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RACE AND THE DOCTRINE OF SELF DEFENSE: THE ROLE OF RACE IN  
 DETERMINING THE PROPER USE OF FORCE TO PROTECT ONESELF

Richard Klein\*

A valid and appropriate use of self-defense justifies the use of force against another, even when such force results in death.<sup>1</sup> But the force used must have been absolutely necessary in order to protect oneself, it cannot have been used as form of self-help or as a display of vindictiveness to retaliate against an individual who may be standing as a symbol for a group that has treated an individual in negative, hostile ways in the past. When Bernhard Goetz shot at 4 black youths in a subway car,<sup>2</sup> was it because he truly believed such an action was necessary in order to protect himself from the infliction of serious harm? And if indeed such *was* his personal belief, is that sufficient to justify his shootings or does the law require that the belief be a reasonable one supported by an objective standard? When John White shot and killed Daniel Cicciaro<sup>3</sup> did he have a valid self-defense based, in part, on his knowledge of the lynching's and attacks on blacks in the southern parts of the U.S. in prior decades?

Self-defense is classified as a necessity defense,<sup>4</sup> the individual claiming the defense must have had no available option but to attack the person who created the threat. And, as the Model Penal Code makes clear, the force that was used must have been “*immediately* necessary for the purpose of protecting himself.”<sup>5</sup> It is generally required that there must have been an overt act by the threatening individual that presented an imminent danger to the person who is claiming self-defense.<sup>6</sup> Any desire by an

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<sup>1</sup> An Act which causes the death of another may be deemed to be justifiable self-defense if done to protect one's own life. *See, e.g., People v. Randle*, 111 P.3d 987, 994 (Cal. 2005) (holding that a killing done in perfect self-defense is not murder or manslaughter, but justifiable homicide).

<sup>2</sup> *People v. Goetz*, 479 N.E.2d 41, 43 (N.Y. 1986).

<sup>3</sup> Corey Kilgannon, *Jury Convicts Man Who Shot Teenager During Driveway Confrontation*, N.Y. TIMES, Dec. 23, 2008, available at 2007 WLNR 26196645.

<sup>4</sup> The original language used in the 1964 New York State legislative study bill regarding self-defense used the standard necessity concepts of lesser and greater evils. Self-defense would apply when such “conduct is necessary to avoid a public or private injury or evil greater than that sought to be prevented by the law defining the offense charged.” Commission Staff Notes, N.Y. PENAL LAW § 35.05 (2009). The Model Penal Code provides that there is a valid necessity defense when “the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged” MODEL PENAL CODE § 3.02 (1962).

<sup>5</sup> MODEL PENAL CODE § 3.04 (emphasis added).

<sup>6</sup> *See, e.g., N.J. STAT. ANN. § 2C:3-4(a)* (West 2008) (“[T]he use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”); 18 PA. CONS. STAT. ANN. § 505(a) (West 2008) (“The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”). *State v. Norman*, 378

individual to use force to punish someone else for conduct others of his race may have previously engaged in, voids the claim of self-defense. A vigilante who feels the need to take the law into his own hands is a criminal. The desire to retaliate to make amends for past wrongs may be understandable, but our criminal justice system speaks clearly and in one voice: No citizen is to act as judge and jury and inflict punishment. Enforcement of the law and dealing with those who are violating the laws are for the police and the police alone.

Self-defense has been recognized as a valid defense throughout the history of our laws. Blackstone's Commentaries reports that "for the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting."<sup>7</sup> The defense applied to a threat of assault, not just a potential killing: "The defense . . . is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him."<sup>8</sup> And in New York, the penal statutes have, since 1829, codified the common law right to use physical force in self-defense.<sup>9</sup>

Self-defense is generally considered to be, as it is in New York State, a Justification defense.<sup>10</sup> Whereas defenses, which are labeled as Justifications, absolve the individual actor from any criminal liability for his conduct, the defenses considered to be Excuses have traditionally not led to the defendant's release from liability.<sup>11</sup> But the use of the phrase "justification" ought not to be interpreted as the criminal justice system's approval of what had been done, but only that the conduct engaged in was understandable and will be tolerated without sanction. The presence of justification does not in any way negate an element of the crime with which the defendant has been charged.<sup>12</sup>

The New York State Justification statute provides that an individual may use "physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person[.]"<sup>13</sup> Deadly physical force can be used only to defend oneself against the use of deadly physical force of another.<sup>14</sup> It may at times become an issue for the jury to

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S.E.2d 8, 12 (N.C. 1989) ("The right to kill in self-defense is based on the necessity . . . to kill [in order] to save oneself from *imminent* death or great bodily harm.").

<sup>7</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*181 (1765-1769).

<sup>8</sup> *Id.* at \*184.

<sup>9</sup> 1829 REV. STAT. OF N.Y., Part IV, Ch 1, Tit. II, § 3.

<sup>10</sup> See N.Y. PENAL LAW § 35.10 (2009).

<sup>11</sup> J. L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS ARISTOTELIAN SOC'Y. 1, 2-3 (1956-1957) as republished SANFORD H. KADISH ET. AL., CRIMINAL LAW AND ITS PROCESSES 738 (8th ed. 2007) (Hereinafter KADISH, CRIMINAL LAW.)

<sup>12</sup> KADISH, CRIMINAL LAW at 737.

<sup>13</sup> N.Y. PENAL LAW § 35.15 (2009).

