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.