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# *Whren's* Flawed Assumptions Regarding Race, History, and Unconscious Bias

## **Erratum**

Page 947, footnote \*, line 3. For "2016" read "2015."

## WHREN'S FLAWED ASSUMPTIONS REGARDING RACE, HISTORY, AND UNCONSCIOUS BIAS\*

*William M. Carter, Jr.*<sup>†</sup>

My heartfelt thanks to CWRU Law School and the Law Review for having me here. I am an alumnus of CWRU Law, a former faculty member here from 2001–07, and a native Clevelander, so it's always nice to be back home.

This symposium marks the 20th anniversary of *Whren*,<sup>1</sup> which happens to coincide with the 20th anniversary of my first year of law school here in this building. Shortly before I entered law school in the spring of 1995, *Adarand v. Peña*<sup>2</sup> was decided. I had come to law school with very idealistic notions about race, social justice, and criminal law: it's fair to say that *Adarand* and *Whren* bracketing my 1L year was a dash of cold water about the law's—and the Court's—willingness to grapple with persistent racial inequality in a forthright or effective manner.

My 1L year here began with, on the one hand, *Adarand*, which by applying strict scrutiny to affirmative action devalued the existence of structural inequalities that might permit the government to intervene in order to create a level playing field.<sup>3</sup> On the other hand, at the end of my first year of law school, the *Whren* decision was issued, which, by allowing pretextual searches and seizures even if racially motivated, devalued the lived experiences of people of color and gave license to racial profiling, at least as far as the Fourth Amendment is concerned.<sup>4</sup>

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\* The following is adapted from the *Whren* at Twenty Symposium Panel IV: Alternative Routes, New Solutions, and New Definitions of the Problem on October 23, 2016, at Case Western Reserve University School of Law.

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1. *Whren v. United States*, 517 U.S. 806 (1996).
2. 515 U.S. 200 (1995). *Adarand* was argued on January 17, 1995 and decided June 12, 1995. *Id.* at 200.
3. *Id.* at 227.
4. *See Whren*, 517 U.S. at 819 (holding that “probable cause to believe that petitioners had violated the traffic code” justified a stop, even if the actual reason for the stop was based on the driver’s race).

Thus, in addition to being an important jurisprudential anniversary, the *Whren* decision is also an intellectual anniversary for me personally as I reflect upon how the decision shaped my view of these issues both as a practitioner and then subsequently as an academic.

I want to talk very briefly about some of the flaws in *Whren* as a matter of constitutional history, doctrine, and social psychology. Those issues have been discussed throughout this symposium,<sup>5</sup> so I will only touch upon them briefly. I will then discuss some legal developments in equal protection doctrine post-*Whren*. Finally, I will suggest a possible path forward. A great deal of my scholarship over the years has been in the field of the Thirteenth Amendment.<sup>6</sup> I will, therefore, suggest that we can reconceptualize racially motivated, pretextual police encounters as a Thirteenth Amendment issue rather than as either a Fourth Amendment issue or a Fourteenth Amendment issue.

First, as to *Whren* itself: it is very striking that there is not a single word in *Whren* specifically referencing the founding history or the Reconstruction Amendments' Framers' intent with regard to whether pretextual searches or seizures would have been considered "reasonable." To be sure, the *Whren* opinion relied largely upon its interpretation of the Court's earlier precedents; accordingly, the Court may not have found it necessary to engage in a lengthy historical exegesis in order to justify the result that it reached.<sup>7</sup> Nonetheless, there is significant reason to question whether the Framers and the Colonial citizenry that respectively wrote and ratified the original Constitution would have believed that the Fourth Amendment placed no restraints upon governmental officials' ability to carry out roving searches and seizures based upon the merest pretext, given their own experiences with the colonial forces of the British Crown in this regard.<sup>8</sup> Further, there is

