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SYMPOSIUM

RACIAL VIOLENCE AND SELF DEFENSE
Touro College, Jacob D. Fuchsberg Law Center
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CASE SUMMARY: *PEOPLE V. GOETZ*

On the afternoon of December 22, 1984, four young Black men boarded an express subway train in the Bronx and headed south towards Manhattan.[1] The four men rode together near the back of the seventh subway car.[2] Two of the four men had screwdrivers inside their coats, which they said were to be used to break into video machine coin boxes.[3] Bernhard Goetz boarded this subway train in Manhattan and took a seat towards the rear of the same car occupied by the men.[4] Goetz was carrying an unlicensed .38 caliber pistol with five rounds of ammunition in a waistband holster.[5] One of the men approached Goetz and stated, "Give me five dollars."[6] None of the men displayed a weapon, but Goetz responded to their demand by standing up, pulling out his handgun, and firing four shots in rapid succession.[7] The first shot hit one man in the chest, the second struck another in the back, the third went through another's arm and into his left side, and the fourth missed, deflecting instead off of a wall of the conductor's cab.[8] After surveying the scene around him, Goetz approached one man, Daryl Cabey, who was sitting on the end bench of the car and said, "You seem to be [doing] all right; here's another," and fired the last of five shots.[9] The bullet entered the rear of Cabey's side and severed his spinal cord. [10] Goetz told the conductor that the four men had "tried to rip him off."[11] While the conductor was aiding the men, Goetz jumped onto the tracks and fled.[12] Two men, initially listed in critical condition, fully recovered but Cabey was paralyzed and suffered some degree of brain damage.[13] 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.[14]

Goetz claimed that he could predict from the victims' words, conduct, and facial expressions that they were going to rob and assault him. Although he claimed self-defense, he admitted in his statement to the police that he intended to "make them suffer as much as possible" and continued to pursue the victims even after they tried to escape.[15] After the New York State Court of Appeals reinstated charges that a lower court had dismissed as a matter of law, a jury acquitted Goetz of the most serious charges filed.

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[1] People v. Goetz, 497 N.E.2d 41, 43 (N.Y. 1986)
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] 497 N.E.2d at 43
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Goetz*, at 44.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (Goetz claimed that if he had had more bullets, he would have fired again and again until the supposed assailants were dead, without regard to whether they were posing a continued threat).

CASE INFORMATION: *PEOPLE V. WHITE*

On August 9, 2006, John White's son, Aaron, attended a party where he was one of few African-Americans present. He chose not to drink and decided instead to mingle instead. Daniel Cicciaro told Aaron that he was not welcome and told him to leave the party. Another young woman told Cicciaro and her brother that Aaron placed a statement on MySpace about how he wanted to rape her and do terrible things to her. Although the statement turned out to be false, Aaron left the party anyway.[16] However, on his way home, he received a threatening phone call from Cicciaro stating he was coming to Aaron's house to "f*** him up." As Aaron entered his house, he received another phone call from Cicciaro, detailing how he was going to attack and kill him.

At this point, Aaron awoke his parents and put the calls on speakerphone, and they all heard Cicciaro threatening him.[17] White then told his wife to call 911. Seeing the boys walk up the driveway, he went to his garage, pulled out an unregistered Beretta, and went outside.[18] White and Aaron continued to exchange words until White pulled Aaron out of the way and fired a single shot from the unregistered Beretta, which pierced Cicciaro in the jaw.

Mr. White stated that the shooting occurred accidentally after he began to head back into his home when Cicciaro lunged at the gun.[19] Cicciaro's friends put him in the back of his car and drove away. When the police arrived, White and his son were arrested and taken into custody.

At trial, White's attorney, Fred Brewington, focused on the racial undertones of the case, defending White on the theory that Cicciaro and his friends were a "modern-day lynch mob" coming after White and his family.[20] The prosecution instead argued that the case had nothing to do with race, but was rather the act of a man who, rather than calm the boys, rushed out with a Beretta to confront them.[21]

The Suffolk County jury found White guilty of manslaughter on December 22, 2007. The case is currently on appeal.

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[16] Corey Kilgannon, *Jury Convicts Man Who Shot Teenager During Driveway Confrontation*, N.Y. TIMES, Dec. 23, 2007, *available at* 2007 WLNR 26196645.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Kilgannon, *supra*, note 16.
[21] *Id.*

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INTRODUCTION

CHERICE VANDERHALL: Hello everyone. I would like to say thank you for attending this discussion on racial violence and self defense. Professor Frederick Brewington is an adjunct professor here at Touro Law School, who teaches Trial Practice during some semesters. He was the defense attorney in the John White case, which is a case I am sure Professor Klein has briefed some of his students on. The verdict was handed down last year. The facts surrounding the case occurred in Suffolk County. Attorney Mark Baker, who was the defense attorney in the Bernhard Goetz case, is running a little bit late, but he will be here. When he arrives he will join in the discussions. Now, we will begin with Professor Brewington. He will speak and our own Professor Klein will moderate, ask questions, and make sure that we tie up loose ends. Thank you.

PRESENTATION ON *PEOPLE V. WHITE*·

FREDERICK BREWINGTON, ESQ.: Good evening! Let me first start out by saying my name is Fred Brewington, and I had the honor of representing John White, along with Paul Gianelli and another co-counsel Marie Michel in our defense of John White, in a case that took us back to August of 2006. I understand that the point of this discussion is to do a comparison in some way of the Bernhard Goetz case and the John White case. Let me start off by giving some information. I also had something to do with the Bernhard Goetz case. I was a recent graduate, in l982, of Northeastern University School of Law and I came into the office of C. Vernon Mason, who helped to represent Darryl Cabey for a period of time both at the time that Mr. Goetz was going through his legal proceedings and then assisting with Mr. Cabey's civil action. Thus, I have some information and knowledge about that particular case. So, it is going to be interesting because I haven't really spoken about it in a long time.

· The factual information, views, and opinions expressed in the following transcript are those of the presenters, and the Journal of Race, Gender and Ethnicity does not endorse or necessarily agree with the factual information, views and opinions.

But let me take you, if you would travel with me in your minds, to the late night and morning hours of a day in August 2006, to 40 Independence Way in Miller Place, the home of John White, his wife Sonia and their son, who came about a set of circumstances that we would describe in my office by saying you can't make this up. The reality was that the son of John White had gone to a party and he was one of the few, if not the only, African American person to be at this party. This was a party where teens were present, drinking, playing beer pong -- it was news to me -- and other drinking games, and the importance of that is that not only was there underage drinking going on, but it was at that point in time countenanced by individuals that were the parents at that home. You should know, as one of the underlying facts that is really not spoken about in this case, is the mother of the host of that party was convicted, and plead guilty to the misdemeanor of service of alcohol to under-aged drinkers. As a result, I think she was sentenced either to a conditional discharge or to probation. I am not quite sure what the outcome of that was. But that kind of sets the stage because Aaron White, John and Sonia's son, we believe is not only a fine, young man but was well raised and well mannered.

When Aaron got to the party he realized that people were drinking. He chose not to drink, and tried to mingle and talk to people. Eventually, he was told by a number of people, including a person by the name of Daniel Cicciaro, that he was to leave the party; he was not welcome there and he should get out. Essentially, the statement was, "Yo Bro, no disrespect but you gotta go." Assuming that the "Yo Bro" was directed toward Aaron, Aaron said okay I'll leave, because his parents essentially told him that you don't stay where you are not wanted.

Aaron was angry at that point and called a friend of his, who actually had been the person that had played a prank over a year before that on Aaron. This is important to understand because the prank involved placing a false statement on the Internet on MySpace to this young woman, who happened to be a young white woman at the party, and the sister of the host of this drinking party. The statement was that he wanted to rape her, do things that were terrible to her. She told her brother and Daniel Cicciaro that she was uncomfortable with Aaron being at the party because of this incident. The point is that she at that time did know that it was a hoax; that it was not Aaron and that someone else had faked this statement. Still, she decided at that point to make an issue about Aaron being at the party and that indeed she wanted him to go. She did not disclose the reason why until Aaron had left, apparently. When Aaron left Daniel Cicciaro and other individuals asked the question, what is the deal, why did you want Aaron to leave, and then she disclosed, what turned out to be this fake MySpace hoax. On the stand she admitted that she knew that it was a hoax.

