
2016

SYMPOSIUM *WHREN* AT TWENTY: SYSTEMIC RACIAL BIAS AND THE CRIMINAL JUSTICE SYSTEM – Introduction

Lewis R. Katz

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Lewis R. Katz, *SYMPOSIUM WHREN AT TWENTY: SYSTEMIC RACIAL BIAS AND THE CRIMINAL JUSTICE SYSTEM – Introduction*, 66 Case W. Rsrv. L. Rev. 923 (2016)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol66/iss4/4>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Symposium —

WHREN AT TWENTY:
SYSTEMIC RACIAL BIAS AND THE
CRIMINAL JUSTICE SYSTEM

INTRODUCTION

Lewis R. Katz[†]

Street relations between the police and African-American communities have seemingly reached new levels of conflict, or else body cams and cell phones are finally disclosing the extent and truth about such interactions. The Cleveland officers who shot and killed Tamir Rice claimed that they had ordered him three times to drop the realistic toy gun he was playing with. The existence of the tape totally discredits their claim. Without the video, the media and White America would have summarily accepted the Cleveland officers' account. Similarly, the University of Cincinnati police officer who is charged with the murder of Samuel DuBose originally claimed that he was being dragged by DuBose's car and had to shoot to save his life. The officer's false claim was corroborated by two other officers on the same force. Scarily, jurors—or one juror, for that is all it takes—might choose to disbelieve what they see and vote to acquit the University of Cincinnati police officer.

These videos tragically corroborate Ta-Nehisi Coates's claim that America (and so-called "white bodies") always has and continues to enslave, segregate, imprison, break, and kill black bodies.¹

[†] John C. Hutchens Professor of Law and Director, Foreign Graduate Legal Studies at Case Western Reserve University School of Law. I have taught Criminal Law and Criminal Procedure here for fifty years. I want to thank Kevin Gross and Seth Osnowitz for their assistance in researching this subject.

1. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 103–05 (2015).

Here is what I would like for you to know: In America, it is traditional to destroy the black body—it *is heritage*.

Enslavement was not merely the antiseptic borrowing of Labor—it is not so easy to get a human being to commit their body against its own elemental interest. And so enslavement must be casual wrath and random manglings, the gashing of heads and brains blown out over the river as the body seeks to escape. It must be rape so regular as to be industrial. There is no uplifting way to say this It could only be the employment of carriage whips, tongs, iron pokers, handsaws, stones, paperweights, or whatever might be handy to break the black

At the same time, every day spokesmen for the law enforcement industry appear on cable television and attribute the rise of murders in cities like Baltimore and Chicago and, sadly, Cleveland to the abandonment of the so-called “broken windows” policy. The broken windows policy they want reinstated is law enforcement without the Fourth Amendment; it is law enforcement based upon racial profiling; it is law enforcement that gives the police license to violate the law. Some of those same self-proclaimed spokespersons are blaming recent police killings on the “Black Lives Matter” movement. Their outrage with Black Lives Matter, and its putative substitute, All Lives Matter, operates from a false premise. Implicit in Black Lives Matter is Too. Unlike the Black Lives Matter movement which followed on police killings in Missouri, New York, South Carolina, and here in Cleveland, none of the police apologists were arguing that All Lives Matter, meaning all lives, including African-American young men. Instead, police union representatives appear on television immediately following police shootings to claim that the killings of young black men are justified. Those claims often are made so quickly that they are uttered before the facts are known. Let’s face it, there will be no change in America until we really mean that ALL LIVES MATTER.

It is appropriate that this symposium acknowledges that the Supreme Court Term that began earlier this month marks the twentieth anniversary of the Court’s decision in *Whren v. United States*.² My choice of the word “acknowledge” is a neutral term. It is not intended to signify concurrence or celebration. *Whren* puts the Supreme Court squarely in the middle of the ongoing conflict: *Whren* fostered the condition that resulted in the current conflicts: racial policing. Nor has it been unusual in our history for the Supreme Court to stand at the forefront of racial injustice. In fact, except for a short period in our nation’s history, 1954 to 1965, from *Brown v. Board of Education*³ to *Mapp v. Ohio*⁴ to *Gideon v. Wainwright*⁵ to *Baker v. Carr*,⁶ the United

body, the black family, the black community, the black nation
That was true in 1776. It is true today.

Id.

2. 517 U.S. 806 (1996).
3. 347 U.S. 483 (1954) (invalidating laws mandating separate schools for black and white children).
4. 367 U.S. 643 (1961) (holding that the Fourth Amendment’s exclusionary rule applies to the states, meaning state courts must suppress evidence gathered when police violate the Fourth Amendment to obtain the evidence).
5. 372 U.S. 335 (1963) (holding that the Sixth Amendment requires state courts to appoint attorneys for defendants who cannot afford counsel).
6. 369 U.S. 186 (1962) (holding that districts for the election of members of state legislatures and Congress are required to be reasonably equal in size as to population, which had the effect of increasing the political power of urban

States Supreme Court has promoted or facilitated injustice against African Americans.