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5. Lewis R. Katz, *Introduction to Whren at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923 (2016).
  6. See e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007) [hereinafter *Race, Rights, and the Thirteenth Amendment*] (interpreting the meaning of badges and incidents of slavery); William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21 (2011) (examining the scope of the Thirteenth Amendment).
  7. *Whren*, 517 U.S. at 811–19.
  8. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (describing the Founders' conceptions of the Fourth Amendment); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 333–38 (1998) ("white colonists rightfully protested that certain British search and seizure practices conferred 'a power that places the liberty of every man in the hands of every petty officer'" (and noting the contradiction that many of these same colonists condoned equally arbitrary searches and

ample evidence that the Fourteenth Amendment's Framers specifically considered race-based pretextual searches and seizures to be violative of the "new birth of freedom"<sup>9</sup> that the Reconstruction Amendments were designed to bring about, since such searches, seizures, and other restraints on blacks' freedom of movement were key aspects of slavery and the legalized white supremacy that slavery both engendered and relied upon.<sup>10</sup>

It is also worth noting how *Whren* fits within the Court's broader equal protection doctrine regarding the role of motive in constitutional analysis. *Whren* holds that "[s]ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis."<sup>11</sup> Thus, under the Fourth Amendment as interpreted in *Whren*, subjective motive is irrelevant to the assessment of whether the government's action is constitutional. On the other hand, the Court's equal protection doctrine has simultaneously placed increasing (indeed, determinative) emphasis on the relevance of motive in cases where plaintiffs have sought to advance the interests of racial minorities, such that proof of subjective discriminatory motive is now the *sine qua non* of equal protection claims.<sup>12</sup> Read

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seizures of blacks, both slave and free)). *See also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (discussing Founders' intent regarding the Fourth Amendment).

9. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).
10. *See* The Civil Rights Cases, 109 U.S. 3, 22 (1883) (stating that the Thirteenth Amendment prohibited the "inseparable incidents of the institution" of slavery that were imposed upon blacks, such as "restraint of [their] movements"). During the congressional debates regarding the Thirteenth Amendment, its proponents similarly described state-imposed or state-sanctioned restraints on blacks' freedom of movement as among the badges and incidents of slavery that the Amendment would abolish. Senator Lyman Trumbull of Illinois, for example, argued during the Thirteenth Amendment debates, that "[i]t is idle to say that a man is free who cannot go and come at pleasure." CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866), cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 430 (1967). Senator Trumbull also noted, shortly after the Amendment was passed, that the Thirteenth Amendment abolished provisions of the states' Black Codes that restrained African Americans' freedom of movement. *See* CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).
11. *Whren*, 517 U.S. at 813.
12. *See* *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that, absent proof of discriminatory purpose, even a substantial racially disparate impact "does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations") (citation omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding, in a case alleging racial and religious discrimination, that the plaintiff failed to provide sufficient factual specificity in his complaint regarding the defendant's subjective state of mind to make his claim sufficiently "plausible" to survive a motion to dismiss). *See also* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1013 (2002) ("Current doctrine requires plaintiffs challenging

together, the Court's doctrine seems to be that the role of motive in constitutional analysis turns upon how it will affect the outcome. That is: if *disallowing* proof of motive means that claims advocating the interests of racial minorities will fail, then proof of motive is deemed irrelevant;<sup>13</sup> if *requiring* proof of motive means that claims advocating the interests of racial minorities will fail, then proof of motive is deemed required.<sup>14</sup> A skeptical observer could conclude that that's a doctrine of convenience rather than of principle.

Moreover, *Whren* is particularly troubling in giving no attention to issues of social psychology, unconscious bias, and the historically grounded implicit associations between race and widespread stereotypes regarding propensity for criminality.<sup>15</sup> Combining the essentially unfettered discretion to conduct pretextual searches and seizures that *Whren* licenses with what we know about the history and psychology of the conflation of race and criminality, one is left to wonder: what did the Court think was going to happen post-*Whren*? The Court could not be surprised that *Whren* would predictably lead to an increase in racial profiling and increasing tension in police-community relations.<sup>16</sup> To be clear, the problem is not necessarily that any individual law enforcement officer consciously singles out people of color due to his or her personal animus against them. I do not assume that police officers are racist; I do believe, however, that in the absence of proactive training and interventions, they are no more immune to unconscious bias than the rest of us.

