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The Legitimacy of Vigilanteism

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BOOK REVIEWS

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Review of: A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL. By George P. Fletcher. The Free Press, 1988. Pp. xi, 253.

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"[P]unishment is necessary 'to defend the honor or the authority of him who was hurt by the offence so that the failure to punish may not cause his degradation.' "[1]

I. INTRODUCTION

On December 22, 1984 at one o'clock in the afternoon Bernhard Hugo Goetz entered the downtown IRT train at the 14th Street station in Manhattan with a loaded five shot 38 caliber Smith and Wesson revolver concealed in his belt holster.[2] There

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1. H. ARENDT, EICHMANN IN JERUSALEM 287 (1964) (quoting the early 17th century Dutch jurist and statesman Hugo Grotius, who was paraphrasing an earlier Roman authority).

2. The first two chambers of the revolver contained standard round-nose ammunition, the last three hollow point shells. The use of the latter by police officers and civilians has been severely criticized. Much of this criticism is based on an apparent misunderstanding of the nature and behavior of such shells. The critics of hollow points are not alone in failing to understand the operation of such shells. The disabling power of bullets in general, and hollow points in particular, is not well understood. Two competing theories of handgun projectile effectiveness are kinetic energy dissipation and momentum transfer. Kinetic energy dissipation refers to the kinetic energy that is dissipated by the bullet in its path through the body. It enters the body with energy equal to its mass times the square of its velocity. If it exits the body whole, its energy at that moment will be its mass times the square of its exit velocity. The kinetic energy expended is the difference between the two. The momentum of the bullet is its mass times its velocity.

were some twenty to twenty-five people in the car, including a group of four young black men: Troy Canty, Barry Allen, James Ramseur, and Darrell Cabey. Goetz sat down across from the youths. Moments later Canty and Allen, followed by Ramseur and Cabey rose and surrounded Goetz. Canty then demanded five dollars. Goetz, feigning a lack of understanding asked Canty to repeat his request. Canty responded, "Give me your money."[3] Goetz stood up, and while supporting himself by one of the poles, reached inside his jacket, drew his revolver, and fired in rapid succession from left to right at Canty, Allen, Ramseur, and twice at Cabey. All, save one of the shots at Cabey, hit their mark. The conductor, who was in another car, hearing the shots, pulled the emergency brake cord. As the train screeched to a halt mid-station, Goetz reassured two female passengers cowering on the floor, and after brushing past the inquisitive con-

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To the extent that the bullet slows down or stops inside its target it transfers that momentum to the target.

Handguns are by design a compromise. They sacrifice the initial velocity of the projectile, and therefore both its kinetic energy and momentum to gain a more convenient size of weapon. The projectile that exits the barrel of a handgun, i.e. the bullet, is approximately the same size as a rifle bullet, but because of the smaller charge in the shell that drives the bullet, and to a lesser extent the smaller barrel length, handguns expel their bullets at much lower velocity than rifles. As a result, the "stopping power" of many handguns is suspect. This shortcoming of handguns was recognized by the U.S. military during the suppression of the Philipine insurrection in the early part of this century when rebels sometimes succeeded in killing and wounding American soldiers with machetes even after the rebels had been hit with several shots from a 38. The Army's response was to replace the 38 with a 45 caliber automatic, which fires a larger, faster projectile.

Another response to the problem of insufficient stopping power, more recently adopted in other quarters, is the use of a hollow point shell. The "hollow point" refers to a concave indentation in the nose of the shell. This indentation has two effects. First, and least important, it lowers the mass of the shell thereby increasing its initial velocity. This usually results in a net gain in initial kinetic energy, though not in momentum. Second, and more important, its less aerodynamic shape means that it plows rather than slices through, not only the air, but its target as well. Thus it is less likely to exit, and if it exits it will do so at lower velocity. As a result it dissipates more kinetic energy and transfers more momentum in passing through the body and has a more disabling effect. As a secondary benefit, hollow point shells, because they are far less likely to exit a person or wall and enter another person, pose less of a threat to innocent bystanders. *See* Di Maio, *The Effectiveness of Snub-Nose Revolvers and Small Automatic Pistols*, 44:6 FBI L. ENFORCEMENT BULL. 10 (1975); Di Maio, et al., *A Comparison of the Wounding Effects of Commercially Available Handgun Ammunition Suitable for Police Use*, 43:12 FBI L. ENFORCEMENT BULL. 3 (1974); T. MULLIN, TRAINING THE GUNFIGHTER 71 (1981); C. PETERS, DEFENSIVE HANDGUN EFFECTIVENESS (1977).