Aaron White left and went home. In the process of going home, he spoke to his friend on the phone and said, this is all because of what you did and this problem was created by you. They went back and forth and then there came a phone call on Aaron's cell phone while he was in route. The phone call was from Daniel Cicciaro saying, we are coming to your house and essentially we are going to come and f* you up, and how dare you say that you were going to do that to Jenny and things of that nature. Aaron then got on the phone with his friend again and said, "Yo man they are coming to jack me

up what is going on here? How did this happen? What went down?" His friend then said, what you need to do really is call the cops. Aaron said at that point he saw a set of headlights speeding down his street, and then started to rush to his door and tried to fumble with his keys to get in the house. A car came down the cul-de-sac, turned around and went back out at a high speed. He said that he recognized this as being one of the muscle cars of one of the guys that hung around with Daniel Cicciaro, otherwise known as Danno. He got into the house and two things happened. His phone rang again and Aaron asked who it was. It was Danno that time on the phone basically saying what they were going to do to him and how they were going to do it.

Then at that point Sonia White, the mother of Aaron, got up out of bed, and heard her son cursing and yelling and basically holding his phone like this saying, "who the f* do you think you are?" She said, "who do you think you are talking to like that? Then he said there are some boys that are coming over here either going to jack me up or beat me up. At that point, Sonia goes into a panic and goes to wake her husband up. As she goes up, she sees headlights coming up and coming in front of the house of at least one car, and then at some point it became two. She wakes John, who is in bed, out of a sound sleep, and says, get up. Then John does the thing that I have done a couple of times when I have been shaken, he did the easy roll. He rolled over nice and easy and said, yeah, yeah I got it, alright, whatever. And she said in a panic, John, get up! John said, what's wrong. At that point he looked into the eyes of his son Aaron, and saw something he had never seen in his son's face before. He said, Aaron what's wrong, as he sat there in his underwear, and Aaron said, "They are coming to kill me Dad." At that point the phone rang again, and Aaron put it on speakerphone and the speakerphone allowed John and Sonia to hear the n* word used several times and that "we are going to f* you up" and "we are outside your house, come out so we can f* you up," like that really makes sense.

At that point, John White provides us with some very important information. John White tells us that he looks out the major window in the front of his house that looks out on to the street, and he can see headlights pointing at his front door with figures standing as silhouettes in the headlights starting to advance on his front door. John says as he is looking out and having put his shorts on and a polo shirt, "Sonia, call the cops." I'm going to tell you, Sonia was freaking out. She was basically saying, what's going on, what's wrong, who are these people, trying to figure out what's going on. And John said that once, "Sonia, call the cops." He then went down and said, "Aaron what's this?" He said, "These are the guys that are coming to get me Dad."

John sees them advancing toward the front door coming up the driveway. The driveway is about sixty feet long. He then goes into his closet by the front door where he has a legal shotgun. He takes the shotgun out because, he said, he was going to scare these people away from my front door. He decides to put the shotgun back in because he looks at it and says, no that is too much and all I need to do is to diffuse the situation. He then, as he is going out the door that leads into the garage, opens the garage door. At that point, he goes in and starts to exit the garage door and remembers that he has his grandfather's .32 caliber Berretta on a shelf in the garage. It is an antique and he has never really fired it. He is a hunter by the way. He has several guns in the house; all of

which are legal, except for which one? The .32 caliber. It was a keepsake. He didn't really have it there, according to John, for any other purpose except for just keeping it. His grandfather apparently brought it back from the war. He takes the gun, places it down on his side and emerges from the garage on to the driveway.

He comes out of the garage and then starts to face those individuals that are coming up the driveway. The headlights are facing him. He then starts to walk down telling them get out of here and go home. At that point he feels a presence to his left. It is his son Aaron, who said to himself, I'm not going to let my skinny old father go out there. He takes the shotgun out of the closet and holds it down by his side. John says, "What are you doing?" But then they both advance down to the apron of the driveway where these individuals are standing, which was essentially on the driveway and they back them up. It is not one person; it is two cars, one with the headlights facing up the driveway and another facing with his headlights into the cul-de-sac. After four or five minutes of conversation, and I say that kiddingly, the conversation really was statements made to John White and Aaron that they were going to kill you, you n*. That they were going to f* him up, that being John White, that he was old, and that they were going to f* him up and then they were going to f* his wife. Then John said, you are crazy, get out of here, what are you talking about? They went back and forth, and then John starts to get firm. He told them to get the f* out of here, get off of his property. At that point, they continue to ridicule John and Aaron and Aaron basically at that point has had some words with the biggest dude there, who is approximately six feet, four inches. He has shoulders like one of the linebackers from the Chicago Bears. He makes several statements that you know all we want to do is that we just want to fight you. Aaron says, you are crazy and get out of here.

At that point there is a lull. John White says, okay Aaron. He takes his left arm and moves Aaron back as though to circle, watching the people in front of him, to circle to his left. As he pushes Aaron back and turns to his left, a figure comes from below him on his right and grabs for the gun that is down by his side. John indicates that he pulls back on the gun and at that point a single shot is discharged. The single shot penetrates the jaw of Daniel Cicciaro, who had been the one reaching for the gun, and the bullet then goes through his jaw lodging in a portion of his brain just below or above the back of the ear. Mr. Cicciaro drops in a heap. John looks and says, "Oh my god!" His friends who are there, and we know that there were at least four at some point, there may have been five, because there was some testimony, not testimony, but at least a witness account that did not make its way into the record that there was someone else that was there that fled early on through one of the backyards. At the time that the gunshot went off, everyone scattered and then they came back and they picked up Daniel Cicciaro. They threw him in the back of the convertible muscle car and drove off at a high speed. In the back of that car which was covered with blood, that being the blood of Daniel Cicciaro, was a baseball bat that had been retrieved by one of the witnesses for the purpose "just in case we need it." That was the testimony.

What happened at that point was John sat on his stoop and began to cry and shake his head. Sonia came out of the house, still freaking out, asking what happened. Aaron

began to just hug his Dad. A neighbor came over took the handgun out of the hand of John, who was still holding it, and placed it down on the freezer in the garage. John White waited for the police to arrive. When they arrived, the police officer did not know what happened. The neighbor, Gary Green, told him exactly what he thought had happened. The officer asked John where the gun was, and he pointed into the garage where it had been taken. Thereafter, John White was arrested and taken into custody. At that time, Aaron was also.

Those are the facts essentially, from the defense side. I give you that, so that you have a context in which to deal with this because when we deal with the context of the people's side, they brought before the jury that John White emerged out of his house with an intent, even though John was charged with manslaughter. They claimed that he came out of the house intending to cause harm to these individuals and that he intentionally, even though it was a manslaughter charge, discharged his gun that contained multiple rounds, once to the face of Daniel Cicero. The case is currently on appeal and John White is free at this time on bond of two hundred thousand dollars ($200,000) pending appeal.

The importance of this case and the facts of this case as we start to compare it to others, the *Horn* case in Texas and the *Goetz* case back in 1984, is that it raises an issue of the subjective and objective mindsets of individuals when dealing with the justification defense and what was John White's fear. We were denied a motion in this case to have our psychologist testify, not about a mental incapacity as a defense, but to talk about what John White was able to testify about, that he and his family had experienced violence and death at the hands of the Klu Klux Klan down South and indeed, his uncles and members of his family had essentially been burned out and forced to move North by threats of deaths and hangings that took place in his family. That he had been taught throughout his life that, when they come for you, being when they come for you in the night with their headlights facing on your front door and calling you out, the next thing they are going to do is burn you out. The fear that he had in his heart that night was not only the fear that his son had been threatened, but that these individuals were advancing on his front door and he felt that it was necessary for him to emerge from his home to push them off of his property and away from his front door. He felt that it was his right to do that because if they got to his front door, which was all glass, and they gained entrance or they did anything else, he had no further place to retreat. He in his mind thought that Sonia would call the cops. Sonia says, I don't know what anybody was saying to me, I don't remember John saying that. She was truthful because I believe that her freaking out about what was going on, placed her in no mindset to really focus on anything about what was taking place except for those individuals walking up their driveway.

John White's state of mind from a subjective standpoint is critical in a case such as this because the defense of justification, which the people must disprove, was an important component to this criminal defense. The fact that in this situation we were not allowed to present evidence from a psychologist, who did an evaluation of John about what he had experienced coming up as a young man in his early adulthood, put a major and possibly crippling effect on our defense because the only one that could then try to

explain this very technical side of the case was the gentleman that paved roads for a living, John White. The inability to present that evidence, that by the way, had been in the hands of the prosecutors for well over six months, was a major blow to the defense in that case.

