

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.