3. Audio transcript of Goetz statement to New Hampshire police at 18 (quoted by G. FLETCHER, A CRIME OF SELF-DEFENCE: BERNHARD GOETZ AND THE LAW ON TRIAL 117 (1988)).

ductor, climbed down onto the tracks through the opening between two cars and disappeared. So began the saga of New York's "Subway Vigilante."[4]

Professor George Fletcher's book, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*, has provided us with an eminently readable account of the incident and its aftermath. The central theme of his work is a detailed discussion of the salient legal issues as they arose at various stages of the proceedings and how those issues were addressed by the attorneys, the judge, and the jury. Fletcher's language and mode of exposition are clear and engaging, and most of what he has to say is both interesting and comprehensible. As a result he produces a work that can be fruitfully read by attorneys and intelligent laymen alike. For this his effort is to be commended.

II. VIGILANTEISM IN THE GOETZ CASE

That Fletcher's book is in so many ways so good makes it all the more frustrating that he all but misses the main issue of the Goetz case. That issue is the legitimacy or illegitimacy of vigilanteism in 1980s America. Fletcher apparently fails to see the centrality of vigilanteism to the course of the proceedings and to the outcome of the case because he has no sympathy for it. He has admitted that despite having been present at the entire trial including the private pre-trial screening of the jurors he grossly mis-predicted the outcome. Fletcher would have found Goetz guilty of some of the more serious charges and believed that the jury would do so as well.[5] The jury, however, found Goetz innocent of seventeen of the eighteen charges including all the more serious ones. Like a eunuch watching an erotic movie, because Fletcher, unlike the jury and a majority of Americans, cannot understand and empathize with the beliefs, ideals, and motives of Bernhard Goetz, he is ultimately at a loss as to the central issue of the case.[6]

Crimes, and the legal proceedings that surround them, excite the public's interest for a variety of different reasons: some

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4. The *New York Post* as well as the police force were quick to use the word vigilante to describe Goetz. G. FLETCHER, *supra* note 3, at 2; L. RUBIN, QUIET RAGE: BERNIE GOETZ IN A TIME OF MADNESS 5 (1986).

5. *See* Roberts, *Exploring Laws and the Legacy of the Goetz Case*, N.Y. Times, Jan. 23, 1989, at B1, col. 1; DESTEPHANO, *"Crime and Self Defense": New Look at Impact of Goetz Trial*, Newsday, July 10, 1988, at 4.

6. G. FLETCHER, *supra* note 3, at 199.

because they involve celebrities, some because they are gruesome, some because they raise important social or legal issues, some because of their racial character, and some because of the bizarre behavior of the parties. The Goetz incident excited more interest than that of Tawana Brawley, Joel Steinberg, Howard Beach, or the Central Park West "wilding." The people of New York and much of the country were enthralled by Bernhard Goetz because they saw his shooting of four assailants as an act of vigilanteism.[7] While most Americans supported Goetz's actions and a minority condemned them, they were united in seeing vigilanteism as central to the issue. The moral implications of vigilanteism did not fall into oblivion at the commencement of the trial, and it was the unspoken subplot of the trial from voir dire to sentencing.

III. Race, Self-Defense, and the Goetz Case

Despite the protestations of various pundits to the contrary, the saga of Bernhard Goetz was neither about racism nor the right of self-defense. Had either of those issues been at the heart of the dispute, Goetz would not have received even a tiny fraction of the attention and support lavished on him.