<sup>14</sup> *Id.* at §35.15(2)(a).

determine whether the actor was truly confronted with the use of physical force that would be considered to be “deadly.” The New York State Penal Law defines such force as constituting “physical force which, under the circumstances in which it is used, as readily capable of causing death or other serious physical injury.”<sup>15</sup> As we shall see, the distinction between the accused use of deadly versus non-deadly force is crucial as to the obligation by the defendant to have retreated prior to the use of force.<sup>16</sup>

The Model Penal Code emphasizes the import of the defendant’s intentions when assessing whether or not he was using deadly force: “A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, as long as the actor’s purpose is limited to creating an apprehension that he will use deadly physical force if necessary, does not constitute deadly force.”<sup>17</sup> The New York Penal Laws, however, do not provide for such an interpretation based upon an evaluation of the motives of the individual who threatens another with the use of deadly physical force.

The most problematic requirement for one who is claiming self-defense is the need to show that the threat that was being responded to was an “imminent” one. Imminent is generally thought of as immediate; if the threat confronting the accused had been the use of future force, there was no immediate threat and self-defense does not apply.<sup>18</sup> If one acts in a pre-emptive manner to avoid even certain harm that will occur at a later date, self-defense is inapplicable.<sup>19</sup> In this respect, the law of self-defense is analogous to the requirements for the use of any other necessity defense.<sup>20</sup>

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<sup>15</sup> N.Y. PENAL LAW § 10.00 (11) (2009). The Model Penal Code defines deadly force as that which is used of the purpose of “causing or that he knows to create a substantial risk of causing death or serious bodily injury.” MODEL PENAL CODE, § 3.11(2) (1962).

<sup>16</sup> See e.g., *People v. Kruger*, 603 N.E.2d 743 (Ill. App. Ct. 1992), *appeal denied*, 610 N.E.2d. 1270 (Ill. 1993).

<sup>17</sup> MODEL PENAL CODE §3.11(2) (1962).

<sup>18</sup> *People v. Aris*, 264 Cal. Rptr. 167, 172-73 (Cal. Ct. App. 1989).

<sup>19</sup> *Id.* at 173.

<sup>20</sup> *State v. Norman*, 378 S.E.2d 8, 12 (N.C. 1989) (“The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from *imminent* death or great bodily harm at his hands.”) (emphasis added). The North Carolina Supreme Court held that in spite of the fact the victim had a history of assaulting his wife at any time, there was no imminent threat existing at the time that the defendant killed her husband and therefore, the trial judge had committed no error in failing to charge the jurors on the law of self-defense. *Id.* at 16. In addition to evidence presented regarding the mental abuse by her husband due to alcoholism, evidence was presented that she sustained regular assaults and beatings, including, “slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her.” *Id.* at 10. The defendant described other specific incidents of abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face.” *Id.* Further testimony revealed that “her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. . . . He routinely called the defendant ‘dog,’ ‘bitch,’ and ‘whore,’ and on a few occasions made her eat pet food out of the pets’ bowls and bark like a dog.” *Id.* He often made her sleep on the floor, and at times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant’s husband threatened numerous times to kill her and to maim her in various ways. *Id.* at 9-10. See also *Commonwealth v. Sands*, 553 S.E.2d 733, 737 (Va. 2001) (refusing to

Were the threats against Goetz and White truly “imminent”? To the extent that there has been any relaxing of the requirement that the threat be an imminent one, it has occurred in the context of the use of the battered woman’s syndrome.<sup>21</sup> It has been found that in 20% of the cases in which a battered woman kills her accuser, there was no direct confrontation occurring at the time of the murder.<sup>22</sup> In fact, 8% of the time the murdered husband had actually been sleeping.<sup>23</sup> But law reformers and women’s advocacy groups attacked the requirement of an imminent threat as being too restricting for the unique position that many women found themselves to be in.<sup>24</sup> A repeatedly battered woman may well be one who fears that the next attack could occur at any time; there was, so to speak, always the threat of an immediate attack.<sup>25</sup>

Were the threats against Goetz and White truly imminent or were the shootings by these men just a release of long-standing pent-up anger and hostility based, in part, on race? Were the shootings attempts to retaliate for past abuses that they or their families suffered from blacks (in the case of Bernard Goetz) or whites (in the case of John White)?

An additional requirement for a valid self-defense is that the force used by the actor not have been excessive.<sup>26</sup> Whereas it may have been appropriate and justified for an individual to have used deadly force to protect himself, was the force used in a manner that was disproportionate to the threat? Would a use of lesser force have accomplished the goal of protecting oneself? Did Goetz need to fire the fifth shot at Darryl Cabey, one of the would-be robbers who at that time was sitting at the end seat of the subway car?<sup>27</sup> Was it necessary for John White to have brought his 32 caliber Beretta out of his house and point it at the youths who had come to his home?<sup>28</sup>

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instruct the jurors as to self defense because the “evidence fails to reveal any overt act by [the defendant’s] husband that presented an imminent danger at the time of the shooting.”)

<sup>21</sup> See, e.g., *State v. Janes*, 850 P.2d 495 (Wash. 1993); *State v. Gallegos*, 719 P.2d 1268 (N.M. Ct. App. 1986).

<sup>22</sup> Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *State v. Kelly*, 478 A.2d 364 (N.J. 1984) (stating that expert testimony regarding battered woman’s syndrome is “relevant to the reasonableness of defendant’s belief that she was in imminent danger of death or serious injury.”).

<sup>25</sup> *Id.* at 376-78. The Court held that the expert may help the jury to realize that the battered wife “is particularly able to predict accurately the likely extent of violence in any attack on her.” *Id.* at 378.

<sup>26</sup> See, *State v. Clay*, 256 S.E.2d 176 (N.C. 1979) (holding that any force greater than that which is necessary to protect oneself from an assault will be deemed excessive as a matter of law); *People v. Colecchia*, 674 N.Y.S.2d 10 (App. Div. 1st Dep’t 1998) (holding that once the threat of deadly physical force dissipates, the use of deadly physical force is excessive), *appeal denied*, 702 N.E.2d 844 (N.Y. 1998); *People v. Stephenson*, 571 N.E.2d 943 (Ill. App. Ct. 1991), *appeal denied*, 580 N.E.2d 130 (Ill. 1991).

