

badly enough to send you or them to the hospital for the treatment of serious injury. This is what serious (sometimes called “grievous”) bodily injury means in most self-defense statutes.

Some self-defense statutes go even further. They allow you to kill someone you reasonably believe is about to commit a serious felony against you that doesn’t threaten either your life or serious bodily injury. These felonies usually include rape, sodomy, kidnapping, and armed robbery. But the list also almost always includes home burglary and, sometimes, even personal property (discussed in “Defense of Home and Property” later).

What kind of belief does self-defense require? Is it enough that you *honestly* believe the imminence of the danger, the need for force, and the amount of force used? No. Almost all statutes require that your belief also be *reasonable*; that is, a reasonable person in the same situation would have believed that the attack was imminent, and that the need for force, and the amount of force used, were necessary to repel an attack. In the 1980s’ sensational “New York Subway Vigilante Case,” the New York Court of Appeals examined these elements as applied to the defense against the armed robbery provision in New York’s self-defense statute (*Fletcher 1988*, 18–27).

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## CASE Did He Shoot in Self-Defense?

### **People v. Goetz**

497 N.E.2d 41 (N.Y. 1986)

#### **HISTORY**

Bernhard Goetz, the defendant, was indicted for criminal possession of a weapon, attempted murder, assault, and reckless endangerment. The Supreme Court, Trial Term, New York County, dismissed the indictment and the People appealed. The Supreme Court, Appellate Division affirmed, and the People appealed. The Court of Appeals reversed and dismissed, and reinstated all the counts of the indictment.

WACHTLER, CJ.

#### **FACTS**

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.

Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench toward 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 toward Chambers Street.

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 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 taken cover, also lying on the floor.

Goetz told the conductor that the four youths had tried to rob him. While the conductor was aiding the youths, Goetz headed toward 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, 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 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, 'you 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."

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 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 Goetz 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 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. Supreme Court, Criminal Term, after conducting an in camera [in the judge's chambers] 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 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 ten-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 a 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.

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment, alleging, among other things, 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.

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.

In an order dated January 21, 1986, the Court, after inspection of the grand jury minutes held 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 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. [We disagree.]

## OPINION

Penal Law article 35 recognizes the defense of justification, which “permits the use of force under certain circumstances.” 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 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* [emphasis added] believes to be the use or imminent use of unlawful physical force by such other person.

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* [emphasis added] that such other person is using or about to use deadly physical force or
- b. He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.

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 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. 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. 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. The prosecutor properly instructed the grand jurors to 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.

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 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. 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*. [emphasis added]. . . .

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.

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. 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.

Goetz 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." 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.

Accordingly, a jury should be instructed to consider this 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 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.

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.

The order of the Appellate Division should be REVERSED, and the dismissed counts of the indictment reinstated.

## QUESTIONS

### 1. Consider the following:

- a. New York tried Goetz for attempted murder and assault. The jury acquitted him of both charges. The jury said Goetz "was justified in shooting the four men with the silver-plated .38-caliber revolver he purchased in Florida." They did convict him of illegal possession of a firearm, for which the Court sentenced Goetz to one year in jail.
- b. Following the sentencing, Goetz told the Court: "This case is really more about the deterioration of society than it is about me. . . . I believe society needs to be protected from criminals."
- c. Criminal law professor George Fletcher followed the trial closely. After the acquittal, he commented:

The facts of the Goetz case were relatively clear, but the primary fight was over the moral interpretation of the facts. . . . I am not in the slightest bit convinced that the four young men were about to mug Goetz. If he had said, "Listen buddy, I wish I had \$5, but I don't," and walked to the other side of the car the chances are 60–40 nothing would have happened. Street-wise kids like that are more attuned to the costs of their behavior than Goetz was. (quoted in Roberts 1989)

If Professor Fletcher is right, was Goetz justified in shooting?

2. Under what circumstances can people use deadly force, according to the New York statutes cited in the opinion?
3. Do you agree with those circumstances?
4. Would you add more? Remove some? Which ones? Why?
5. Were Goetz's shots a preemptive strike? Retaliation? Necessary for self-protection? Explain.