A. Race

Had his shooting been racist, that attention would have been of an entirely different character. It is merely a vicious canard to suppose that Goetz's actions were motivated by racism. Support for Goetz was multi-racial.[8] Roy Innes, the black director of the Congress of Racial Equality has been a dedicated and consistent Goetz defender. Had Goetz's motive been racist, such support would be unthinkable.

The salient fact about the four individuals he shot was not that they were black, or young, or male, but rather that they were attempting to rob him. These young men had all committed serious crimes prior to their attempt to rob Goetz, were en-

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7. This was no ordinary notoriety and popularity. In January and February of 1985 polls showed that 86% of the American populous knew of Goetz. This was twice the number of people who knew of Mario Cuomo then touted as the next Democratic candidate for President. Nor was this mere notoriety; pledges of support and cash donations came from South Dakota farmers, Georgia sheriffs, and Hollywood movie stars. *See* L. Rubin, *supra* note 4, at 76-78.

8. G. Fletcher, supra note 3, at 199.

route to other crimes when they tried to rob Goetz, and have all, save Cabey who remains paralyzed, committed serious crimes since recovering from the wounds inflicted by Goetz. James Ramseur, for example, was later convicted of a particularly brutal rape, sodomy, robbery, and beating of Gladys Richardson, a pregnant nineteen year-old.

Professor Fletcher repeatedly raises the issue of race and goes so far as to say that the seemingly race-neutral arguments of the defense in fact were intended to and succeeded in sending a racial message to the jury:

> Reading the record of the Goetz case, one hardly finds an explicit reference to the race of anyone. But indirectly and covertly the defense played on the racial factor. [Defense counsel] Slotnick's strategy of relentlessly attacking the "gang of four," "the predators" on society, calling them "vultures" and "savages," carried undeniable racial undertones. These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against the defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in this implicit extrapolation is their blackness.[9]

Academics, law professors in particular, have become inured to such pseudo-intellectual claptrap and, like the townspeople in *The Emperor's New Clothes*, fear displaying their obtuseness by questioning such a proposition. I doubt that the lay reader will assent to Fletcher's argument. Surely only someone who has been educated at one of America's elite law schools could be taken in by such convoluted nonsense.[10]

The word "gang" rather than sending a racial message alerts the jury to the greater threat posed by a criminal group as compared to a single individual. And such terms as "predators," "vultures," and "savages" are nothing more than evocative words that convey the message that Troy Canty and his crew

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9. G. FLETCHER, *supra* note 3, at 206.

10. I confess to not being the first writer to notice the tendency of intellectuals to accept and promulgate the most bizarre and untenable propositions. During World War II some left-wing Englishmen asserted that American troops had been brought to England not to fight Germany but to suppress an English revolution. To which George Orwell averred: "One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool." G. ORWELL, *Notes on Nationalism*, in COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 379 (1968).

were vicious and violent individuals who had no regard for the dignity of Bernhard Goetz and meant to prey upon and humiliate him. They imply and suggest no extrapolation.

Even were we to accept Professor Fletcher's notion of an extrapolation to a wider class, that extrapolation has no invidious racist component. If Slotnick was trying to convey a sense that these four young men represented a wider class, it was the class of street criminals to which he was referring. That a disproportionate number of those criminals are black is perhaps an unfortunate truth, but that hardly means that Mr. Slotnick was attempting to elicit a racial response by placing these assailants in the universe of street hoodlums. If one accepts Fletcher's logic that permits racist implications from generalizations about the class that these hoodlums represented, then the same logic and generalizations could also imply both an age and gender animus. After all, those who commit street crime are overwhelmingly between fifteen and thirty, and an even greater percentage of street crime is committed by men than by blacks.

It is fortunate for Slotnick and even more so for his client that this invidious extrapolation is merely a figment of Professor Fletcher's overactive intellect. Had that extrapolation gained purchase in the jurors' minds, the two blacks, eight men, and several young people on the jury might well have taken offense at being included in the wider class that Canty and his crew represented. If that had happened it is doubtful that they would have been so willing to unanimously find Goetz not guilty of seventeen of the eighteen charges. That the jury did not discern this "indirect and covert" racist argument is revealed by the fact that one of the most consistent and decisive voices on behalf of Goetz in the jury room was that of Robert Leach a black bus driver.[11] Leach concocted a bizarre argument that succeeded in persuading the other jurors to acquit Goetz of several of the minor weapons charges.