<sup>27</sup> *Goetz*, 497 N.E.2d at 43 (N.Y. 1986).

<sup>28</sup> Kilgannon, *supra* note 3.

If any one of the elements for the justification of self-defense fails, the defense is not valid.<sup>29</sup> The threat against the individual must have been one with the potential of causing serious physical injury, the threat must have been an immediate one and the force used in defense must not have been excessive.<sup>30</sup> Once the threat no longer exists, the necessity to use force has ended.<sup>31</sup> In *People v. Kruger*,<sup>32</sup> the court held that the right to use self-defense had terminated once the attacker had been shot and incapacitated because there was no longer any threat.<sup>33</sup> The second shot, which was fired, therefore, was not done in self-defense.<sup>34</sup>

In New York State, self-defense is deemed to be an ordinary defense.<sup>35</sup> Defenses, on the other hand, that are considered to be Excuses and not Justification defenses are labeled affirmative defenses.<sup>36</sup> The distinction is one of great import. For self-defense, the prosecutor has the burden of disproving the claim of self-defense beyond a reasonable doubt.<sup>37</sup> Whenever the defendant has submitted evidence of self-defense, the court must then rule whether, as a matter of law, the defendant's claimed facts if established would constitute self-defense.<sup>38</sup> The Court is required to view the evidence in the light which is most favorable to the accused.<sup>39</sup> There is no common law approach in New York to the defense, the requirements of Penal Law § 35.15 control.<sup>40</sup> If the defendant has raised a colorable claim of self-defense, the judge has the obligation to instruct the jury as to the requirements needed to establish the defense.<sup>41</sup> The justification charge that is required is

<sup>29</sup> *Patrasso v. Nelson*, 121 F.3d 297, 302-03 (7th Cir. 1997).

<sup>30</sup> *Id.* at 302 (citing *People v. Zolidis*, 450 N.E.2d 1290, 1294 (Ill. App. Ct. 1983))

<sup>31</sup> *Rorie v. United States*, 882 A.2d 763, 771 (D.C. 2005).

<sup>32</sup> 603 N.E.2d 743 (Ill. App. Ct. 1992).

<sup>33</sup> *Id.* at 745.

<sup>34</sup> *Id.*

<sup>35</sup> N.Y. PENAL LAW § 35.05 (2009).

<sup>36</sup> See Peter H. Lagonikos, *Affirmative Defenses Under New York's Penal Law*, 1998 No. 27 N.Y. Crim. L. News 1 (1998). See, e.g., N.Y. PENAL LAW § 40.15 (2009) (stating that it is an affirmative defense that the actor "lacked criminal responsibility by reason of mental disease or defect ..."); N.Y. PENAL LAW § 40.00 (2009) (stating that it is an affirmative defense if "the defendant engaged in the proscribed conduct because he was coerced to do so ..."); See also, N.Y. PENAL LAW §25.00 (2009) (stating that the statutory affirmative defenses shift the burden to the defendant to establish the defense by a preponderance of the evidence).

<sup>37</sup> *People v. Steele*, 260 N.E.2d 527 (N.Y. 1970).

<sup>38</sup> N.Y. PENAL LAW § 35.05(2) (2009).

<sup>39</sup> *People v. McManus*, 496 N.E.2d 202, 207 (N.Y. 1986).

<sup>40</sup> *People v. Magliato*, 496 N.E.2d 856, 857 (N.Y. 1986).

<sup>41</sup> See *People v. Khan*, 502 N.E.2d 987 (N.Y. 1986) (holding that the trial court erred in refusing to charge the jury regarding justification); *People v. Dare*, 562 N.Y.S.2d 251 (App. Div. 4th Dep't 1991) (holding that assault, a crime involving the use of force, warranted the justification charge when evidence was introduced to support it), *appeal denied*, 586 N.E.2d 67 (1991); *People v. Jones*, 538 N.Y.S.2d 876 (App. Div. 2d Dep't 1989) (holding that it was reversible error to omit the jury instruction permitting the jury to determine whether the force used by the defendant was deadly); *People v. Suarez*, 539 N.Y.S.2d 325 (App. Div. 1st Dep't 1989) (holding that the trial court erred in giving justification defense when the defendant's testimony supported self-defense); *People v. Ortiz*, 381 N.Y.S.2d 682 (App. Div. 1st Dep't 1976) (holding that the trial court erred in not giving justification charge because portions of both the defense and prosecution evidence could have been believed).

to include an explanation of the burden of the prosecution to disprove the validity of the defense.<sup>42</sup> The failure of the trial judge in New York to give the jury a justification charge is not to be deemed as mere harmless error.<sup>43</sup>

Some states hold it is not reversible error for the trial judge to fail to give the charge for self-defense if the defendant has not made a request for the jury instruction or has not presented evidence indicating self-defense.<sup>44</sup> In California, it is considered to be reversible error to fail to give the charge for imperfect self-defense when evidence has been introduced to support the defense.<sup>45</sup> Where self-defense is deemed to be an affirmative defense, the defendant may raise the defense only if he or the State presents evidence in support of the necessary elements of the defense.<sup>46</sup>

