tailored, expensive suits, and even on the warm days of early summer, the jury would never see him without his vest buttoned beneath his dark blue wool jacket.

Slotnick arrived at court every morning in his long black, chauf-

feur-driven limousine from suburban Westchester. With the press already assembled at the judge's entrance, he would step out of his private carriage, with Goetz and the rest of the defense team,[14] confront the sea of live microphones and clicking cameras, and offer comments on the progress of the defense. Though Slotnick never missed an opportunity to explain and justify the defense's position to the press, Waples zealously avoided publicity. Largely as a matter of personal style, he avoided the contemporary practice of trying the case in the media as well as in the courtroom.

Waples maintained an argumentative posture of taut, pointed remarks, and he seemed to have no time or patience for little ingratiating gestures. He remained sitting as the entire defense table stood every time the jury entered the room. He spoke to Justice Crane crisply and directly. Slotnick and his assistant on legal questions, Mark Baker, could hardly utter a remark to the bench without adding "respectfully" at every grammatically appropriate point.[15] For Waples, Justice Crane was simply "Judge." For Slotnick and Baker, he was almost always "Your Honor."

Waples sat alone at the prosecution table, his assistants remaining incognito in the audience of the courtroom. Slotnick sat with his team of three or four assistants as well as with his client Goetz.[16] Waples sought to avoid giving the impression of overweening state power, expressed in a battery of prosecutors bearing down on the defendant. It made sense not to trigger sympathy for a defendant by casting him as the underdog against the full force of the District Attorney's office. But Waples seemed also to enjoy his isolation in the well of the court. He was there to bring justice to the City of New York, and with his modest, taciturn style and lean good looks, he called to mind Jimmy Stewart as the solitary lawyer fighting for the truth in *Anatomy of a Murder*.

Waples is a loner—curiously like his prey, the intense, thin, taciturn man sitting at the defense table. Neither Goetz nor his prosecutor chatted much with others in the course of the trial; neither had wife nor children who would come to court to wish him well.[17] Both whiled away waiting time in private pleasures like reading. Goetz too must have sensed his kinship with Waples, for in the early days of screening the jurors, in one of the most ironic, private remarks of the trial, he turned to the person next to him and said, "Don't you think that Gregory Waples is a very intense young man?"

The bearded, imposing, religiously observant[18] Slotnick had the air of an Old Testament prophet. But he surely was not a prophet

ignored in his own land. He was constantly surrounded by his followers, by the press, by his colleagues on the defense, by his wife and children, who often came to court.

The dozen or so artists at the trial had a relatively easy time capturing Goetz's meek and passive look, Waples's sincere and straight intensity, and Slotnick's elegant and assertive figure. The one personality they never seemed to get right was Stephen Crane, the judge at the center of the storm. A learned and patient man, always correct in the way he speaks to his staff and to litigants in his court, Crane comes across as a professional spokesman of the law. As he runs his courtroom, his own needs and his own personality recede into the background. His gentle style and the softly curved lines of his face eluded the artists.

As the presiding judge in the trial, Justice Crane was the only major figure in the drama who was not supposed to have a perspective on the truth. Waples could believe that Canty's demand for money was not a veiled threat and that Goetz overreacted by shooting. Slotnick and Baker could believe firmly in their client's moral as well as legal innocence. And their client, of course, could maintain his silent conviction that he had triumphed over his aggressors. The jury too would eventually generate its decisive perspective on the truth of what happened. Justice Crane, however, had to stay above the fray. His task combined moving the trial along and resolving the legal debates that surrounded the admissibility of evidence. He was at once traffic manager and oracle of the law.

The man at the center of attention, Bernhard Goetz, remained an enigma to trial observers. Born of a Jewish mother and a German father, Lutheran by practice but regarded as Jewish by his childhood friends,[19] reared in the small upstate New York town of Rhinebeck but living in the dense urban mosaic of 14th Street in Manhattan, Goetz eludes conventional categories. He has always sought in fact to be his own person, speaking out against authority when others would be silent. As a nuclear engineer working on submarines, he would point out design and manufacturing defects to the Navy that his bosses in private industry allegedly preferred to suppress. As an individualist who could not readily surrender to corporate authority, Goetz eventually gravitated to running his own electronic repair service out of his 14th Street apartment.

If we were looking for a psychological account of Goetz's shooting, we might focus on his tumultuous relationship with his father. That he bought a heavy-duty gun, a 9-mm semiautomatic pistol,