B. Self-Defense

Aside from overplaying the issue of race, Fletcher's more general failing is his focus on the narrow legal issue of self defense, as central to what this case was about. It is hardly surprising that Goetz's attorneys would make their case in terms of self-defense; after all, vigilanteism is not an affirmative defense

11. *See* G. FLETCHER, *supra* note 3, at 182.

to the charge of attempted murder. In addition to perhaps persuading some jurors, the self-defense argument provided the jury with a convenient hook on which it could rest the hat of acquittal. But though self-defense was the surface issue at trial, that was not what this case was about.

Treating Bernhard Goetz's shooting of four hoodlums as merely an act of self-defense is inconsistent with the evidence and more importantly diminishes the moral character of his act. In addition to his recorded confession in which he speaks of his desire to kill his assailants, the facts of the incident speak for themselves. If he had merely sought to protect himself he could have done so by drawing his gun. Indeed, this is what he did in other similar circumstances. Even if merely brandishing the weapon was not enough, surely firing once, or at most twice, would have been. The last three shots were gratuitous. With them Goetz was meting out street justice, he was using the occasion of an attempted robbery to not merely protect himself but to punish his would-be robbers as well. It is the legitimacy of that vigilanteism that is central to the controversy surrounding this man.

Goetz's shooting of Canty and company was to be sure a hybrid form of vigilanteism, in that it had an act of self-defense as its triggering event. This self-defense origin had a useful role to play in legitimating Goetz. It established that he was not merely a desperado, riding the subways seeking to confront the bad guys. But self-defense was no more than the legitimating trigger. Acts of pure self-defense are almost a daily occurrence in New York and receive virtually no attention. It is because both the news reporters and the public believed that this mystery man had gone beyond self-defense that he received so much attention. He was labeled a vigilante, and for that very reason a large majority of Americans supported his actions and a vocal minority vehemently decried them.

IV. Jury Nullification and Vigilanteism

Professor Fletcher does not totally ignore the issue of vigilanteism. He discusses it obliquely in the context of jury nullification. Fletcher points out that juries can and do knowingly ignore the strictures of the law and make deliberately false findings of fact in order to serve their higher sense of justice, and that when they do so, not only do their findings stand, but

they are personally immune from any judicial sanction.[12] He notes tellingly that the defense counsel, though careful not to explicitly inform the jury about nullification, did attempt to surreptitiously get the point across. During the voir dire "Barry Slotnick tried to probe the prospective jurors about whether they felt obligated to convict even if they found Goetz guilty beyond a reasonable doubt."[13]

Jury nullification was also on the mind of Justice Crane. Despite the fact that

> [t]he conventional practice in New York as in other states is to instruct the jury that if they find beyond a reasonable doubt that all elements of the crime are satisfied, they *may* convict the defendant. . . . Justice Crane was inclined to instruct the jurors at the end of the trial that if they found Goetz liable on the facts, they had a 'duty' to convict him. But [defense counsel] Mark Baker prevailed upon him to make the less noticeable change of converting the permissive use of *may* to a mandatory must.[14]

Why defense counsel preferred this change to the use of the word "duty" eludes me. That the change from "may" to "must" was less noticeable to the ear seems an odd justification. Had the jurors made careers out of attending criminal trials then perhaps they would have been so used to hearing "may," they would not have noticed the change to "must." But the jurors were largely unfamiliar with the proceedings and thus as far as they were concerned there was no change to notice or fail to notice. They simply heard the word that was spoken, and the word "must" is more damaging to the defense than the word "duty." While "must" implies the absence of choice, "duty" implicitly recognizes choice, in that the jury has the power to breach its duty.

This tactical consideration, though interesting in its own light, reflects a more serious moral and legal concern. Why should the question of jury nullification arise? What element of justice does the law ignore? It is here that Professor Fletcher misses the boat. He states:

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12. Many state courts employ jury instructions that either explicitly or implicitly inform the jury of their privilege to nullify the law. *See* Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980); M. KADISH & S. KADISH, DISCRETION TO DISOBEY (1973).