The burden for proving self-defense also varies according to jurisdiction. In some states, self-defense is designated as an affirmative defense that places the burden on the defendant to prove he or she acted in self-defense by a preponderance of the evidence.<sup>47</sup> The United States Supreme Court, in *Martin v. Ohio*,<sup>48</sup> upheld the constitutionality of requiring the defendant to prove self-defense by preponderance for the evidence; such a requirement was found not to violate Due Process.<sup>49</sup> Most jurisdictions follow the New York approach: self-defense must be disproved by the State beyond a reasonable doubt once evidence is introduced relating to self-defense.<sup>50</sup> The New Jersey Supreme Court in *State v. Gardner*,<sup>51</sup> however, has ruled that it is erroneous to place the burden on the defendant: “Once [the] proof appears either in the State’s case or defendant’s case in support of an allegation of self-defense, the State has the burden of proving that the defense is untrue. And that the State must do so beyond a reasonable doubt.”<sup>52</sup> Similarly, a California jury instruction in *People v. Cornett*<sup>53</sup> regarding self-defense was

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<sup>42</sup> *People v. Fermin*, 828 N.Y.S.2d 546, 548-49 (App. Div. 2d Dep’t 2007), *withdrawn*, 868 N.E.2d 239 (N.Y. 2007).

<sup>43</sup> *People v. Young*, 825 N.Y.S.2d 147, 151 (App. Div. 3d Dep’t 2006), *appeal denied*, 866 N.E.2d 465 (N.Y. 2007)

<sup>44</sup> *State v. Johnson*, 234 N.W. 263, 264-65 (Iowa 1931).

<sup>45</sup> *See, e.g., People v. Michaels*, 49 P.3d 1032 (Cal. 2002) (holding that imperfect self-defense is not an affirmative defense for murder; the claimed version of the facts would establish the elements of voluntary manslaughter), *cert. denied*, 538 U.S. 1058 (2003). *See also* Aris, *supra* note 18, at 1192 (stating that substantial evidence of self-defense must be raised in order for the judge to give the instruction to the jury.)

<sup>46</sup> *People v. Anderson*, 601 N.E.2d 831, 836 (Ill. App. Ct. 1992), *appeal denied*, 606 N.E.2d 1225 (Ill. 1992).

<sup>47</sup> *State v. Gillespie*, 874 N.E.2d 870, 873 (Ohio Ct. App. 2007), *See also* OHIO REV. CODE ANN. § 2901.05(A) (West 2008) (“The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.”).

<sup>48</sup> 480 U.S. 228 (1987).

<sup>49</sup> *Id.* at 233-34.

<sup>50</sup> *See, e.g., Commonwealth v. Walker*, 820 N.E.2d 195, 201 (Mass. 2005). *See also State v. Singleton*, 906 A.2d 725 (Conn. App. Ct. 2006) (stating that the only burden on the defendant is production).

<sup>51</sup> 242 A.2d 1 (N.J. 1968).

<sup>52</sup> *Id.* at 6.

<sup>53</sup> 198 P.2d 877 (Cal. 1948).

determined to be erroneous when the burden was placed on the defendant.<sup>54</sup> The jury should have been instructed that the homicide is to be found to have been justified if the evidence as self-defense raises a reasonable doubt of guilt.<sup>55</sup> South Carolina, however, departs from the majority and requires the defendant to prove by the greater weight of the evidence that he acted in self-defense.<sup>56</sup>

Courts and legislatures throughout the country have wrestled with the standard to be used in assessing whether or not the accused acted reasonably when he concluded that he was being threatened with the imminent use of deadly physical force. Should there be a subjective standard, wherein self-defense would be warranted as long as that particular individual believed he was threatened? Or, should the standard be an objective one, and only if a reasonable person would have felt threatened would the defense be appropriate.

The courts at three different levels in New York considered this issue in the Bernhard Goetz case. The New York State Supreme Court judge who was assigned to be the trial judge for Goetz considered a motion by the defendant to dismiss the Grand Jury indictment because of an incorrect instruction provided by the prosecutor as to the appropriate standard to be used in assessing the claim by Goetz that he was confronted with an imminent threat.<sup>57</sup>

As was stated by Judge Crane, “[t]he case presents a challenging question”<sup>58</sup> and the context arises from “one of the most difficult criminal cases of our generation”<sup>59</sup> which has “galvanized the world.”<sup>60</sup> The prosecutor had told the grand jurors that

So there’s both a subjective and objective element to this. First of all, you have to determine whether the defendant, in his own mind, believed he was in the kind of peril that permitted him to use deadly physical force. You must also then determine whether his response was reasonable under the circumstances, whether that was the action – the response was the action that he – that a *reasonable man who found himself in the defendant’s situation* and if it was unreasonably excessive or – or otherwise unjustifiable it – then the defense, would not be made out and the third element is retreat.<sup>61</sup>

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<sup>54</sup> *Id.* at 885.

<sup>55</sup> *Id.* Self-defense must be disproved by the prosecution beyond a reasonable doubt. The jury instruction contained the words “absolutely necessary” in reference to the elements of self-defense. The court on appeal held this to be prejudicial, possibly causing the jurors to believe the force must have been “actually necessary.” *Id.* at 881-82

<sup>56</sup> *See, e.g., State v. McDowell*, 249 S.E.2d 916 (S.C. 1978).

<sup>57</sup> *People v. Goetz*, 502 N.Y.S.2d 577, 579 (N.Y. Sup. Ct., 1986).

<sup>58</sup> *Id.* at 578.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 580.

The defendant maintained that the italicized language above incorrectly conveyed an objective standard.<sup>62</sup> Whereas the prosecutor contended that the hybrid standard was appropriate, Goetz maintained that the appropriate standard ought to be fully a subjective one.<sup>63</sup> Were the prosecutor's statement on this issue to be incorrect, the indictment would have to be dismissed.

