

# Saint Louis University Law Journal

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Volume 48  
Number 4 *Teaching Criminal Law (Summer 2004)*

Article 17

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10-15-2004

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### Recommended Citation

Deborah Price, *Struggling with Self-Defense Standards*, 48 St. Louis U. L.J. (2004).  
Available at: <https://scholarship.law.slu.edu/lj/vol48/iss4/17>

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## STRUGGLING WITH SELF-DEFENSE STANDARDS

What makes a person a “criminal,” one whom society should punish? An obvious response is that a criminal is a person who breaks the law. Therefore, it would appear that if a student learned the purposes of the law and identified the elements of an offense, the student could predict the circumstances under which a person’s behavior would warrant punishment. Likewise, careful study should enable the student to learn the defenses to certain crimes and identify situations where a person should not be punished, regardless of his seemingly criminal behavior. However, as a student of criminal law, I quickly realized the true complexity and uncertainty of this task, particularly in the context of self-defense.

While the claim of self-defense initially appeared clear, careful scrutiny of the “reasonable person” standard and applicable case law revealed the numerous inconsistencies and uncertainty involved in the application of self-defense. Moreover, the reality of jurors’ biases, along with continuous shifting of societal moral norms, contributes to the difficulty of determining what circumstances and behavior will be viewed reasonable so as to ensure the success of a self-defense claim. Ultimately, the student must learn to function within these limitations and to appreciate the inherent subjectivism in the criminal law.

In general, “a defendant makes out a claim of self-defense when he shows that he was confronted by a serious threat of bodily harm or death, the threat was imminent, and his response was both necessary and proportionate.”<sup>1</sup> The law recognizes that “if a person has no realistic choice but to use deadly force, then her use of such force is neither culpable nor deterrable.”<sup>2</sup> A defendant will succeed on such a claim, though, only if “a reasonable person in defendant’s circumstances would have perceived self-defense as necessary.”<sup>3</sup> Therefore, the defendant’s individual, honest belief that deadly force was necessary is not sufficient. To fully appreciate this requirement and make legitimate arguments regarding its fulfillment, a student must recognize and

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1. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.7(a)-(d) (2d ed. 1986)).

2. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 328 (1996).

3. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 3 (1998) (quoting *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988)).

understand both the objective standard and the subjective part of that standard, the difficulties associated with applying those standards, jurors' biases, and community and societal norms.

A purely objective standard of reasonableness forbids any non-universal personal characteristics of the defendant from being imputed to the "reasonable person."<sup>4</sup> The rationale for using this standard is "to ensure that . . . there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard, notwithstanding their distinctive personality traits and varying capacities to achieve the standard."<sup>5</sup>

While the standard prevents the consideration of certain "traits," the identity of the universal "reasonable person" remains a mystery. Further, "courts have slowly come to accept the widespread scholarly belief that the formal neutrality of the objective standard is systematically biased against the self-defense and provocation claims of individuals from groups that lack significant economic, political, and social power in American society—particularly women, the poor, and nonwhites."<sup>6</sup>

A number of American courts reject the purely objective standard and allow the jury to consider a variety of the defendant's personal characteristics.<sup>7</sup> "[V]arious courts have held that evidence of battered woman syndrome, fear caused by past abuse at the hands of the police or by past assaults, stress caused by being an immigrant from a different culture, gender-specific responses, and physical disabilities are relevant to a determination of reasonableness."<sup>8</sup> Ultimately, however, little guidance is available regarding the extent to which characteristics may be considered. Moreover, if too many personal circumstances are considered, the objectiveness inquiry of the reasonableness requirement may be compromised.

In addition to the issue of what characteristics the "reasonable person" should possess, this inquiry becomes further complicated with the issue of jurors' biases. Each juror has his own characteristics which influence his perspective, and thus who he views as the "reasonable person." Jurors have different sociological backgrounds and do not forget them. As one commentator has pointed out, "differences inevitably affect how jurors view the reasonableness of a particular . . . act. . . . [D]ifferent jurors will always have different conceptions of what kinds of acts a 'reasonable person' would, under the right circumstances, be willing to commit."<sup>9</sup>

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4. *Id.* at 4.

5. *Id.* at 8 (alteration in original) (quoting *R. v. Hill*, [1985] S.C.R. 313, 334).

6. *Id.* at 4.

7. *Id.* at 4-5.

8. *Heller*, *supra* note 3, at 5.

9. *Id.* at 53.

In a sense, the court and justice necessarily depend on jurors' biases. The members of the jury ultimately determine what the community will accept as reasonable. "[T]he reasonable person is simply 'a device for delivering to the jury, in its role as conscience of the community, the normative or value judgment as to the degree of moral culpability to be assigned to the particular offender.'"<sup>10</sup> Realistically, however, the "conscience of the community" is not usually fully represented by the jury.

"A genuinely impartial jury . . . must represent all of the groups in the community. . . . 'As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.'"<sup>11</sup> Each jury is composed of different people having a different standard of what is reasonable.

That fact necessarily threatens objectivity, because juries are always different, both in terms of the jurors who constitute them and in terms of the facts of the cases they decide. As a result, the outcome of any particular self-defense case is undecidable *ex ante*: different juries would, contrary to what an objective standard requires, decide the same case differently.<sup>12</sup>

The jury's determination of reasonableness may result in arguably unjust results that are contrary to the law's purposes.