13. G. FLETCHER, *supra* note 3, at 159.

14. *Id.* at 158-159 (emphasis in original).

> The defense in the Goetz case thought that they would be able to appeal to the jury's innate power and convince the jury to acquit even if the evidence under the applicable law clearly required conviction. They proceeded as though the popular support for Goetz would translate into an issue of conscience that would move the jury to acquit. But fear of crime and racial antagonism are hardly motives of political conscience. There is no hint of a universal principle in the claim that Goetz had to carry a gun because if attacked, he would have to "give those punks what they deserved."[15]

Fletcher borrows the phrase "give those punks what they deserve" from Andrea Reid, a young black woman who was in the subway car with her husband and baby and witnessed the event.[16] Professor Fletcher apparently does not recognize the simple statement by Mrs. Reid that Canty, Allen, Ramseur, and Cabey got what they deserved as a claim of the justice of the act. But why? It is certainly not that giving someone what they deserve is foreign to the concept of justice. We can trace that very definition of justice to Plato's *Republic*. No, it is rather that because Fletcher does not believe that Canty and his cohorts deserved to be shot, he cannot recognize that under some circumstances others might see it as a fitting punishment. Fletcher states without support that "[m]ost people would recoil from the notion that protecting property justifies shooting and risking the death of escaping thieves. It is better from a social point of view to suffer the theft . . . than to inflict serious physical harm on a fellow human being,"[17] and he believes that, *a fortiori* even in the more trying circumstances faced by Goetz, most people would find going beyond self-defense to private retribution unjustified.

Because it is obvious to Professor Fletcher that shooting was clearly a punishment disproportional to the offense, he can only see a live legal and moral issue if this were really a matter of self-defense. He notes that "[p]roportionality in punish-

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15. *Id.* at 156.

16. *Id.* at 28.

17. *Id.* at 24. The opposite seems more generally the case. Consider the circumstances of Katko v. Briney, 183 N.W.2d 657 (Iowa 1971). Mr. Briney had protected an old boarded up house he owned with a spring gun. Katko, in attempting to burglarize the house, was shot by the gun. He sued Briney and was awarded $30,000. The public outrage at this result was intense. Briney received donations and letters of support from strangers all over the country. Van, *Booby Trap Case in Iowa Takes New Turn*, Chicago Tribune, Apr. 25, 1975, at 1, col. 1.

ment—making the punishment fit the crime—is more rigorous than proportionality in self-defense. . . . Clearly more [violence] is permitted in self-defense."[18] Thus, to make of this a real legal issue, he takes as vital the mannequin of self-defense.

That the jury understood the issue as one of vigilanteism is revealed by an examination of their treatment of some of the lesser charges of weapons possession. After finding Goetz guilty of unlawful possession of the weapon that he admitted to owning without a permit and using to shoot his assailants, the second charge they addressed was fourth degree possession of a weapon. This charge related to the possession of: (1) a Smith and Wesson model 60, 38 special revolver, similar to the weapon used in the shooting; and (2) a 9 mm semi-automatic pistol. Even though the prosecution presented the testimony of two gun dealers supported by documents that Goetz had purchased these weapons, the testimony of his neighbor that Goetz had delivered these guns to her for safe-keeping shortly after the shootings, the testimony of the detective who recovered the weapons, and the defense's failure to present rebuttal evidence, the jury nonetheless acquitted Goetz of the charge. It was here that Robert Leach, the mid-fifties black bus driver from Harlem, was instrumental in opening the floodgates and raising an irresistible tide for acquittal. He concocted a weird theory of why the prosecution's witnesses were not credible.[19] Perhaps with Robert Leach taking the lead, other jurors no longer fearing express or implied charges of racism, were quick to join in. As one juror described the atmosphere,

> [p]eople were coming up with the wildest scenarios as reasons for doubt. There were people who doubted Detective Clark's testimony that they opened . . . the box with guns . . . at the lawyer's office. There were people who thought Clark was lying about everything he said. That . . . I couldn't figure out at all.[20]