The case was tried, it was presented. Twice, the jury came back with the statement to the judge that we are hung, hopelessly hung. This happened to be December 23rd. Excuse me, let's go back to the day before, December 22nd. The jury says we are hung. The judge says okay, you are going to keep on deliberating. We all say okay, and she said we will see you tomorrow, tomorrow being Saturday. Everyone comes in, it is now December 22nd and the jury comes in and deliberates from 9:00 a.m. from 5:00 p.m. Their words at that time, we are hopelessly hung again. The judge then brings them in and gives them what we call as lawyers the dynamite charge. Yes, I am going to talk about that. I'm going to get there. I like dynamite first because it is descriptive. It is commonly known as the "Allen Charge" but we call it the dynamite charge, and the reason why is because it is like taking a closed vessel that the jury deliberations are, taking a stick of dynamite, throwing it in and putting the top back on. Something is going to happen. You may hear a pop, you may see it blow up, but something is going to happen, and at the time that she gives this full "Allen Charge" she sends them out but with this last statement, ". . .please tell us what your religious obligations are for tomorrow," Sunday, "so that we can make arrangements" for you to deliberate on Sunday, the Sunday just before Christmas with one day in between. We knew at that time that there had been jurors that were concerned about not having done Christmas shopping. One juror was traveling down to Florida to meet with her children that had already gone and she did not have a gift. Another woman had problems because she had not purchased a Christmas tree and she was a single parent, who still had not done any Christmas shopping, and had nothing for her children in her house. Another individual was traveling and was the only person that could travel on the plane with his nephew, and if it didn't get done now he was going on the plane with his nephew, period.

The impact of the dynamite charge, "Allen Charge," along with that final statement led to this result. Within forty-five minutes a note came back out from the jury saying that, we have reached a verdict. John White was convicted. He was convicted of manslaughter and weapons possession. We believe that the appeal will illustrate some of the concerns about that statement on that day as well as the pressure placed on the jury at that particular point particularly in a case of this importance where the issue of race became a relevant issue for this jury that was clearly wrestling with it, to have to deal with. In speaking to two of the jurors, they were the two holdout jurors, they felt that the pressure just became too much, that they had been mistreated. They were public about their mistreatment. One of them I think published a paper or an article about it. But one of the things that was clear was that the dynamite was not only thrown into the jury room, but it was a dynamite that was laced with plastic explosives. It really had a charging impact on what was going on in the sacred aspects of the jury pool.

That's the John White case. We are in the middle of appeal at this point. The process is going to be long. He probably will be and remain free on bail until there is a

final decision once the appeal takes place, but every day John White wrestles with the fact that at his hands, someone did die. He says he constantly keeps in prayer both the soul of Daniel Cicciaro and his family. At the time of the verdict and then at the time of sentencing, the White family was threatened; they were threatened with death. They were threatened with people driving by and one of the things that we learned as a reminder of the importance of this case is that when the decision was made that he would be sentenced to essentially two to four years, it's actually one and one-third to four depending on how you look at the crimes that he was convicted of, but we say two to four for simplicity sake, that the only black family on the block of the Cicciaro's had extreme vandalism conducted on their home. Their lawn was torn up, their mailbox was ripped down, and they were made to feel fearful of their existence in that neighborhood. It is that type of fear that John White knew for real when he stepped out the door of his home. Trying to get someone to understand that and put it in context particularly when you are dealing with a society that has historically played that down, and essentially said forget about it, get over it, we are past that now, is a very, very unfair and difficult thing for us to try to come to grips with from a societal standpoint. We believe that the importance of what John White experienced through his childhood going through the Mason Dixon Line and having to get on the back of the train when he was in the front when he left New York, were all relevant for this jury to understand in excruciating detail.

There is no question that the issue of race in America still plagues us even with Brother Obama in the White House. But that issue is one, that if we do not address it in cases like this or in other ways, it is my belief that we short change ourselves because we forever continue to try to downplay the fear and horror that someone else may have in their heart and when we do that we are essentially saying you don't have a right to be afraid. When we do that we cheapen what our history has taught us, that there was a time period when some of the people in this room would never have been in this room, and it wasn't so long ago. So we raise that issue and we are raising it on appeal as an important component of our appeal, but it is also one that takes us back now to 1984. I don't want to steal counsel's thunder, he is not here yet, but that very case, the Bernhard Goetz case, that individual who had a degree from New York University in nuclear science and was doing repair work on computers and had his own business, who had on --

PROF. RICHARD KLEIN: Can I just make a suggestion that instead of us now switching to Goetz, why don't we ask some questions concerning this case and maybe Mark Baker will be here by the time we start?

FREDERICK BREWINGTON, ESQ.: Cool, I'm hopeful.

PROF. RICHARD KLEIN: First, thanks very much. Just a couple of points. We did talk about this in class today and let me just ask you some of the questions and some of the concerns that students had. First of all, the police were never called. Right? Even though the testimony is that John White is claiming that he had told his wife to call the police and the police never were called. How much of a factor was that do you think in the jurors' eyes? The students certainly thought that when they felt threatened instead of perhaps taking things into their own hands, we know that Bernhard Goetz was called the

subway vigilante, that what they should have done was to have immediately called the police? How much of a concern do you think that was to the jurors?

FREDERICK BREWINGTON, ESQ.: I think it was a major concern. The District Attorney leaned and laid on that regularly. Part of their case, which we thought was totally irrelevant, was that they went back, and we didn't know that you could even go back for five years. They responded to our subpoenas as defense counsel and said we only keep one year of records of 911 calls going back. They went back five and six years and found out that Sonia had called 911 when someone had stolen their garbage and Sonia had called about someone that had done graffiti. They attempted to use this and did. The judge allowed them to cross examine John and Sonia. When you called 911 back then, you called 911 when your tire was flat, or when you had a disagreement, or someone drove past your house, but you didn't call 911 this time. One of the things that became very difficult was trying to defend a whole other case because in this situation we were dealing with allegations of calling 911 going back five and six years when the set of circumstances and facts were completely different. At those times, no one was advancing on their front door. At that time, there were no headlights going on to their front door, but I will tell you that the subliminal aspects of the people's case, and I say this with all sincerity and respect for my brothers at the Bar that were involved with this from the District Attorney's office, they preyed on the fear and the hatred that can happen in a person's heart when you look at the fact that there was a young white man that ended up getting shot by a black man. And it wasn't obvious. It wasn't overt, but it was there. It was kind of like that thing, how do you put your thumb on it. Well, you really can't but you know it when you see it and that was the use of the 911 call, this whole thing well how afraid could you have really been you could have just called 911. Again, how dare you tell me that I can't be afraid for my life when I see shadows coming up the driveway and I am concerned that they are going to come into my house.

PROF. RICHARD KLEIN: You knew of course before the trial ever began how important race was going to be for the jurors. Could you just talk a bit about the jury selection process and to what extent you voir dired the jurors about that because there was only l black person amongst the twelve jurors.

FREDERICK BREWINGTON, ESQ.: That is correct.

PROF. RICHARD KLEIN: Can you just describe the voir dire and how you could try to get a juror that would be sympathetic?

FREDERICK BREWINGTON, ESQ.: Not only sympathetic but fair. I mean one of the things we all say is we want a fair and impartial jury. We always want that, that's where we start. Then from there we want to get everybody else that is going to lean our way.

PROF. RICHARD KLEIN: I always tell the students that neither side wants a fair jury, so you can be frank.

FREDERICK BREWINGTON, ESQ.: No, No, I want to be frank because one of the things as attorneys all of us have is an obligation to seek justice first in a situation and it's a hard thing to fathom. A lot of us just want to win and I did, I want to win, I want to win when I go into a trial, but at the same trial what we want to do is make sure that the people that are going on the jury are open minded and fair enough to be able to evaluate all the facts.