Upon reading the facts of *People v. Goetz*,<sup>13</sup> I predicted that the court would definitely deny the self-defense claim; such a claim seemed preposterous to me. The relevant facts, in part, were as follows:

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for \$5.

. . . Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster.

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

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10. *Id.* at 16 (quoting Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 *LOY. L.A. L. REV.* 435, 444-46 (1981)).

11. *Id.* at 18 (one set of internal quotations omitted) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 529 n.7 (1975)).

12. *Id.* at 16.

13. 497 N.E.2d 41 (1986).

was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being “maimed.” Goetz then established “a pattern of fire,” deciding specifically to fire from left to right. His stated intention at that point was to “murder [the four youths], to hurt them, to make them suffer as much as possible.” When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot “tried to run through the crowd [but] they had nowhere to run.” Goetz then turned to his right to “go after the other two.” One of these two “tried to run through the wall of the train, but . . . he had nowhere to go.” The other youth (Cabey) “tried pretending that he wasn’t with [the others]” by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been “taken care of.” Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, “I said ‘[y]ou seem to be all right, here’s another,’” and he then fired the shot which severed Cabey’s spinal cord. Goetz added that “if I was a little more under self-control . . . I would have put the barrel against his forehead and fired.” He also admitted that “if I had had more [bullets], I would have shot them again, and again, and again.”<sup>14</sup>

The first grand jury that was presented with these facts indicted Mr. Goetz only of possession of the weapon used in the subway shootings and possession of guns found in his apartment, even though the prosecutor was seeking an indictment for attempted murder and assault, among other charges.<sup>15</sup> Regardless of Mr. Goetz’s past experiences and his subjective belief, it seems inconceivable to conclude under these circumstances that the youths he met in the subway that day presented an imminent threat of deadly force; it is also difficult to see how Mr. Goetz’s response could be construed as “reasonable.” However, this is precisely the conclusion the jury reached.

The jury determined that, at least for Mr. Goetz, with his personal characteristics and experiences, it is reasonable to fear four African-Americans on a subway in New York who ask for money and give identifiable facial expressions. Under the circumstances, Mr. Goetz may have reasonably believed that the youths were going to rob him. However, without the implicit reliance on negative stereotypes, objectively, Mr. Goetz’s response appears totally irrational and unreasonable. He did not receive direct threats. He did not see a weapon. He did not attempt to handle the situation in a different manner.

*Goetz* serves as an example of the consequences of failing to establish clear guidelines and standards in the identification and application of the

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14. *Id.* at 43-44 (alterations in original).

15. *Id.* at 44-45.

objective standard of reasonableness. However, *Goetz* also sent the message that the jury and a significant part of the community believed Mr. Goetz, in fact, acted reasonably. Mr. Goetz had the support of “the millions who apparently believe[d] that they would have done precisely what he did and that the punks he shot got what they deserved . . . . To his public, Mr. Goetz was cool and calculating, showing the courage that millions of others would wish for themselves.”<sup>16</sup>

Ultimately, a community is responsible for determining standards of reasonableness. What will be considered reasonable necessarily depends on the subjective perspective of jurors. Further, “[a]s the norms that define what kinds of goods are valued by a reasonable person change, so too does the law’s appraisal of emotions that reflect such valuations.”<sup>17</sup> For example:

What was once settled in the law—that marital infidelity can provoke a reasonable man to homicidal rage—is now contested. . . . Has the public come to doubt the genuineness or intensity of the cuckold’s anger? Or does a substantial portion of the public now question the moral quality of this emotion, and hence the appropriateness of treating the cuckold’s anger as reasonable?<sup>18</sup>

Another area that reflects how changes in social norms demand a reassessment of standards and reasonable behavior is that of battered women who kill their husbands. Arguably:

The battered woman is not a reasonably prudent person. Her characteristics and personality have been severely affected by the abuse which she has endured. She should not be punished for being the victim of that abuse. Considering her acts only in the light of a reasonable person, when through no fault of her own she does not qualify as one, is in essence condemning her for her suffering.<sup>19</sup>

The law has an interest in keeping the law “based on a generally accepted standard of conduct applicable to all citizens alike.”<sup>20</sup> However, the difficulties associated with the “reasonable person” standard, the inherent biases of jurors, and the continuous changes in social norms require flexibility in assessing behavior. While these factors may result in uncertainty as to what behavior the community will accept as reasonable, the result is unavoidable. Surely an objective standard is necessary to maintain general standards of the law. Ultimately, a student needs an understanding and appreciation of the

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16. Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 423 (1988).

17. Kahan & Nussbaum, *supra* note 2, at 274.

18. *Id.* at 346.

19. Heller, *supra* note 3, at 86.

20. *Id.* at 4 (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, 1949–1953, at 53 (1953)).

source of inconsistencies and difficulties in order to determine if particular behavior will be deemed reasonable.

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\* J.D., Saint Louis University School of Law, 2004. I would like to thank Professor Camille Nelson for her guidance with this piece. I would also like to thank my parents, Mindy and Howard Price, for their incredible encouragement, love, and support.