The Court cited the following language for a requested justification charge which is contained in the New York Defender Digest: "The test the law requires you to use in deciding what this defendant was reasonably justified in believing is what this defendant *himself, subjectively*, had reason to believe – not what yourself or some other person might reasonably believe."<sup>64</sup> The Court concluded that indeed the prosecutor's explanation of the law regarding the justification defense was error and that "the error impaired the integrity of the Grand Jury and prejudiced defendant."<sup>65</sup> The Court did, however, provide permission to the prosecutor to resubmit the case to another grand jury.<sup>66</sup>

The Office of the Manhattan District Attorney appealed Judge Crane's order dismissing the nine counts of the indictment against Goetz.<sup>67</sup> Three months later, the First Department of the New York State Appellate Division considered the matter.<sup>68</sup> Once again, language was used to highlight the import of the Goetz prosecution: "This appeal poses a *critical* legal issue in a *most significant* criminal case."<sup>69</sup> The court found it necessary to cut through the "confusion"<sup>70</sup> and "the rhetoric"<sup>71</sup> and the "media sensationalism"<sup>72</sup> and "heat"<sup>73</sup> that have surrounded the matter.

The Appellate Division once again focused on the need for the grand jurors to have realized that it was the subjective state of mind of the defendant that was of crucial import.<sup>74</sup> It was the moral culpability of the defendant that determined liability,<sup>75</sup> and it was improper to resort to the standard of the reasonable person used in civil cases involving claims of negligence.<sup>76</sup> The prosecutor's instruction to the grand jurors was not

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<sup>62</sup> *Goetz*, 502 N.Y.S. 2d at 581.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 583

<sup>65</sup> *Id.* at 584.

<sup>66</sup> *Id.* at 585.

<sup>67</sup> *People v. Goetz*, 501 N.Y.S.2d 326 (App. Div. 1st Dep't 1986).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 327 (emphasis added).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Goetz*, 507 N.Y.S.2d at 327.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 318.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 323.

a fair statement of the law of self-defense, and the indictment needed to be dismissed.<sup>77</sup> An angry dissenting opinion maintained that the court's ruling would give "legal excuse to any hot-tempered individual, fearful neurotic or simply excessively self-righteous person who rashly uses deadly force."<sup>78</sup>

The Court of Appeals, the highest court in New York State, reinstated the indictment against Goetz.<sup>79</sup> The prosecutor's explanation to the grand jurors about the appropriate standard was correct.<sup>80</sup> The law in New York was clearly laid out: The first task of the jurors would be to determine whether the defendant believed that the deadly force was necessary to protect himself from an imminent use of deadly force against him.<sup>81</sup> If such a finding were to be made, then the jury is to assess whether those beliefs of the defendant were reasonable, could a reasonable person in light of all the existing circumstances have maintained such a belief.<sup>82</sup>

Some states have attempted to deal with the objective/subjective dilemma by creating what is referred to as an imperfect self-defense.<sup>83</sup> The perfect self-defense applies if a reasonable person in the defendant's position would have believed he was in imminent danger.<sup>84</sup> Such a defense justifies the response of the defendant to the threat and an acquittal of the charges is to result.<sup>85</sup> The imperfect self-defense applies when the defendant did have an honest belief that he was being threatened, but such belief was not considered by the trier of fact to have been a reasonable one.<sup>86</sup> The impact of such an imperfect self-defense is not to acquit the defendant, but rather serves to act in mitigation.<sup>87</sup> A murder charge will typically be reduced to manslaughter if an imperfect self-defense is found.<sup>88</sup>

The most common instance that leads to the imperfect self-defense charge is when the defendant's perception of the threat meets the test under the subjective prong and not the objective prong.<sup>89</sup> If there is no such a charge informing jurors of the existence of an

<sup>77</sup> Goetz, 501 N.Y.S.2d at 331-32.

<sup>78</sup> *Id.* at 341-42 (Asch, J., dissenting).

<sup>79</sup> *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

<sup>80</sup> *Id.* at 52.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The decision of the court was a unanimous one and was written by the Chief Judge of the Court, Sol Wachtler. *See id.* at 98.

<sup>83</sup> *See, e.g., Faulkner v. State*, 458 A.2d 81 (Md. 1983), *aff'd*, 483 A.2d 759 (Md. 1984).

<sup>84</sup> *Goetz*, 497 N.E.2d at 47.

<sup>85</sup> *State v. Peterson*, 857 A.2d 1132, 1147 (Md. 2004).

<sup>86</sup> *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

<sup>87</sup> *State v. Kirkpatrick*, 184 P.3d 247, 256 (Kan. 2008).

<sup>88</sup> *See, e.g., Richmond v. State*, 623 A.2d 630, 632 (Md. 1993). Maryland only allowed imperfect self-defense to mitigate a murder charge until recently when *Richmond* was overruled by *Christian v. State*, 951 A.2d 832 (Md. 2008) (holding that imperfect self-defense will mitigate a charge of first degree assault).