So, race was a major component to the case and it played a major component in trying to select the jury because when we were selecting the jury, we attempted to try and get people that were open minded. It's very difficult to select a jury because you can't get into everybody's history. For those of you who haven't done it, in that twenty or thirty or forty-five minutes that you have to present, we averaged it out per juror we had a total of one minute and forty-five seconds, if we divided it up to really speak to all of the jurors we needed to speak to, we could only speak to each person for one minute and forty-five seconds. That's tough. I look at you and I say, "Could you be fair and impartial?" and you go, "Oh yes, Mr. Brewington, not a problem." Then you hear, eh eh eh. That's a very difficult thing. But part of our approach was to try to address that issue and many individuals had problems dealing with the race issue. Other individuals were wishy-washy and other individuals that we thought told us that they would have no problem, we learned when they were deliberating in the jury room they said things like, that's a bunch of garbage. There is no way a black person could even be afraid of those boys, so when you have that in the jury room, you start to really have to deal with those factors from a societal standpoint. You may look somebody dead in the eye and say, "Can you be fair and impartial?" They say, yeah sure Mark, sure Fred. The reality is that you have no way of knowing what the ulterior motives are, particularly when we were asked to use a very specific juror questionnaire in this case that had test questions that we had created that would allow us to be able to look at how you answered one question and if it came back a little different in a different question phrased a different way we might be able to use that to work on. We were denied that opportunity in this case so that we might be able to test the issue of race rather than me as an African American looking at a white person that lived in one of the areas in Suffolk County and said does it matter to you that I am a black man and my client is a black man and they say, oh no, and I am saying like all right what else can I do. It's a very tough thing and it's a reality in our system that has major flaws particularly when we know that addressing the issue of race offends some people. It turns some people off and also will allow some people to show their true colors but in a case such as this, not being able to really address it from a frontal standpoint creates concerns both in the voir dire process and in the long term when we see them deliberate.

PROF. RICHARD KLEIN: You mentioned before that you had wanted to call the psychologist, have a psychologist testify about just how Mr. White was so conscious of the racial factors. He testified at trial, and if you could just talk a bit and then we will get to the Goetz case, about how your closing argument emphasized to the jurors as well how important, it was here that Mr. White was black.

FREDERICK BREWINGTON, ESQ.: In my closing arguments, I remember starting out by saying people are going to tell you that race has nothing to do with this case. I told them that they are "dead wrong, that this case has everything to do about race." And then I went into explaining why the issue of race was a key, particularly for this defendant, both in speaking from a subjective standpoint and an objective standpoint looking at what the charge was going to be in this case. The issue of race was not only one that was raised by Mr. White, but that was confirmed by Aaron and the witnesses that the People put on. The claim that they did not use initially any racial epithets against the White family became very untrue and disproven through cross examination. We were able to get one of the individuals to say he might have said it once or twice. But then there was a tape that was not played by the People. It was a tape of one of the friends of Daniel Cicero who was in the car with them and the phone had a call 911 that had been left open, the line was left open, and you heard the individual saying, Mr. Servano was his name, don't worry Danno "we are going to get those f*ing n*" for you. And the statement was, but that was the first time that we ever said it that night. The statements at the party were let's go f* up that n* and that's when they got in the car. They drove to the home of the Whites. They came on their turf, and took the fight to their doorway. Race had everything to do with it in this case.

PROF. RICHARD KLEIN: Mark Baker is here, who was one of the lawyers in the Goetz case, and every student who has taken criminal law, which ever case book you might use, has dealt with the Goetz case. Mark Baker will talk about that case.

PRESENTATION ON *PEOPLE V. GOETZ*[••]

MARK BAKER, ESQ.: Who was more than ten years old in 1987? Don't raise your hand. You don't have to admit it; you can remain silent. If you were, you were subjected to repeated media saturation going on for years starting on December 22, 1984 when there was a shooting in the subway. One man shot four black youths. A myth was created, gestated by the New York Post, and picked up by other media. There wasn't a day that went by until certainly December 31st, when he surrendered in New Hampshire, that the public was not subjected to the story of the subway vigilante.

I am going to tell you something that I said at another law school and I got booed, but you people are much too sophisticated to do that. This was not about race. You have to understand the social climate in 1984. There were rampant crimes certainly on the subways and the people feared for their lives walking in the streets. Goetz, as I said, was depicted as the subway

[••] The factual information, views, and opinions expressed in the following transcript are those of the presenters, and the Journal of Race, Gender and Ethnicity does not endorse or necessarily agree with the factual information, views and opinions.

vigilante. The "Death Wish" movie was very big in theatres at the time, and by the same token he was viewed by many, some polls said seventy-five percent of the people, including African Americans and Whites, as a hero, as a vindicator, not only of his rights but of society as a whole.

One of the jurors named Mark Leslie, who ultimately wrote a book about it, stated in it that when he was first brought into the courtroom amongst three hundred other people and they announced the case, thirty people started applauding for the defendant. That is not something you see too often in a courtroom.

So vital to understanding what happened in the Goetz case is first appreciating that we are talking about someone who had been a prior mugging victim. He had been actually mugged twice. In his videotape confession, which he gave in New Hampshire around New Year's Eve around 1985, he never talked about the race of the kids. He talked about four people surrounding him who he said, quote, "We are going to beat him to a pulp."

The jury ultimately included two African Americans. Now, Fred was talking about jury selection in cases like this. Everybody comes to the Courthouse with an agenda. I mean, I don't know if you can imagine when I say high profile. Take the O.J. Simpson case and magnify it thirty times. We didn't have televisions in the courtroom in New York at that time, but we had seventy international reporters who had their own section, and four years of television media saturation. Everybody came. We had a pre-screening before we had the regular voir dire, where there would be the Assistant District Attorney, myself, Mr. Goetz, and the judge, and we would go in the back room. From December 1986 through March 1987, every Friday, twenty-five to thirty prospective jurors would come. The idea was to wiggle it down to one hundred, and then they would go into the regular voir dire in March when the trial started. So, the rules were, if any one side didn't want one of these people, they were gone. So one fellow comes in, and he was African American, and we determined it was my time to question. I asked, do you have any opinions about this case? What case? Well, this is the Bernhard Goetz case. Who? Bernhard Goetz? Do you see this gentlemen seeing next to me? Yes I do. Do you recognize him? No. You don't recognize him? How long have you lived in New York? About twenty years. You lived here twenty years and don't recognize this gentlemen? Do you read the newspapers? Oh yes, I read them all. Which papers? The New York Post, the Daily News, the Times, Newsday. You read all these papers and you never heard of him. Do you watch television news? Absolutely. What stations? Two, four, five, seven, nine. You watch all these stations? The judge is rolling his eyes like this and the assistant district attorney, Gregory Waples, is doing the same thing, so it was clear. We didn't pursue it; he was gone.

But go back now, to March 1987. We have people in the box. They are answering all of the questions that Fred was talking about. Can you be fair? Can you put aside any opinions? Absolutely. I want to hear the evidence in the courtroom.

There was one fellow, he was African American, the answers were just too good, and there was nothing that we could put our finger on. We didn't want to start using peremptory challenges for which we didn't give a reason, because they are limited and we didn't know what was going down the pipe, but this guy was just too good. So there was nothing we could do, and we just put it aside for one moment. Then all of a sudden, Roy Innes walks into the courtroom.

Does everybody know who Roy Innes is? Roy Innes is the Chairman of the Congress of Racial Equality, CORE, a Civil Rights organization, but at the far right. He is my only far right friend that I have in the world; a lovely guy, but he was a Bernie Goetz supporter at the time. This guy in the box gave Roy a look like he wanted to just put a dagger in his eyes. I elbowed my partner, Barry Slotnick, did you see that? He said, No. This guy hates Innes. This is not our guy. We don't want him, so we asked further questions. We couldn't still get him to the point where we can challenge him for cause and we preempted him out. Ten minutes later, an African American court officer comes over to me when we had a break and said, do you know what that guy just said when he left? I said, no. He said, "Some other brother is going to get that mother f*." So this is the point. You can do anything you want. Be as inquisitive as you can in a voir dire. People come in with an agenda and there is nothing you can do about those individuals, unless you are super alert. Thankfully, Innes came into the courtroom and I was able to pick up on that, but you are going to end up with problem jurors.

Now in this particular case, it was our objective to put on the jury prior mugging victims. We actually had eight of them; the District Attorney wanted to do the same thing. His feeling was, and this is a guy from Iowa by the way, the Assistant District Attorney, so he really had a sense of what New Yorkers were all about. He wanted to put on the jury prior mugging victims because he wanted to argue to them, you didn't have to shoot somebody, Bernie Goetz didn't either. We wanted prior mugging victims on the jury so we could argue that Bernie Goetz, and if you have read the Goetz decision you will know what standard of reasonableness of the hybrid objective subjective standard is, was someone who was able to perceive faster than the next individual because of his experiences, the body language, the nuances, what it meant to be surrounded in such close quarters. By the way, we took the jury into the subway during the course of the trial, and we ended up having a greater sense of what these jurors were about. Sure, they couldn't shoot somebody when they were mugged, but as each one said to us afterwards, it was because we didn't have a gun. So obviously, in this case, we were much more aware than the prosecutor, and that gave us an advantage of the sense of where New Yorkers' heads were.

