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HARDLY THE TRIAL OF THE CENTURY

*Franklin E. Zimring**

A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL. By *George P. Fletcher*. New York: The Free Press. 1988. Pp. xi, 253. \$19.95.

The Bernhard Goetz case has become one of those landmark events in American criminal justice that spur people to write books and articles. While the case has provided constant fascination for a diversity of authors and disciplinary perspectives, the sort of book one writes about the Goetz case seems very much a function of the perspectives one brings to it. In this regard, the case and its literary progeny evoke the tale of the International Symposium on the Elephant. The papers submitted to the Symposium ranged widely, we are told, and in a predictable pattern. The German contribution was called "The Elephant as Symbol and Actor in Western European History." The French paper was titled "The Love Life of the Elephant." The American contribution concerned "Practical Aspects of Elephant Training and Management." The Israeli delegate submitted a paper entitled "The Elephant and the Jewish Question."

What is George Fletcher's particular interest in this Elephant? In his Preface, Fletcher, professor of law at Columbia University and longtime student of the comparative dimensions of the substantive criminal law, is forthright on the particular aspect of the case that tempted him to take pen in hand:

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. [pp. ix-x].

For this reason, Fletcher became what he calls an "academic observer" of the trial by jury of Mr. Goetz for a variety of charges stemming from his December 1984 encounter in a New York City subway

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with four young black males who approached him, asked him for money, and were shot.

The book that resulted from Fletcher's observations is a mix of three chapters of substantive law followed by a six-chapter account of the trial told in chronological order from jury selection through verdict. The first chapter (pp. 1-17) sets the stage with a short summary of the facts of the subway shooting and a description of the maneuvers that led to the formal charges in New York State court. The next three chapters, while based on aspects of the Goetz case, are excursions away from the particularity of the subway shooting into the moral and principled conundrums of special interest to Professor Fletcher.

In "Passion and Reason in Self-Defense" (pp. 18-38), Fletcher shows how the competition between objective and subjective requirements for a valid claim of self-defense are a recurrent debate in the criminal law literature. In seeking to draw the line between criminal and noncriminal self-defensive use of deadly force, some scholars argue that the defense should only include behavior motivated by reasoned calculation, while others argue forcefully that the law should allow for passions as well. As a mixture of the facts of the Goetz case and the larger themes Fletcher wishes to pursue, this chapter is by far the book's most successful.

The third chapter (pp. 39-62) continues the discussion of standards for self-defense, but is mostly concerned with the question of whether the defense of justification is limited by an objective standard in New York law, a question that was of importance in the pretrial skirmishes in *People v. Goetz*.

"The Significance of Suffering" (pp. 63-83), is the last of the chapters organized around a persistent problem in substantive criminal law — in this case the extent to which the harm done, as opposed to the harm risked or intended, should be the basis of penal liability. While these issues are less central to the Goetz case, the discussion is consistently interesting.

From this point on, the book becomes an annotated narrative of the Goetz trial with short chapters on jury selection, trial tactics, the now-famous two-hour taped statement by Goetz used as evidence in the trial, and discussions of excluded evidence and the role of the jury in criminal trials.

This annotated narrative consumes more than half the book and culminates in a short chapter, "Mixed Messages" (pp. 199-217), where Fletcher tries to tie some of the conflicts about the meaning of the trial and verdict to the passion-versus-reason debate framed earlier. It is in these later chapters that the book suffers from an inability to sustain the reader's interest.

The aim of the book is to reach a broad audience, one that presumably includes nonlawyers. Professor Fletcher thus assumes little

knowledge about the workings of the criminal justice system and of criminal trials in telling the Goetz story, and the pedagogic tone and emphasis on basics may put off lawyers and advanced law students. Yet, I am uncertain about the value of this book as an introduction to the American criminal trial process for the uninitiated. Certainly, any narrative on the Goetz case is unrepresentative of criminal justice processing and thus a poor introduction to the criminal justice system. But even as an introduction to major criminal trials, the book is incomplete and leaves a host of questions unanswered: How did Goetz pay for his defense? Was a plea bargain offered? What will be the role of the appellate process?

There is also some inconsistency in message between the two parts of the book that parallels the inconsistency in tone. In chapter two, the conflict between different foundations and theories of the limits of self-defense is presented as a perennial element of the criminal law:

Passion and reason interact in the law of self-defense, then, by generating conflicting theories that nag at our loyalties when we seek to interpret the vague contours of the defense. Passions impel us to think of defensive force as punitive and vengeful, inflicting deserved harm on wrongdoers. Reason invites us to think of self-defense as a means of maintaining order and harmony among independent, autonomous persons. The historic struggle of the law has been from passion to reason, from inflicting just deserts to the vindication of the defender's autonomy. Other theories, such as self-defense as an excuse based on an involuntary response and the social theory of justifiable self-defense, complicate the task of reason. [p. 37]

Later, however, in his discussion of the trial, Fletcher seems more inclined to regard the public support of Goetz's actions as a sign of the current times, "remind[ing] us, painfully, of the difference between the mentality of the 1960s and that of the 1980s" (p. 209).

The better interpretation here is that public sympathy for violent self-help against burglars and robbers is chronically high. The so-called spring-gun cases produced the same kind of tug-of-war in the 1960s as they do in the 1980s. Support for armed self-help is not a recent phenomenon. Instead, shooting criminals is a standard American enthusiasm.

If the Goetz case is not of special value in judging the unique temper of the 1980s, what is there about this case that justifies its landmark status in public discussions of crime and criminal justice? Perhaps there is less than we might suppose.

Indeed, one key to the sense of disappointment many will feel about this book is the fact that the Goetz trial does not deserve the close scrutiny Professor Fletcher provides. No great issue of morality or law was presented to the jury and none was decided. The jury acquitted the defendant of all charges except one felony gun count. Perhaps the verdict represented a willingness to allow greater latitude in

self-defense, but it did allow the imposition of a felony sentence, and thus has many features of a classic jury compromise. Professor Fletcher's close observation of the trial provides no stunning new explanation of the jury verdict, in large part because that verdict generated no great sense of mystery among the general public or professional observers.

Perhaps the incident which gave Bernhard Goetz his measure of notoriety was interesting because it typified a longstanding conflict in the law of self-defense. But the trial itself produced little to justify Fletcher's investment of time or attention, or that of the reader in the book's final seven chapters. The book fails to find the deeper meanings of the trial of Bernhard Goetz, most probably because they do not exist.

A Crime of Self-Defense is thus hampered by uncertainties of audience, method, and message that leave it something of a disappointment. The materials on substantive criminal law are far more original and more interesting than the narrative of the trial. This version of the trial is a story without a conspicuous moral, leaving the reader with a strong sense of anti-climax at book's end.

Still, this rendering of the case will probably be among the very best available. And the author's section on passion and reason in the law of self-defense will be of substantial value to criminal law students and scholars.