<sup>89</sup> *See* KAN. STAT. ANN. § 21-3403(b) (2008) ("Voluntary manslaughter is the intentional killing of a human being committed . . . upon an unreasonable but honest belief that circumstances existed that justified deadly force . . .").

imperfect self-defense, the defendant will be guilty of murder because the “perfect” self-defense will fail.<sup>90</sup> For example, in *State v. Shaw*,<sup>91</sup> the defendant wanted a jury instruction for imperfect self-defense, however the state of Vermont does not allow for this charge and a murder conviction resulted.<sup>92</sup> California, however, recognizes imperfect self-defense to be a mitigating factor if it is found that the defendant had a sincere belief that he or she was in imminent danger of death or serious physical injury but this belief was determined to have been unreasonable.<sup>93</sup> In *Christian S.*,<sup>94</sup> alleged members of a California gang harassed the defendant for over a year, and in response, the fearful defendant started carrying a pistol.<sup>95</sup> On one occasion, there was a dispute concerning damage to a truck, and the defendant drew his weapon as the victim continued to approach him; the victim taunted the defendant and dared him to shoot.<sup>96</sup> The defendant shot and killed the victim from twenty feet away.<sup>97</sup> The defense claimed that however unreasonable the killing might appear to be, the defendant did have an honest fear of imminent death or serious physical injury which therefore served to negate the element of malice required for murder.<sup>98</sup> The defense contended that at most a conviction of voluntary manslaughter would be warranted.<sup>99</sup> The California Supreme Court held that a charge of imperfect self-defense should be permitted.<sup>100</sup> The Court held that if the defendant honestly believed that he was shooting because of an imminent fear of death or serious physical injury, the murder charge should be reduced to manslaughter because even though the shooting was intentional, the imperfect self-defense negated the element of malice required for a conviction of murder.<sup>101</sup>

In Pennsylvania, the statute is clear: “[A] person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing ... but his belief is unreasonable.”<sup>102</sup> The Model Penal Code allows for mitigation but not justification of a murder charge if the defendant had a subjective but mistaken belief regarding a threat and was “reckless or negligent in having such belief or acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force....”<sup>103</sup>

<sup>90</sup> *State v. Shaw*, 721 A.2d 486, 491-92 (Vt. 1998).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 489.

<sup>93</sup> *In re Christian S.*, 872 P.2d at 575.

<sup>94</sup> 872 P.2d 574, 575 (Cal. 1994).

<sup>95</sup> *Id.* at 575.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* See also, CAL. PENAL CODE § 187(a) (West 2008) (“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”).

<sup>99</sup> *In re Christian S.*, *supra* note 93.

<sup>100</sup> *Id.* at 583.

<sup>101</sup> *Id.*

<sup>102</sup> 18 PA. CONS. STAT. ANN. § 2503(b) (West 1995).

<sup>103</sup> MODEL PENAL CODE §3.09(2) (Proposed Official Draft 1962); See also MODEL PENAL CODE §3.04(1) (stating “the use of force upon or toward another person is justifiable when the actor believes that such

Some States permit an imperfect self-defense jury instruction to be given to the jury when the defendant fails to meet one element required for a “perfect” self-defense.<sup>104</sup> In *Swann v. U.S.*,<sup>105</sup> the D.C. Court of Appeals allowed the charge when the defendant was the initial aggressor (which negates the applicability of self-defense) but acted due to a subjective fear of imminent death or serious physical injury.<sup>106</sup> The Court determined that “a defendant’s actual belief both in the presence of danger and in the need to resort to force, even if one or both beliefs be objectively unreasonable, constitutes a legally sufficient mitigating factor to warrant a finding of voluntary manslaughter rather than second degree murder.”<sup>107</sup>

New York State law imposes a major restriction on the use of self-defense. An individual cannot use deadly force to defend oneself if “knows that with complete safety to oneself and others he or she may avoid the necessity of so doing by retreating.”<sup>108</sup> Could Bernhard Goetz have retreated from the threat, if indeed such a threat existed, by merely proceeding to move from one car to another in the subway train that he and the four youths were in?<sup>109</sup> Could he have waited for the subway to arrive at a station and then exited onto the platform? Could John White have left the scene of the confrontation with the four youths and retreated into his house and locked the door and called the police?<sup>110</sup>

The doctrine of retreat can be traced back to English common law.<sup>111</sup> Deadly force was permitted to be used only when an individual had his “back to the wall.”<sup>112</sup> It was initially required that one had to have attempted to flee the scene altogether; if that proved impossible, one must attempt to get as far away as possible from the enemy –

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force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such person on the present occasion.”)

<sup>104</sup> See, e.g., *State v. Larry*, 481 S.E.2d 907 (N.C. 1997) (“[i]mperfect self-defense renders a defendant guilty of at least voluntary manslaughter if the first two elements above exist at the time of the killing but the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force.”), *cert. denied*, 552 F.3d 356 (2009).

<sup>105</sup> 648 A.2d 928 (D.C. Cir. 1994).

<sup>106</sup> *Id.* at 932.

<sup>107</sup> *Id.* at 931.

<sup>108</sup> N.Y. PENAL LAW § 35.15(2)(a) (N.Y. 2009).

<sup>109</sup> *Goetz*, 497 N.E.2d at 43.

<sup>110</sup> See Kilgannon, *supra* note 3.

<sup>111</sup> Jason W. Bobo, *Following the Trend, Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 346 (2008). (“At the core of Blackstone’s view was the centuries-long English common-law tradition that supported the idea of all homicides as public wrongs.” *Id.* at 341. Therefore, in order to avoid any use of force that may lead to a death, one had the obligation to retreat. *Id.* at 342).

<sup>112</sup> *Id.* at 342. Professor Richard Maxwell Brown describes the “back to the wall” test: When another person attacks you, you must not defend yourself with violence until you have attempted to flee from the scene. If you were unable to flee from the scene, you must retreat as far as possible from your enemy until the wall is at your back. Then, and only then, may you legally face your opponent and kill him in self-defense. Even with the wall at your back, there must be the need to save yourself from grievous harm. *Id.*

until one's back was up against the wall.<sup>113</sup> It was only at that time, were the threat to still be continuing, that one may use force in self-defense.<sup>114</sup> The long-standing common law exception to the obligation to retreat if assault--and not murder--was the charge against the defendant, was changed in New York by statute requiring retreat before self-defense in any instance could be claimed.<sup>115</sup>

The provisions of the Model Penal Code, which relate to retreat, are virtually identical to those in New York.<sup>116</sup> There are, however great difficulties in the application of the retreat doctrine. First, the test is a subjective one.<sup>117</sup> An actor is required to have *known* that he had the option of a completely safe retreat.<sup>118</sup> But how can the prosecutor be expected to show that the defendant actually had such knowledge and that, therefore, the use of deadly force was not necessary? The fact-finders are not to apply a reasonable person standard and assume, therefore, that this defendant knew of the retreat option.<sup>119</sup> Any charge to the jury that indicates that an objective standard is to be used is improper and if a conviction results subsequent to such an instruction by the court, it will be overturned.<sup>120</sup> Certainly, if the defendant were to testify at trial, he will claim that he never believed that he could just leave the scene with complete safety.