I recommend to you and I'll have this outlined for dissemination, there is a Brigham University Law Review article, which reviews the book by George Fletcher, *Legitimacy of Vigilanteism*.[22] It says that, let me just quote this because I think it is important, "It is merely a vicious canard to suppose that Goetz's actions were motivated by racism. Support for Goetz was multi-racial. Roy Innes, the black director of the Congress of Racial Equality, has been a dedicated Goetz defender. Had Goetz's motive been racist, such support would be unthinkable."[23] It goes on to point out that each of these individuals, clearly in their own communities, had created a great climate of fear prior to this incident. They were hated, and quite frankly we're told statistically these four youths, as a result of their ultimate injuries some of them were obviously put out of commission, the crime rate in their particular neighborhoods had diminished appreciatively, and this was told to us by African American individuals who came in support of Goetz during course of the trial.

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[22] Lloyd R. Cohen, Book Note, *The Legitimacy of Vigilanteism*, 4 BYU L. REV. 1261 (1989) (reviewing GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988).
[23] *Id*. at 1264.

So, what created all this media hype? The District Attorney did, and the attorneys for the kids who were shot: guys like Bill Kunstler and my good friend, Ron Kuby. These are activists; and joined by Al Sharpton, who was at our trial every day, who obviously have their own agendas and this fit into that pattern. However, you have to understand what happened.

The first grand jury that heard this case did not indict Goetz for shooting offenses, only for gun possession. As a matter of fact, when we later picked the jury, the first question we asked any prospective juror was, can you distinguish between the unlawful possession of a weapon and its lawful use under appropriate circumstances? Those that went like this [makes a gesture, scratching his head] they were gone, but those that said, I think I know what you are saying, and we asked further questions, those are the ones we put back into the voir dire pool. So, we had very smart jurors because we were giving them very esoteric legal principles and very sophisticated, scientific, forensic, ballistic and medical evidence that ultimately was propounded by the defense.

The first grand jury did not indict for the shooting because the climate was this man was a hero. Goetz's videotape confession, which by the way we later disproved at trial as having actually captured the reality of the moment, was that I think you may have seen news reports about. He said that, I stopped shooting, I looked around, I saw the fifth kid, I went over to him and I said you don't look so bad, here's another, and I shot him. That never happened. We proved that at trial. But that, in Goetz's transcript of his statement, was put in the public file by the District Attorney's Office during the court appearance on the first gun charge, and so knowing that this file was captured everyday by the media, gone through with a fine tooth comb, well that just hit the papers that night. It was all over the news; you don't seem to be so bad here's another. Within three days Goetz was no longer the seventy-five percent hero. His ratings, and these polls that were taken almost daily, at that time were dwindling, and the climate was now correct for the shooting victims' lawyers to start shouting from the rooftops, for the activists to do that, and the District Attorney ultimately succeeded in getting an indictment for the shooting related defenses. The District Attorney exploited the situation and this was the District Attorney's agenda because this was a case that was literally tried in the media. It was tried in the newspaper and we had to respond, but if you go through all the interviews, the videotapes of every news conference that defense attorneys held, race was never mentioned. It was simply not our agenda, and as I said before, we had two African Americans on the jury. One of them was a bus driver, a great juror and he was actually a champion for Goetz in the jury room. Why? Because he drives a bus; he sees this group of kids every day, white, black, purple, yellow, and he sees groups of four traumatizing other people on the bus. Remember, this is not 2008. This is 1984 where crime was simply rampant.

So, what was the evidence at trial? Each of the nine subway witnesses who testified, black, Hispanic, white, all called by the district attorney, talked of Goetz being surrounded and hearing shots in a very important phrase that we exploited on cross examination, "rapid succession." There was no rapid succession of three or four shots followed by a break and then followed by a fifth shot, so Goetz's confession is already suspect because all of the shots --boom, boom, boom—were made in the course of one second, maybe two seconds. Every subway witness said that. The proof that actually showed this was from one of the African American women on the subway, who was with her husband and her infant. A res gestae utterance

statement was admitted by the District Attorney where she said to her husband, look at those four guys messing with the white guy. She said that to her husband, and then after the shooting she said to her husband, "Those punks got what they deserve." This was a black woman testifying. This is powerful evidence in a case that is supposed to be about a white guy shooting black guys.

In fact, because of the events depicted in the confession -- by the way, I could have moved to suppress that confession, but I knew I wasn't going to have my nutcase client testify because he was an unguided missile. So, I had, I was, I could have suppressed this confession in a heartbeat because he said right in the beginning I don't want to talk to you, and I want, I think maybe I should see a lawyer, and they just ignored that and went ahead. Now, if you've studied confessions in criminal law you'd know that under New York law, that's it, you have to stop questioning, but we wanted that in. This was a powerful, powerful piece of evidence. An hour of pure, unbridled emotion by someone who had been on the lam from December 24th to December 31st, surrendered himself in New Hampshire and just unloaded about New York, about his experiences in the past, about what happened to him in the subway, about his mindset and not one word about race. That confession was powerful for the defense. The prosecution put it in because he admitted the shooting, so they needed it, but for the defense it was just as powerful.

So, we had the subway witness talking about rapid succession. The ballistic evidence all showed that the bullets, contrary to what Kunstler and Kuby were saying, did not shoot one of the kids in the back. What we proved was he was facing Goetz, he was lunging forward and the bullet went down his neck, not from straight on in the back but from the bent perspective of going over his head into his back, down his back. Now the most important witness, for what we did prove was Darryl Cabey, who unfortunately was paralyzed and his life is now obviously ruined. We proved that he would not have been shot straight in the front, which if Goetz's confession had any validity would have been the case. His bullet was through the left side going right across his body severing his spinal column. We had a demonstration twice in the courtroom. Once was by four guardian angels, and that caused an uproar because Curtis supplied me with the largest African American guardian angels he had in his group and they were the ones who demonstrated this, so we got criticized for doing that by the District Attorney. The second demonstration was by our ballistics guy and we used court officers. But, the point of it all was that we proved forensically that each kid was facing Goetz, and that Cabey, who was all the way to the right in this circle, was the fourth. Goetz started shooting left, left, right, right, and Cabey by that time had enough time to start turning this way. He was right in the corner of the subway. He caught the bullet and fell right in his seat; no bullet in his front. We proved through the rapid succession of the shots, the testimony of our ballistics guy and our medical examiner, who recreated this, that, this was completely contrary to Goetz's confession.

We urged the jury to disprove Goetz's confession, to ignore it, and then we had the piece de resistance, we had a witness who is an expert, a psychiatrist, on the autonomic nervous system. Now, you have heard of these trials. I got so many calls from so many lawyers after this trial that had similar situations. The Diallo case, forty-one shots and they were acquitted. Why? Because this type of evidence shows that when you are in a stressful, fight or flight situation, the body really goes into what is called automatic pilot. The mind shuts off, the body takes over, and police officers in shooting incidents when being debriefed will say, I only shot once and they will pass a lie detector test. Not only will they have emptied out their guns, but some of them

will empty out, change their magazines and fire another round, and they will think they shot once because they have no cognizance of what they are doing, which is why you have heard of acquittals in cases like that.

Well that is also what happened with the evidence we have in the Goetz case. The automatic pilot explained the rapid succession; it explained that Goetz had no recollection of how many shots. He thought he actually fired a fifth, but he was imagining. He was imagining because in his prior incidents of being a victim, that's what he fantasized he would have done, and he projected that to this moment, and that's what we convinced the jury to believe.

So what is the most gratifying thing that came out of the case? You have to understand that this is four years of my life, up to the court of appeals three times. You've all read, I assume, *People v. Goetz*, in 68 New York Second 96.[24] Until 1986, when the Court of Appeals decided this case, the law in New York was purely the subjective standard. That was, what did the person personally believe, so with the second grand jury, the District Attorney was trying to push the envelope; he instructed the grand jurors that, if they find that a reasonable person would not have had a need to shoot these individuals, you would have to find the justification was not available to explain Mr. Goetz's conduct. The grand jury indicted. When I got to see the grand jury instructions that the judge gave me, I fell off my chair because that was contrary to law at that time. I made a motion to dismiss the indictment. Justice Crane, in a decision that was on the front page of the New York Times in January of 1986 dismissed the indictment. The Appellate Division upheld that decision three to two saying that, the District Attorney gave the grand jury erroneous legal principles that impaired the integrity of the grand jury and caused severe prejudice under 210.35 Subdivision five of the Criminal Procedure law.[25]

It went up to the Court of Appeals. My argument was that there has to be a subjective test because what happens if you have a four foot person who is surrounded by four or five-foot people. He is going to feel, intimidated, whereas a six-foot person perhaps wouldn't. So, you have to understand what the personal circumstances of the accused are, and if you use an objective standard, you can't possibly have a jury or a fact trying body relate to that individual. Well, Judge Wachtler, in his infinite wisdom, concurred in by the other six members of the court, created a new test, this hybrid test. But what was so gratifying about it was that under the hybrid test, first the jury has to define what the defendant personally believed, and then the jury is instructed to find what a reasonable person in that individual's place would have believed. What do they use to determine that? You would use the prior experiences of that individual, his prior muggings, his or her size in relation to the assailants, and the like.

