

INTRODUCTION

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

PRESENTATION ON *PEOPLE V. WHITE*

FREDERICK BREWINGTON, ESQ.: Good evening! Let me first start out by saying my name is Fred Brewington, and I had the honor of representing John White, along with Paul Gianelli and another co-counsel Marie Michel in our defense of John White, in a case that took us back to August of 2006. I understand that the point of this discussion is to do a comparison in some way of the Bernhard Goetz case and the John White case. Let me start off by giving some information. I also had something to do with the Bernhard Goetz case. I was a recent graduate, in 1982, of Northeastern University School of Law and I came into the office of C. Vernon Mason, who helped to represent Darryl Cabey for a period of time both at the time that Mr. Goetz was going through his legal proceedings and then assisting with Mr. Cabey's civil action. Thus, I have some information and knowledge about that particular case. So, it is going to be interesting because I haven't really spoken about it in a long time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROF. RICHARD KLEIN: You knew of course before the trial ever began how important race was going to be for the jurors. Could you just talk a bit about the jury selection process and to what extent you voir dired the jurors about that because there was only 1 black person amongst the twelve jurors.

FREDERICK BREWINGTON, ESQ.: That is correct.

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

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

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

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

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

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

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

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

PRESENTATION ON *PEOPLE V. GOETZ***

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

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

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