And, indeed it is "complete" safety that is required.<sup>121</sup> In *State v. Anderson*,<sup>122</sup> the Supreme Court of Connecticut overturned the defendant's conviction because the judge's instructions to the jury had failed to use the words "complete safety."<sup>123</sup> In the common situation where the aggressor possesses a gun and is threatening its use, how can a jury determine that the defendant knew he could retreat from the threat in complete safety? Because, in part, of these practical concerns, there has recently been a steady trend in the number of states which are abolishing the retreat requirement.<sup>124</sup>

It was in Ohio, in 1876, where the "true man" concept originated.<sup>125</sup> A "true man" is not a coward who retreats from a confrontation; a "true man" stands his ground and uses the force required to meet the threat.<sup>126</sup> It has not been the courts that have led

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 342-43.

<sup>115</sup> *People v. Dingley*, 366 N.E. 2d 877 (N.Y. 1977).

<sup>116</sup> See MODEL PENAL CODE § 3.04 (2)(b)(ii) (self-defense is not justifiable "if the actor knows he can avoid the necessity of using such force with complete safety by retreating").

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (emphasis added). See, e.g., *Mosby v. Devine*, 851 A.2d 1031, 1043 (R.I. 2004) (stating before one may employ *deadly force*, he or she must retreat "when an open, safe avenue of escape is available and he [or she] is consciously aware of this fact.").

<sup>119</sup> *People v. La Susa*, 447 N.Y.S.2d 738 (App. Div. 2d Dep't 1982).

<sup>120</sup> See *id.*

<sup>121</sup> *State v. Saunders*, 838 A.2d 186, 194 (Conn. 2004), *cert. denied*, 124 U.S. 2113 (2004).

<sup>122</sup> 631 A.2d 1149 (Conn. 1995).

<sup>123</sup> *Id.* at 1155.

<sup>124</sup> *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990).

<sup>125</sup> See *Erwin v. State*, 29 Ohio St. 186, 199 (1876).

<sup>126</sup> *State v. Renner*, 912 S.W.2d 701, 704 (Tenn. 1995).

the way to the departures from the requirement of retreat. In a two-year period, the legislatures of fifteen states have enacted what are commonly referred to as “stand your ground laws.”<sup>127</sup> The National Rifle Association has aggressively lobbied for abolition of the retreat requirement and these efforts have led a total of 30 states in the years 2005-2007 to consider changing their laws on self-defense.<sup>128</sup> A spokesperson for the National Rifle Association justified its support for the anti-retreat legislation in that law-abiding citizens should know that “if they make a decision to save their lives in the split second they are being attacked, the law is on their side.”<sup>129</sup>

The new statutes are often shaped by the “Stand Your Ground” laws enacted in Florida in 2005.<sup>130</sup> The new legislation is clear. If an individual is attacked in a place where he has a right to be, then he has “no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to prevent death or great bodily harm to himself or herself or another.”<sup>131</sup>

Even in those states such as New York that still adhere to the retreat doctrine, there is an exception provided for one who is in his own home at the time of the threat.<sup>132</sup> Justice Cardozo, in the 1914 case of *People v. Tomlins*,<sup>133</sup> explained the rationale: “It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.”<sup>134</sup>

In New York State, as is true in virtually every state as well as the Model Penal Code, the initial aggressor in the conflict cannot claim a justified use of self-defense.<sup>135</sup> Whereas there often is not a clarification within the penal codes as to what exactly designates one the initial aggressor,<sup>136</sup> it is generally accepted that the person who is at

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<sup>127</sup> Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, available at 2006 WLNR 13604882.

<sup>128</sup> P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 2 (2007).

<sup>129</sup> See Liptak, *supra* note 127.

<sup>130</sup> See FLA. STAT. §776.013(3) (2008).

<sup>131</sup> *Id.*

<sup>132</sup> See N.Y. PENAL LAW § 35.15(2)(a)(i) (2009) (“The actor is under no duty to retreat if he or she is in his or her dwelling”); See also MODEL PENAL CODE § 3.04(2)(b)(ii)(A)(1962) (stating “the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.”).

<sup>133</sup> 107 N.E. 496 (N.Y. 1914).

<sup>134</sup> *Id.*, at 497.

<sup>135</sup> See N.Y. PENAL LAW § 35.15(2)(b) (2009) (stating “[a] person may ... defend himself ... unless: ... [t]he actor was the initial aggressor ...”); See also MODEL PENAL CODE §3.04(2)(b)(i) (1962) (stating “the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter.”).