We don't have to go back to the Dred Scott case in 1857, almost universally thought to be the worst case in the Court's history, to find the Supreme Court on the side of injustice against blacks.⁷ During Reconstruction the Supreme Court limited the reach of the Fourteenth Amendment to state action.⁸ The Court helped President Rutherford B. Hayes strike the blow that ended Reconstruction. In *United States v. Harris*,⁹ the Supreme Court invalidated the Ku Klux Klan act,¹⁰ Congress's attempt to fight white terrorism rampant then in the former confederate states. Despite the conspiratorial links between those terrorists to southern law enforcement and elected officials to discourage blacks in the south from participating in public life by voting and running for public office, the Court held that "[i]t was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen."¹¹ Thus ended Reconstruction and America's commitment to black equality until 1964 and 1965, and the adoption of the Public Accommodation Act¹² and Voting Rights Act.¹³ The recent Supreme Court decision watering down the Voting Rights Act fits into this common pattern, though, and abets states that, under the false

areas with greater population and reducing the influence of less populated rural areas).

7. *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (holding that African Americans, whether enslaved or free, could not be American citizens and therefore had no standing to sue in federal court and that the federal government had no power to regulate slavery in the federal territories acquired after the creation of the United States).
8. *See United States v. Cruikshank*, 92 U.S. 542, 542–43 (1875) (holding that states have the duty under the Fourteenth Amendment to protect "all its citizens in the enjoyment of an equality of rights" and that "[t]he only obligation resting upon the [federal government] is to see that the States do not deny the right[s]"); *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the privileges and immunities clause of the Fourteenth Amendment only safeguards the rights of citizens of the United States against the actions of states).
9. 106 U.S. 629 (1883).
10. Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985(3) (2011)) ("If two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the law . . .").
11. *Harris*, 106 U.S. at 644.
12. 42 U.S.C. § 2000a (2012).
13. 42 U.S.C. § 1973 (2012); *see Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating § 4(b) of the Voting Rights Act, thereby no longer requiring jurisdictions with histories of discrimination to demonstrate that any proposed voting change is not discriminatory before that change can be implemented).

claim of preventing voting fraud, are attempting to make it more difficult for African Americans to vote.

*Whren v. United States*¹⁴ belongs in this same column. In the name of racial neutrality, the unanimous Court¹⁵ sweepingly interprets the Fourth Amendment to allow blatant, and, at times, admitted, racial profiling when stopping automobiles.

Whren occurred when District of Columbia vice-squad police officers were patrolling for drug activity in a high drug area on the night of June 10, 1993.¹⁶ Officers Efrain Soto, Jr. and Homer Littlejohn were among the plainclothes officers searching for drug activity that night, and they were passengers in an unmarked police cruiser that was being driven by Investigator Tony Howard.¹⁷ As Investigator Howard drove past an SUV that was stopped at a stop sign, Officer Soto observed the youthful driver of the SUV looking into the lap of his front seat passenger.¹⁸ Officer Soto kept his eyes on the SUV as Investigator Howard continued driving away from it; Soto testified that the SUV remained at the stop sign for “more than twenty seconds” with “at least one car” stopped behind it.¹⁹ Although the District of Columbia police regulations permitted plainclothes officers in unmarked police cruisers to enforce traffic laws “only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others[.]”²⁰ Investigator Howard decided to pursue the SUV.²¹

As Investigator Howard maneuvered the U-turn, the SUV “turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.”²² Thereafter, Investigator Howard tailed the SUV until catching up and pulling alongside it at a red light.²³ Then, Officer Soto immediately exited the unmarked police cruiser and identified himself as a police officer as he approached the driver’s door of the SUV.²⁴ After demanding that the driver of the SUV, James Lester Brown, put the vehicle in park, Officer Soto noticed that the passenger, Michael Whren, was holding a large clear plastic bag in each of his hands. Suspecting

14. 517 U.S. 806 (1996).

15. If I had the chance to ask Justice Ginsburg one question, it would be how she let this one slip by her.

16. *Whren*, 517 U.S. at 807–08.

17. *U.S. v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995).

18. *Id.*

19. *Id.*

20. *Whren*, 517 U.S. at 815 (citation omitted).

21. *Whren*, 53 F.3d at 372.

22. *Whren*, 517 U.S. at 808.