After disposing of the gun charge, the rest was inevitable. Like a bulldozer, the jury pushed aside all opposition and brought in unanimous verdicts of acquittal on all the remaining charges. It is inconceivable that everyone on this jury had a reasonable doubt that Goetz possessed these weapons. Then why

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18. G. FLETCHER, *supra* note 3, at 29.
19. *Id.* at 182.
20. *Id.* at 183.

did they reach this result? They were clearly searching for any excuse to acquit. But why? The answer seems to be that a vigorous majority of the jurors approved of what Goetz did. They approved not merely of his defending himself but of his arming himself in disobedience to the law. They grabbed for any straw they could to support an acquittal.

V. Interpreting Goetz's One Conviction

What can we make of Goetz's one conviction? If the jury was so sympathetic then why didn't they acquit him of that charge as well? There are three plausible explanations. The first rests on the dynamics of the deliberations. It was the first charge that they addressed.[21] Goetz's partisans likely did not yet feel comfortable in fighting vigorously on his behalf on so open and shut a charge. The second explanation rests on an implicit bargain. At least one of the jurors, Catherine Brody, and perhaps others, were initially in favor of conviction on the more serious charges.[22] It may have been implicitly understood as a kind of quid pro quo: "we will go along with a guilty determination on the minor gun charge if you go along with a not guilty on the other charges." The final explanation, and the one that I find most trenchant, is that the jury may have failed to recognize two things: (1) its power to nullify the law, and (2) the judge's animus to Goetz. They may not have understood that they did not have to justify their verdict or explain it. They were entirely free to find him innocent even if they knew that he was guilty.[23] They may also have thought they were sending a clear message to the judge and the world that Goetz was guilty of no serious legal failing. They undoubtedly did not anticipate that having found Goetz innocent of seventeen of eighteen charges he would be sentenced to prison and would actually have to serve time.

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21. The jury addressed the charges in the order in which they were presented by the court. "The charges given to the jury were listed in the following order: the counts from the first indictment and then from the second indictment, both listed in order of decreasing gravity." *Id.* at 181.

22. *Id.* at 181.

23. After the trial "the jurors said . . . *they had no choice* but to find Mr. Goetz guilty of illegally possessing a gun." Catherine Brody, one of the jurors who was initially most inclined to convict, was present at the sentencing. She "indicated [at that time] that she felt Mr. Goetz should have been freed. 'But the problem is the law' she said, 'and it *must* be followed.'" Sullivan, *Goetz is Given A One Year Term on Gun Charge*, N.Y. Times, Jan. 14, 1989, § 1 at 1, col. 1 (emphasis added). *See supra* text accompanying note 14.

VI. The Legitimacy of Vigilanteism

Why was Goetz's jury, and the nation at large, so sympathetic to vigilanteism? To understand this we must first distinguish vigilanteism from self-defense. The right of self-defense should not be controversial. It is true that there are not enough police to protect us, but there never were nor could there ever be. And so, the law has consistently recognized a right to use whatever force is necessary to protect oneself from an assault. The key words are "necessary" and "protect." The law does not permit the victim of an assault to use it as an excuse for taking vengeance and punishing his assailant.

Vigilanteism stands in sharp contrast to self-defense. What distinguishes the vigilante from the man who merely defends himself is that the vigilante takes the law into his own hands. He does not merely protect himself, he also uses the occasion to punish the assailant. This grates against the widely shared belief that in civilized countries the punishment of wrongdoers should be a communal act carried out through the organs of the state, not a private act of vengeance.

To some, it might seem odd that in a nation with such a distinguished record of successful self-government, so many Americans have defended and even praised what, disingenuous posturing aside, was a fairly obvious act of vigilanteism by Bernhard Goetz. Why have otherwise respectable citizens chosen to reject the standard response to the vigilante that the punishment of wrongdoers is to be left to the institutions of the state and that the ordinary citizen must not take the law into his own hands? Do they fail to appreciate that there is much to be lost by our civilization if we fall away from the rule of law? No, Goetz supporters, like myself, have a deep and real affection for the civilized life afforded by the rule of law. When, however, the state abdicates its proper role and does not provide an adequate system of criminal justice, the political and moral obligations to defer to the state are no longer operative.