<sup>136</sup> The New York Penal Code, for example, merely states that self-defense is not available to “the initial aggressor.” See *id.* § 35.15(2)(a)(1).

fault for provoking the confrontation is considered to be the initial aggressor.<sup>137</sup> Another common formulation of this restriction on the use of self-defense was stated by the court in *Nowlin v. United States*:<sup>138</sup> “Appellant had no legitimate claim to the defense of self-defense since he had voluntarily placed himself in a position which he could reasonably expect would result in violence.”<sup>139</sup>

Had John White been the initial aggressor when he left his house carrying a loaded 32 caliber gun?<sup>140</sup> Had he not placed himself in a position that one could expect to lead to violence? Did Bernhard Goetz not provoke the confrontation when he took out his gun in the subway?<sup>141</sup> Or did the victim of his violence “start the whole thing” by saying to Goetz, “Give me five dollars”?<sup>142</sup> If either John White or Bernhard Goetz were the initial aggressors, their self-defense claim is inappropriate and invalid.

“Words” are what both John White and Bernhard Goetz claim led them to fear for their or others safety, and therein provoked the violent response. To John White, the words said to his son at a party, followed by the words said in a phone call, followed by words said once White approached the four men with his gun,<sup>143</sup> caused him to fear for his or his son’s safety. Certainly, “fighting words” exist. There are words, as the Supreme Court held in *Chaplinsky v. New Hampshire*,<sup>144</sup> which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>145</sup>

Whereas it might well be maintained by the prosecution that both Goetz and White were the initial aggressors because they are the ones who introduced the threatened use of deadly physical force,<sup>146</sup> one aspect of the law relating to the initial aggressor does not seem to apply. New York State law provides that the use of physical force by the initial aggressor would be justifiable “if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force.”<sup>147</sup> Once Goetz and White introduced their guns into the scene, there was no subsequent attempt by them to withdraw their threatened use of deadly force.

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<sup>137</sup> *U.S. v. Slocum*, 486 F.Supp.2d 1104, 1108-09 (C.D. Cal. 2007). Defendant must show he “was free from fault in provoking or continuing the difficulty which resulted in the slaying.” *Id.* at 1108.

<sup>138</sup> 382 A.2d 9 (D.C. Cir. 1978).

<sup>139</sup> *Id.* at 14, n.7.

<sup>140</sup> See Kilgannon, *supra* note 3.

<sup>141</sup> See *Goetz*, 497 N.E.2d at 43.

<sup>142</sup> *Id.*

<sup>143</sup> See Kilgannon *supra* note 3.

<sup>144</sup> 315 U.S. 568 (1942).

<sup>145</sup> *Id.* at 572.

<sup>146</sup> In some states, if the actor is “even slightly at fault,” self-defense will not be available. See *Perricllia v. Commonwealth*, 326 S.E.2d 679, 685 (V.A. 1985).

<sup>147</sup> N.Y. PENAL LAW § 35.15(1)(b) (2009).

## Conclusion

There are direct and strong parallels between the use of deadly physical force by Bernhard Goetz and John White. Each claimed that he was confronted with a threat from others that was imminent. Each claimed that his use of a gun to protect himself was justified. Each claim was made even though there was no weapon used or shown by those who allegedly were the source of the threat. In both instances, the defendants were in unlawful possession of their guns. In neither instance, did the defendants retreat after the initial showing of their weapon. Whereas the defense in the White case clearly and forcefully told the jurors “[r]ace ... is very much a part of this case,”<sup>148</sup> counsel for Goetz was less direct but no less clear.<sup>149</sup>

The Goetz and White cases were intriguing because they present such critical challenges to the standard that ought to be used in determining whether an individual has acted reasonably in using deadly physical force to defend oneself. The crucial issue of race, especially when used to justify the use of armed force in self-defense, makes the

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<sup>148</sup> Transcript of Record at 2541, *People v. White*, No. 2662A-06 (Suffolk County Sup. Ct. Mar. 19, 2008) (unpublished opinion). During closing arguments, Frederick Brewington elaborated as to the manner in which race prompted the very incident that occurred on the night of the shooting. *Id.* at 2541-45. Brewington explained how Daniel Cicciaro and his friends felt that “they had the right to go to Aaron’s house ... and essentially terrorize the entire family,” because Aaron White was black and Jenny Martin, whom he allegedly had raped, was white. *Id.* Upon arrival at the house, Cicciaro and friends questioned Aaron, saying “Who the f\* do you think you are, n\*? ... I’m going to f\* you and your mother.” *Id.* at 2542. John White was unfortunately all too familiar with “the Klan ... They pull up. They blind you with their lights. They burn your house. They threaten you. That’s how they come.” *Id.* at 2543. Brewington rebutted the claim that race was not a factor in the conflict by emphatically stating that “this case has everything to do [with] race.” *Racial Violence and Self-Defense*, 4 *Journal of Race, Gender and Ethnicity* 2 at 14 (2008) Brewington explained,

[R]ace was key, particularly for this defendant both in speaking from a subjective standpoint and an objective standpoint. 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 we might have said it once or twice. 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.” ... Race had everything to do with it in this case. *Id.*

<sup>149</sup> Goetz’s attorney requested the Guardian Angels, a group of young men and women who were strong supporters of the need for those other than police officers to aggressively respond to street criminals, to bring to court four black youths to portray the four individuals who were shot by Goetz for a re-enactment of the crime scene. Mark Baker, Goetz’s attorney, commented, “we got criticized for doing that by the District Attorney.” See *Racial Violence and Self-Defense*, 4 *Journal of Race, Gender and Ethnicity* 2 at 18 (2008). But it’s not as if this re-creation of the crime was needed to remind jurors of the significance of race. Baker commented, “I had a photograph of each [black] kid blown up ... on big posters ... three feet by five feet facing that jury for seven weeks ... they were violent photographs and that was the atmosphere we tried to create.” *Id.* at 21. When Baker was asked about playing on the racist feelings of the jurors, only two of whom were black, Baker responded that, “I didn’t create the color of their skins.” *Id.* at 24.

resolution of the issues presented in this article both all the more complex and all the more compelling.