So, I had input in creating law because my arguments were accepted to the extent that the opinion had to contemplate, at least to some degree, the personal situation of the defendant, and that is very gratifying. I am an appellate lawyer. When a decision is issued by an Appellate Court, reduced to a written opinion, and you can see that your arguments are accepted and becomes, precedent for future cases, there is nothing more gratifying. So, to those of you who are contemplating a career in litigation, I suggest and I recommend that you come to my side of the bar. I think I went over my time but that is where we are.

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[24] People v. Goetz, 68 N.Y.2d 96 (1986).
[25] N.Y. CRIM. PROC. LAW § 210.35(5) (2008).

PROF. RICHARD KLEIN: I think no lawyer wants to say that what happened, the reason the acquittal occurred, was because of jury nullification, but rather, the prosecution just didn't prove their case. Do you think here, that really, that self-defense was made out because the threat was imminent and the defendant's use of force was not excessive, or do you think the jurors basically just saw this guy and nullified the law?

MARK BAKER, ESQ.: This jury deliberated for almost two weeks. It came back with more notes than I can remember. Speaking with them afterwards, and I attended a couple of reunions of the jurors, they talked about Jack Reasonable, and they had a dummy they used in the jury room, and they were recharged on the concept of justification and the hybrid standard three times at their request, so there is no doubt in my mind this was not jury nullification. They did not disregard the law, disregard the facts, and say we like this guy and he is going home. Clearly they were of the view that, given the standards that they were instructed upon, Goetz's justification was not disproved beyond a reasonable doubt.

PROF. RICHARD KLEIN: Some of the jurors even wanted Goetz's autograph after the trial?

MARK BAKER, ESQ.: They got it.

PROF. RICHARD KLEIN: One other question. Ccould you talk a bit about the cross examination of the kids who were shot?

MARK BAKER, ESQ.: The one who really destroyed the case for the People was James Ramseur. Ramseur, by the way, subsequent to being shot, committed a horrid rape on a rooftop in Bronx County for which is he was ultimately convicted and sentenced to twenty-five years. He was brought down in handcuffs to the courtroom. During his cross examination he was getting so heated up towards Mr. Slotnick that he started to reach for his shoe, because he wasn't wearing his handcuffs at that point, and by my recollection, about eighteen court officers surrounded him and grabbed his hands. At that point, when he was settled down, he refused to continue and so on the big decision we made, between Slotnick and me, we had a disagreement. Barry wanted to have his testimony stricken because he was not able to be cross examined, so his direct testimony, would be stricken because he was not able to be confronted because of this episode. I wanted the testimony to remain in the record because it contributed to my legal argument at the end of the People's case that justification was not disproved beyond a reasonable doubt by virtue of his admitting that everybody was surrounding Goetz. However, eventually we agreed to not have it stricken because the jury had seen all of that and we knew it was going to go to the jury. That was probably the most dramatic episode in the trial.

PROF. RICHARD KLEIN: So, he lost it. In other words, Ramseur lost it as a witness.

MARK BAKER, ESQ.: So, the jury got to see the same kind of guy that Goetz saw on the subway, basically. He saw that temper and then when we got a court order, we actually stopped the New York subway system. I got a court order from Judge Crane, which I served on the MTA, and they rolled two of the similar cars that Goetz was on under the city hall station, which hasn't been used in fifty years, and we brought the jury down into that train. So, they got to see from

the perspective of a juror, who heard all this evidence, that little corner of the train where one guy would have been sitting and four guys surrounding him. Thus, they got to appreciate the close quarters that Goetz found himself in.

PROF. RICHARD KLEIN: To what extent was it a calculated defense strategy to get Ramseur to lose it, to get him so ticked off?

MARK BAKER, ESQ.: Absolutely. We wanted the jurors to see these kids. I mean, I had a photograph of each kid blown up because we knew they were going to come in with ties and shirts. But we had mug shots of them. I had them blown up on big posters and we were looking for a way to introduce them. All of a sudden, the District Attorney said to Troy Canty, the first kid that was shot, the one that approached Goetz and said give me five dollars, you didn't look like this in 1984 because he was wearing a coat and jacket and he says not really. So, I went like this to Slotnick, and said this is what you are going to do and told him how to get it admitted. So, he gets up on cross and he said, now you told the District Attorney this is not what you looked like in 1984, is this what you looked like? And he showed him his mug shot. Yeah, that's me. And is this what Mr. Ramseur looked like? Yes. And Mr. Cabey? Yes. And Mr. Allen? Yes. We offered them all into evidence. We had four posters of mug shots blown up by three feet by five feet facing that jury for seven weeks. Every morning the District Attorney would come in and put the posters under the table, and I would come in after that and pick them up and put them back up on the table to the point where the judge said all right enough already. But clearly, you know and as I said, they were violent photographs and that was the atmosphere we tried to create.

PROF. RICHARD KLEIN: Fred, do you want to make any comments?

FREDERICK BREWINGTON, ESQ.: Yes; I was one of those lawyers that were raising the issues and holding the press conferences for Darryl Cabey because I was in Vernon Mason's office at the time, and one of the things that was pretty clear was that, and again defense counselor has a very important role and an important responsibility to provide your client with the best possible defense that you can put on within the confines of the law, and we understood that was going on, but that still left an enormous amount of unrest in the community and a lot of the communities because of the fact that Bernhard Goetz had done, what he had done, was not simply seen by all people as being an act of a vigilante who was justified particularly when he had had experience firing and had basically planned this thing out waiting for it to just happen. There were a number of issues or arguments that we made. Essentially he talked about being able to squeeze off five rounds from this gun, this .38 caliber, in one point six seconds, and in doing it in such a way that it was almost strategic, if not surgical. So, there was a lot of question that was going on about that at the time in the several communities, Reverend. Sharpton, the City Sun, remember that paper, the City Sun and…

MARK BAKER, ESQ.: That was another one my jurors didn't read.

FREDERICK BREWINGTON, ESQ.: Yeah, well sure. It was a good one. They had the greatest headlines. It was the City Sun that was the New York Post of Queens and Brooklyn for the African American community, but at that time, one of the big issues that was really clear in a lot

of aspects was that while the defense was pulling back off the race issue, and I think that was a very smart move on the part of the defense, there was a real concern that even though it was not fully spoken or it was not something which was obvious that race did play an issue here or was part of the issue here, and it didn't creep completely into the case, but it most certainly did fuel a lot of things that were going on from a societal standpoint at that time, from a community's standpoint and still to this day I think leaves a lot of unrest in a lot of hearts because when we look a case such as John White, bringing you back to the John White case, the ability to be able to just dismiss that becomes so easy, becomes so convenient, when with John White, what happened and why those individuals felt free to be able to go to John White's house, maybe the way these individuals Mr. Cabey and Mr. Canty felt free to go to Bernhard Goetz. There may have been issues in why Bernhard Goetz felt it was okay to pop off five shots on these young men and whether it or not it would have happened if it were just anybody else we don't know, but those were questions that did resonate at that time back in 1984 and both certainly bear a mark on where we are in 2007 and 2008 as we dealt with the John White case.

PROF. RICHARD KLEIN: Ok. Thanks so much for coming. I do think that this discussion, I think it would have been entirely appropriate and possible to have the days long symposium dealing with these issues, and I think that the Journal is going to go ahead and publish something concerning again these two cases but go ahead.

QUESTION AND ANSWER SESSION

CHERICE VANDERHALL: Does anyone have any questions?

AUDIENCE MEMBER: You talked about the antique gun. If I had some kind of antique gun, it would have never been loaded. That doesn't seem--

FREDERICK BREWINGTON, ESQ.: He never unloaded it. He got it at the time of his grandfather's death. It was passed on to him. He never unloaded it or used it in any way. It was as he had gotten it. He kept it up. He put in on the shelf saying he would do something with it. He actually had planned to register it at some time. He just never did it.