23. *Id.*

24. *Id.*

that the plastic bags contained cocaine, Officer Soto yelled “C.S.A.” to notify the other officers that he observed a Controlled Substance Act violation.²⁵ Then, Officer Soto heard Whren yell “pull off, pull off,” and observed Whren pull the cover off of a power window control panel on the passenger door and put one of the plastic bags into the hidden compartment.²⁶ As a result, Officer Soto opened the driver’s door of the SUV, dove across Brown and grabbed the other plastic bag from Whren’s hand.²⁷ Soon thereafter, Brown and Whren were arrested and the officers subsequently searched the SUV, recovering “two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks and a large white rock of crack cocaine from the hidden compartment on the passenger side door, numerous unused ziplock bags, a portable phone and personal papers.”²⁸ The defendants were convicted of four federal narcotics offenses.²⁹ Prior to trial, the defendants challenged the stop, claiming that the stop *to issue a warning* to the driver was pretextual.³⁰

Justice Scalia claimed to agree with the defendants’ claim “that the Constitution prohibits selective enforcement of the law based on considerations such as race.”³¹ Cynically, however, he refers the defendants to the Equal Protection Clause to object to intentional discriminatory application of the law, rather than the Fourth Amendment.³² However, there is no remedy in a criminal case except in New Jersey for a police stop or arrest based on race under the Equal Protection Clause.³³ The only real remedy for a pretextual stop or arrest would be under the Fourth Amendment exclusionary rule. However, *Whren* tells us that

25. *Whren*, 53 F.3d at 373.

26. *Id.*

27. *Id.*

28. *Id.*

29. The four offenses included:

(1) possession with intent to distribute [fifty] grams or more of cocaine base or crack, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A)(iii) (Count One); (2) possession with intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a) (Count Two); (3) possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844(a) (Count Three); and (4) possession of a controlled substance (PCP) in violation of 21 U.S.C. § 844(a) (Count Four).

Whren, F.3d at 372.

30. *Whren*, 517 U.S. at 806.

31. *Id.* at 813.

32. *Id.*

33. *State v. Segars*, 172 N.J. 481 (2002); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

remedy is not available if there is an “objective” basis—reasonable suspicion or probable cause—for the stop or arrest. The Court stresses that an “officer’s motive” for the stop or arrest, even when based upon race, does not “invalidate[] objectively justifiable behavior under the Fourth Amendment.”³⁴ The Court tells us it is so, not why it is so, so we can assume that it is so because of the Court’s hostility to the exclusionary rule. Further the Court rejects the alternative test that would invalidate a stop if a reasonable police officer would not have made the stop under the circumstances, even though that substitute variation to determine pretext had worked somewhat well.³⁵ Scalia rejects the “reasonable officer” test: “Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.”³⁶ That’s an obvious reason to advance the alternative theory. It is actually debatable which was the more sensible option: the subjective test, which depended upon a police officer truthfully admitting on the witness stand that he stopped a particular car because of the race of the occupants (there are a few rare instances of such admissions)³⁷ or the reasonable officer test which measures a stop by whether reasonable officers in the jurisdiction would have made the stop (such as the officers in *Whren* who ignored departmental regulations by engaging in traffic enforcement in the absence of an immediate threat of safety to others). The Scalia opinion in *Whren* foreclosed federal and state courts from engaging in that debate under the Fourth Amendment.

Let’s face it, *Whren* legalizes any stop where there is reasonable suspicion or probable cause to believe that a traffic offense has occurred or is occurring no matter how blatant the pretextual nature of that stop. Make no mistake, *Whren* helped pave the way for traffic stops resulting in the death of black drivers that are causing conflict in our society today. I believe that we will continue to face this problem until at least *Whren* is reversed. Cases like *Whren* are not race neutral. They sanction and encourage race-based policing, which is the ultimate Scalia legacy. *Whren* is squarely in the tradition of those judges who enforced the Fugitive Slave Act, which paved the way for the Civil War.³⁸ However, the reversal of *Whren* is of now just a fantasy of mine because it

34. *Whren*, 517 U.S. at 812.

35. *Whren*, 517 U.S. at 815; Lewis R. Katz, “*Lonesome Road*”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1419 (2013).

36. *Whren*, 517 U.S. at 814.

37. Katz, *supra* note 35, at 1421 (citing *United States v. Harvey*, 16 F.3d 109, 113 (6th Cir. 1994)).

38. See Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797 (2011) (challenging the conventional belief that “neutral legal

depends upon the election of a president committed to appointing judges who will enforce the Fourth Amendment and enough (60) votes in the Senate to confirm those judges.

We have distinguished panelists here today who will address these issues: distinguished scholars, such as the pioneer Professor David Harris, on race-based policing and race in America, and outstanding practitioners who face the ramification of *Whren* every day in court. Perhaps they can show us the way and help us to find a way out of this morass.

principles required antislavery judges to uphold proslavery legislation in spite of their moral convictions against slavery”).