Vigilanteism, and its support by the general public has a long and distinguished history in this country. It has usually attracted some of the most productive, educated, and respected members of the community. Vigilante rule was probably longest, most violent, and ultimately most effective in the Montana territory in the second half of the 19th century. All told in the period from 1862 to 1884 over a hundred men were executed by vigilan-

tes in Idaho and Montana.[24] One of the leading advocates of, and participants in, vigilanteism in Montana in the 1860s was William J. McConnell, who later became both a governor and a senator. Similarly Dr. John E. Osborne, a leading Wyoming physician, was an active vigilante who went on to be governor of his state.[25] McConnell and Osborne are not exceptional in the prominence they achieved. Vigilantes and their active supporters have included Presidents Andrew Jackson and Theodore Roosevelt, author Owen Wister (*The Virginian*), historian Hubert Howe Bancroft, educator and journalist Thomas Dimsdale, historian and conservationist Nathaniel Langford, businessman Leland Stanford, writers Booth Tarkington and Edgar Lee Masters and a host of other well known persons too numerous to list.[26]

In his preface to the 1974 edition of William McConnell's remembrances of his vigilante days, Professor Thomas J. Ward succinctly summarizes the rationale and moral and political justification of vigilanteism:

> In an analytical sense vigilanteism is a direct result of the ineffectiveness, perceived or actual, of our criminal justice agencies. Vigilantes exist for they believe that justice is far better served by their methods as opposed to the formal processes of government. They feel that the law enforcement bureaucracy is totally unresponsive to the needs of the citizenry and in many cases they perceive the government as being disinterested in the public safety of the various communities. As a result they sense a moral obligation "to take the law in their own hands" thus circumventing all of the established legal bodies.[27]

One can infer from the support Goetz has received that the public believes vigilanteism is a legitimate form of criminal justice, perhaps the only one available in some parts of the country. Do Goetz's supporters lightly arrogate to the individual citizen the right to punish wrongdoers? Are those who support vigilanteism fanatics who will brook no compromise with their private vision of the good? After all, reasonable men cannot require perfection in a system of criminal justice before being willing to defer to the state the right to mete out a communal retribution.

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24. W. BURROWS, VIGILANTE 22 (1976).

25. *Id.* at 20. *See also*, H. HUTTON, VIGILANTE DAYS: FRONTIER JUSTICE ALONG THE NIOBRARA (1978); W. MCCONNELL & H. DRIGGS, FRONTIER LAW; A STORY OF VIGILANTE DAYS (1974).

26. W. BURROWS, *supra* note 24, at 20-22.

27. W. MCCONNELL & H. DRIGGS, *supra* note 25, at i-ii.

Rather than fanaticism, it seems that despair is what has motivated admiration for Bernhard Goetz. Many support Goetz's vigilanteism because they have come to the sad conclusion that there is no system of criminal justice in the United States worthy of its name.

It is a widely shared and deeply held opinion in this country that the system of criminal procedure and law has degenerated to the point where it no longer satisfies its essential spiritual function of reflecting man's desire to impose a communal sense of order on the moral universe. As the opening quotation of this essay highlights, throughout civilized history that sense of order has required the appropriate and vigorous punishment of those who commit criminal wrongs.[28] There is now a widespread recognition that the requirement is no longer being met.[29]

The failings of our criminal justice system are manifold. To the reasonable law abiding citizen the man-made impediments to convicting and effectively punishing wrongdoers are incomprehensible. Three of these failings, though far from exhausting the field, capture the spirit of the misguided pernicious character of our system. First, there is the "exclusionary rule" that does not allow the jury to hear evidence if certain procedural safeguards having little, or more often nothing, to do with the reliability of the evidence have not been followed. Second, there are the procedural safeguards themselves, such as the *Miranda* rule, that create rights for the accused that defy a reasonable balancing of the law abider's concern about being a victim of either crime or the criminal justice system.