PROF. RICHARD KLEIN: After having it for how many years?

FREDERICK BREWINGTON, ESQ.: He had it for a long time, sitting up there on the shelf.

CHERICE VANDERHALL: I'm sorry there is another question right here.

AUDIENCE MEMBER: Very often it is said that we look at race in too instrumental a fashion and not look at it structurally. I was a kid here in 1973. Any one who lived through 1984, who lived through Reagan, Koch, Giuliani, "Death Wish" and that period of time cannot tell me, cannot honestly believe that race was not an issue in that courtroom.

MARK BAKER, ESQ.: It was.

AUDIENCE MEMBER: The problem with the White case is that Goetz is bad law. Goetz is the product of a racist society. *Goetz*'s law, the jurisprudence of Goetz, is the product of a racist society. I don't know what was in his head. The result that came about has produced a situation in which powerless people, black folk, have to defend ourselves with a legal system that minimizes our victimization since 1619. Black people always must lose. *Goetz* is bad law. We need to go back to the standard the way it was. We have produced, a standard that we have to lose. The problem with the White case is the jury got it right.

MARK BAKER, ESQ.: Well, I respectfully disagree.

AUDIENCE MEMBER: The jury, the jury--

MARK BAKER, ESQ.: I have had people acquitted.

AUDIENCE MEMBER: The jury in the *White* case got it right. *Goetz* was incorrect. That's the problem with the jurisprudence of these two issues. Until we recognize that when you put up those pictures of those kids, you in fact played on the racist feelings and presumptions of that jury. That's what you were doing. That's what race is. That's how race works. By the way, that is why I am so upset. I spent six months of my life, every Thursday outside his house and if there is a God, that man will suffer for it, if there is a God. Black life is cheap. Those four kids' lives were cheap. Mr. White's life is cheap.

MARK BAKER, ESQ.: I don't agree. I think the opinion in the *Goetz* case, the standard of justification and reasonableness, I respectfully disagree is a race neutral standard. I have been involved in three trials since then, two of them involving black defendants who were acquitted with that instruction. That's number one. With respect to the photographs, we had no choice because the boys were brought into court and portrayed as choir boys, and they were not. So, we had to react to that. That was the way to do it. I didn't create this episode. The scenario developed on its own. We had to deal with what we had. We acted as responsibly as we could to try to diffuse the racial issue. The racial issue on the other hand was fanned by the individuals on the outside who represented the kids, the District Attorney, and those who wanted to make this into a race case because that was the necessity at the time.

PROF. RICHARD KLEIN: But I think part of Patrick's point was, and you started off this discussion by saying that the case wasn't about race, is when you show to the jurors and when you try to use every trick possible to show to the jurors the four pictures of these black kids and the contrast with the white defendant sitting there, aren't you then trying to have the jurors respond in some way?

MARK BAKER, ESQ.: Well, I read the Canons of Professional Ethics very carefully, and I am supposed to zealously defend my client. My client was charged with shooting four kids, who happened to be black, and I had a lot of people screaming every day in the newspapers, which these jurors were reading, because they weren't sequestered until deliberations, and they could be voir dired every day until the cows come home. However, they read this stuff. We had to

counter adverse publicity they had to deal with, and if that is how we had to do it, that is what we did. I didn't create the color of their skins. I just was just given photographs of their mug shots. They each had criminal records. These were really dangerous kids, especially Ramseur, he was the scariest one of them all, given what he had done after the shooting. If those are the cards I am dealt and I have to represent my client zealously, what am I supposed to do? I will say this; I wanted the jury verdict to have credibility whatever it was. We wanted African Americans on that jury because we wanted to have credibility, because we were sensitive to the political issues, and we wanted to have the results that we had where we could point to two very smart, streetwise people who happened to be African Americans, who were Goetz's champions in the jury room. That was very gratifying.

FREDERICK BREWINGTON, ESQ.: Let me just add on because Patrick raises a good point and I think Mr. Baker also addressed it appropriately. One of the things that Patrick raised was that there is an institutional aspect with what we are dealing with here, and we as lawyers and advocates are unfortunately shackled. I hate to use that term on film, but shackled with the aspects of that institution, the limitations that come with that, and let me give you the institutional concerns from the other side, because Patrick again you raise a very critical point. I remember, I was probably standing next to you and I didn't know you at that time. But in this case, in the White case, we had learned that Daniel Cicciaro and his father had threatened an African American, to kill him and beat the crap out of him over a race car, and we went to the dealer and got the information. We went in and said, judge this shows that there is a racial onimus with regard to how these individuals will deal with black people, period. We were denied that piece of evidence to go before the jury, as well as others, the threatened use of guns to shoot another black person in a park, and things of that nature, and when we deal with rulings of people that are in control, as well as the institutional components of what is allowed and what is not allowed, and how they deal with them, they often times end up with both inconsistent determinations and rulings and also problematic issues, because if you have that evidence and you want to use it to be able to say look these are really the people we are dealing with can you put pictures up? Yeah, you can, but if you have evidence from testimony that this person was threatened as soon as they walked in, and the person said to him, may I help you, and they said I don't talk to n* and moved on, and then it raises a question of how consistent are we in the criminal justice system when we are really trying to so-called get it right, and we get it so wrong so often.

MARK BAKER, ESQ.: But we are not supposed to be social scientists; we are supposed to be advocates. We have to use the tools at our command to represent our clients as zealously as possible within ethical constraints.

FREDERICK BREWINGTON, ESQ.: And try to do some good along the way.

MARK BAKER, ESQ.: Absolutely.

AUDIENCE MEMBER: I just wanted to ask in the John White case, I understand that he had told his wife to call the police and there was talk about that. But did it ever come up during the discussion of the case what happened about the issue of race and mistrust of the police, and I

know that she had called about the garbage can, but in serious criminal situations there is an issue, mistrust of the police.

FREDERICK BREWINGTON, ESQ.: That most certainly is true. In this situation it did not come up because that was not even an issue because she didn't even think about it at that point.

AUDIENCE MEMBER: Why didn't he himself choose to call the police?

FREDERICK BREWINGTON, ESQ.: He thought the police would be coming and in the interim he was going to stave off the attack, and soon the people, the cavalry would be appearing. One of the things that became clear was that John White said, not only did he tell his wife to call the police, but he said by the time the police got there, they would have already been in the house, and that was his concern that they were going to enter his house because they had already threatened that if you don't come out, and I didn't tell you all the quotes, but if you don't come out, we are going to come in and get you.

CHERICE VANDERHALL: Are there any other questions?

AUDIENCE MEMBER: Given all these trials are so politically charged, what thought, if any, did you guys give to having a bench trial instead of a jury.

MARK BAKER, ESQ.: No way in hell. No judge would have had the judicial gonads to have acquitted this guy in that climate, especially an acting Supreme Court Justice, who could be knocked down to criminal court at the whim of the administrator of the court.

FREDERICK BREWINGTON, ESQ.: And my answer to that is no way in heaven, because we were in Suffolk County and the realities of Suffolk County are quite different from the boroughs of the City of New York, and that is again another institutional and political reality that we had to take our chance thinking we might be able to get at else one or two open minded individuals on the jury who might help on the acquittal, or else hang. We did, but they got beat down because it was two days before Christmas.

CHERICE VANDERHALL: Any others?

AUDIENCE MEMBER: Just to clarify, so your position would be then that Bernhard Goetz, a white male, should be in jail for shooting four black youths that surrounded him, but Mr. White shouldn't then go for shooting white children. I think that there are extremely clear parallels between the two.

MARK BAKER, ESQ.: I assume that is to Fred.

FRED BREWINGTON, ESQ.: Great question, and let me tell you why there may be a little flaw in the reasoning on that. My view here is that John White says that he emerged to try to be a peace keeper, to try to tell them to get away. There is no question, from at least three witnesses, that he turned and the gun was grabbed. One of the people said he had it in their face at one time and that it came down and then came back up, so there is a question there that exists. Bernhard

Goetz goes into the subway with his gun strapped on him waiting for something to happen, with his speed shooting training. Again counsel can speak about this, he had essentially kind of prepared for that particular set of circumstances. At that point, it was not through any struggle over the gun or anything like that. He popped off the five shots, in full view, with the intent to shoot these individuals. John White, clearly in his defense and pretty much everything that we thought was credible evidence before the jury, indicated that he did not intend to shoot anybody and at the time that the single shot was fired, it went off at a time when he was turning to go back into his house because he was saying these guys are punks, they are not going to do anything.

MARK BAKER, ESQ.: But Goetz used to carry his gun all the time and never used it.

PROF. RICHARD KLEIN: It was loaded?

MARK BAKER, ESQ.: It was loaded. This was his security blanket and having been through what he had been through in the past, including having been thrown through a plate glass window, and having been severely beaten up earlier. I'm not about to pass judgment on him or anybody in that situation, but he certainly did not go on that subway looking to be confronted.

FREDERICK BREWINGTON, ESQ.: He has given interviews since then, and I know you are not responsible for that.

MARK BAKER, ESQ.: He says more stuff.

FREDERICK BREWINGTON, ESQ.: He's kooky. Again, really, I mean the camaraderie that exists in the front of this room is really important. We are both required to do our job and try to do it the best that we can in the circumstances that we choose to undertake, but also are faced with. It is not easy defending in any of these high profile cases . . . death threats. I mean, Aaron was not the only one that had to have bullet proof vests in that case. The concern particularly in a case such as this is that you are dealing with all types of elements that you have no control over. Yet, you're still asked to do your job. That's a good lesson for all of you who are advocates in this room, that the responsibility that you have is to represent your client zealously within the confines of the law to the best of your ability, and at some point when we look at defense counsel and I say ah man you played the race card, I also have to say, hey, you were defending your client. Do I always accept it? No, but at the same time we have to understand it.

CHERICE VANDERHALL: I think we have four more questions.

AUDIENCE MEMBER: It seems that the attorneys are trying to distinguish the cases, and in the Goetz case, seems like he was kind of, sort of, the victim of previous muggings, and the people who he shot were actually accosters. Then in the White case, it seems like although Mr. White wasn't himself, I'm not sure if that was clear, but himself a victim of some kind of violent attack, the people who he shot you try to admit evidence that they constantly accosted other people, so would it then be fair to say that a person who has some kind of knowledge that, they are more susceptible to having things happen to them, can just kind of whip up that card. I felt, in my mind, I was threatened because I am a woman, or I am this, or I am that, or whatever reason, not

having to do with race. Just on your own personal perceptions of what has happened to you in the past, does that seem to be a standard?

FREDERICK BREWINGTON, ESQ.: That is part of the justification defense. That is essentially it. That you will experience as lawyers. Your experiences help to shape your ability to be in fear of immediate physical danger or death, and that utilizing that as part of the defense is now available.

MARK BAKER, ESQ.: Right, that's the case that sets the standard.

AUDIENCE MEMBER: I would be interested to know if Mr. Goetz continued to carry his weapon after he shot them.

MARK BAKER, ESQ.: I have to tell you something. He was sentenced originally to a split sentence of six months and to be followed by four and one-half years probation, and that is an illegal sentence in New York because the judge was trying to fashion a longer period that Goetz could be under supervision. He didn't want that; there was no way in hell he wanted to be under supervision for four and one-half years because of that, so I argued on appeal that the sentence was illegal and he should be given a year and everybody thought we were crazy, but this is what my client wanted. So, I got the District Attorney to consent because we were right on the law and the judge was trying to be creative to try to stretch out a sentence, not of incarceration but of supervision, where Goetz wanted to just get the time out. So, he went in, did eight months in Riker's Island. Then he was finished and he didn't have to deal with the probation officer for four and one-half years because he never would have gotten through the metal detectors.

CHERICE VANDERHALL: A question back left.

AUDIENCE MEMBER: With regard to the White case, putting yourself in the driver's seat, how do you explain there has to be an imminent threat, so if there is an imminent threat, would you think to put on your pants before you grab your gun, or as when you are grabbing the gun, would you have the time to think, oh well, should I use this gun, I should use the other, when there is an imminent threat, do you just react immediately without thinking about all that?

FREDERICK BREWINGTON, ESQ.: You are asking me that question, and I can't simply put myself in the place of John White. It's very difficult for anybody to do that, but in this situation, at the point that he was putting his pants on, he was trying to figure out what he had to do to save both his family and his household. The imminent threat was one in his mind that likened back to, has anyone ever seen the movie "Mississippi Burning?" That is how he described it and understanding what had been passed down to him from his uncles and aunts that at this point he saw those silhouettes coming up the driveway he in his mind said they are coming to get us, that was the imminent threat. They were not in the house. They had not broken the window, but he felt that once they entered the cartilage, that is property 101, and started coming towards the house where he and his family were at that point. The justification defense is one that does require some both elasticity and some evaluation as you look at it, and that was his state of mind. Really, your question is a good one because when we look at what John White was thinking, that

is exactly what we have to ask. We have to say, what was he thinking, as opposed to dismissing it, and saying, "but I would have." That's really is what jurors are required to do.

AUDIENCE MEMBER: I was going to just touch on what you were saying and say that the whole grabbing the gun and walking outside, you have to understand these are nineteen-year-old boys. I mean, I have a nineteen-year-old brother, who if he was accused in a dispute with somebody, I mean, I guess you can't say my father would not take a gun out. I just think that his bringing a gun out, and then his son seeing it and grabbing a rifle and there he and his father were standing there with the guns. I think for him to have brought that gun out there and not try to solve it even with his fists, if he had to and maybe he would have gotten assault instead of murder, for him to bring a gun out there was reckless; it wasn't what a father should do. Look what he is teaching his son. Now, every time there is a dispute, and you think that your life is being threatened, you have to grab a gun. I am just saying now a boy is dead, and you are saying that he should get off because he was scared.

FREDERICK BREWINGTON, ESQ.: I am not saying anything.

AUDIENCE MEMBER: I'm not saying you. If you are saying he should be acquitted of the charges.

FREDERICK BREWINGTON, ESQ.: Let me take your question and field it this way. When you see people coming to your home and they have already threatened to kill your son, do you know what they have in their hands? Do you know what you are going to face coming out of the house, fearful that you are going to be trapped in your own house? The ability to simply dismiss what John White thought and felt is part of the concern in that case. I understand your question, but the real question is, and I have to throw back at you, in this situation when John White the father, the adult said to these drunken young men, go home, get off my property, and get the hell out of here. When they told Aaron to go home, he did everything except say, yes sir, boss. These individuals said, "f* you," you tall, old black n* "we'll f*" you and your wife too." How was someone in this society supposed to deal with that when the disrespect to you as an African American man comes out of someone's mouth, and you don't fear for your life? That's tough.

AUDIENCE MEMBER: Then you call the cops in that situation.

FREDERICK BREWINGTON, ESQ.: In that situation, you hope that the cops are coming, but when they are there threatening you and you don't know what they have because remember, the headlights are still in your eyes, and still the jury did not even consider the fact that they did bring a weapon. They just said that they never took it out of the back of the car.

MARK BAKER, ESQ.: Was there a duty to retreat charge on that case since you were on the curtilage of the house?

FREDERICK BREWINGTON, ESQ.: No, there was not.

AUDIENCE MEMBER: I have a question. You always read these cases, and for some reason, the Goetz case for one, always assumes the fact that that happened, the fifth shot, oh, you are not done, and yet, I am going to shoot you again, which kind of changes our mind --

MARK BAKER, ESQ.: That was from the grand jury testimony, not the trial testimony.

AUDIENCE MEMBER: Okay, from the grand jury testimony. I am trying to figure out what was the theory then that the fifth shot was done with it. Just rapid succession two shots into one?

MARK BAKER, ESQ.: Five shots the last one went into the wall of the subway car.

FREDERICK BREWINGTON, ESQ.: Or the fourth one did, the fifth one hit Darryl and the last shot over Darryl --

MARK BAKER, ESQ.: It was the fifth shot. It went over his head. Darryl got hit with the fourth shot.

FREDERICK BREWINGTON, ESQ.: Oh, okay. Well, my understanding was the fifth. But, the whole thing of going to Darryl was there were no more guns, there were no more bullets in the gun.

MARK BAKER, ESQ.: So he said.

FREDERICK BREWINGTON, ESQ.: Yes.

MARK BAKER, ESQ.: But what you read in that opinion, which was the confession that the District Attorney introduced to the grand jury, was what was disproved at trial.

FREDERICK BREWINGTON, ESQ.: Yeah.

CLOSING REMARKS

PROF. RICHARD KLEIN: I think we are very lucky. This was a wonderful opportunity to explore some basic and crucial issues in Criminal Law. Thank you.