Finally, and most importantly, our prison system grotesquely fails to perform its most important role, that of being a vehicle for retributive justice. Sentences served are too short, too social, too unsupervised, and for the most predatory and degenerate inmates, too pleasant. Prisoners can decorate their cells, watch television, exercise, have conjugal visits, and with impunity rape, abuse and terrorize the weaker among them. Although it gives some satisfaction to the citizenry to know that many of

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28. An essential purpose of the criminal justice system is to provide a catharsis by which a community expresses its outrage at the transgression of the criminal. *Judge Kennedy, in His Own Words*, N.Y. Times, Dec. 1, 1987 at B7, col. 1.

29. Public outrage at the criminal justice system has become more pronounced recently as articles are published in the popular press that reflect and confirm the public's intuitions. *See, e.g.*, Bidinotto, *Getting Away With Murder*, READER'S DIGEST July 1988, at 57 (the infamous Willie Horton article).

those victimized in prison were themselves victimizers on the outside, nonetheless, it does not serve to create a moral sense of fitness of the punishment to the crime. The moral justification of an exclusive governmental role in punishing criminals requires that we, the citizenry, acting through the state, mete out a punishment flowing from our righteous and reasoned anger. When prisons were "penitentiaries" they gave appropriate vent to the public's wrath at the wrongdoer. Now that they are "correctional institutions," they are something both different and considerably less. The great and growing affection for the death penalty is probably in part a reflection of the fact that prisons are neither what they were nor what they ought to be.

So, against this bizarre landscape in which it is overly difficult to convict a wrongdoer of a crime, where the adjudication of a wrongdoer's guilt will be governed as often by amoral procedural niceties as substance, and where convicted wrongdoers receive punishment that is inadequate and inappropriate, the law abider takes delight in a Bernhard Goetz who, at great risk and cost to himself, provides a measure of justice that our public institutions deny us. New York City's then Mayor Ed Koch, among others, opined that the acquittal of Bernhard Goetz of all serious charges should not be interpreted as an endorsement of vigilanteism. I emphatically disagree; it was a ringing endorsement. As long as the government abdicates its proper role of providing a criminal justice system that performs that basic task of a civilized society—to *punish* lawbreakers—many of us with an affection for the rule of law will nonetheless cheer people like Bernhard Goetz, who dole out a small portion of street justice.

VII. Epilogue

The saga of Bernhard Goetz did not end with the publication of Professor Fletcher's book. On Friday, January thirteenth, 1989, after having exhausted his appeals, Goetz was sentenced to one year in jail for possession of an unregistered handgun and began serving his sentence in protective isolation in the prison hospital on Rikers Island the same day. He was eligible for early release on March third. To the great surprise of his attorneys, the New York State Parole Board unanimously rejected his application for parole. As a result he had to serve at least eight months of his sentence.[30] Goetz was released on September 20,

30. Sullivan, *Goetz Parole Denied; Must Serve Till September*, N.Y. Times, Mar. 4,

1989, fourteen days beyond his scheduled release date. The delay was caused by his refusal to return a disposable razor out of fear he might contract AIDS if he had to share a razor previously used by another inmate.[31] Had the jury known the sentence would be so severe and that they were free to ignore the law, I have no doubt they would not have found him guilty of gun possession.[32] And, had he not been so quick to confess, Goetz himself would likely have avoided capture and notoriety, and perhaps muggers would have more to fear from the efforts of a few more brave armed citizens.

1989, § 1 at 31, col. 1. Meanwhile, on February 28th 1989, while Goetz was in prison, Barry Allen, apparently fully recovered from his gunshot, was arrested shortly after mugging a man on the streets of the High Bridge section of Manhattan. *Goetz Victim Held in Mugging*, N.Y. Times, Mar. 7, 1989 at B2, col. 6.

31. *Metro Datelines: Goetz Jail Release Delayed Over Razor*, N.Y. Times, Aug. 29, 1989 at B5, col. 3; *Bitter Sweet Freedom*, N.Y. Times, Sept. 24, 1989. § 4 at 7, col. 3.

32. *See supra* note 23 and accompanying text.