To be sure, the *Whren* opinion gives a brief nod in the direction of these concerns in two lines that appear at the end of the opinion: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on consideration such as race. But the

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neutral laws or policies with a disparate impact to prove illicit motive . . . ."); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191 (2008) (discussing the use of motive, in part, in equal protection law).

13. See, e.g., *Whren*, 517 U.S. 806.
14. See, e.g., *Washington v. Davis* 426 U.S. 229 (1976); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
15. See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 56-60 (2004) and authorities cited therein (discussing these issues in detail).
16. See e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (discussing the implications of racially motivated pretextual traffic stops); see also Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (discussing the use of racial profiling in stops and searches).

constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment.<sup>17</sup> Because *Whren* appeared to open the door to equal protection claims, litigants quickly began invoking the Equal Protection Clause in cases involving alleged racial profiling. Courts generally have not, however, been receptive to such claims post-*Whren*.<sup>18</sup>

In *United States v. Avery*,<sup>19</sup> for example, the defendant moved to suppress evidence of cocaine that was found in his carry-on luggage, arguing that he had been singled out for surveillance and subsequently searched because of his race, in violation of the Equal Protection Clause. The officers testified at trial that Avery drew their attention for several reasons: he appeared to be very focused in trying to get to his seat on the plane; he appeared to be very anxious and in a hurry to board the airplane; he was the first passenger to get on the plane; and he had purchased a one-way ticket with cash shortly before departure.<sup>20</sup> Avery was detained, and the police seized his carry-on bag, which was later found to contain cocaine.<sup>21</sup>

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17. *Whren*, 517 U.S. at 813.

18. *See e.g.*, *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002) (finding that the plaintiff failed to prove discriminatory effect where she did not submit any statistical evidence of bias); *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) (affirming grant of summary judgment in favor of defendant because plaintiffs failed to prove the prime facie elements of an equal protection claim); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *Ford v. Wilson*, 90 F.3d 245, 248–49 (7th Cir. 1996) (affirming grant of summary judgment in favor of the defendant officer because the plaintiff could not point to evidence showing that the officer's sole motivation in making the stop was the plaintiff's race); *United States v. Travis*, 62 F.3d 170, 173–74 (6th Cir. 1995); *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994); *United States v. Jennings*, 985 F.2d 562 (6th Cir. 1993); *United States v. Taylor*, 956 F.2d 572, 578 (6th Cir. 1992); *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (stating, in a pre-*Whren* Fourth Amendment case, “[w]e would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [the officer] relied solely upon the fact of Weaver's race as a basis for his suspicions, we would have a different case before us.” (emphasis added)); *Farm Labor Org. Comm. v. Ohio State H'way Patrol*, 95 F. Supp. 2d 723, 733–34 (N.D. Ohio 2000). *But see* *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that city officials demonstrated deliberate indifference to equal protection violations) (remanded and reassigned for other reasons in *Ligon v. City of New York*, 736 F.3d 118 (2013)); *Giron v. City of Alexander*, 693 F. Supp. 2d 904 (E.D. Arkansas 2010) (holding that police officers intentionally and purposefully targeted Hispanic motorists in traffic stops in violation of equal protection).

19. 137 F.3d 343 (6th Cir. 1997).

20. *Id.* at 346.

21. *Id.* at 347.

At trial, one of the officers testified that Avery met several elements of a narcotics trafficking profile. Crucially, although the officer said he had never been formally taught to use race as an element of such a profile, he admitted on the stand that the understanding among officers was to look for black or Jamaican gang members who used young white women as drug couriers.<sup>22</sup> In addition to this testimony regarding the influence of race on the officers' decision-making, defendant Avery also presented statistical evidence that he argued raised an inference of a discriminatory motive in the decision to stop and search him.<sup>23</sup>

Despite the explicit (and highly unusual) admission in open court that race influenced the officers' decisions regarding who to stop and search and the statistical evidence of broader racial disparities, the Sixth Circuit nonetheless rejected Avery's equal protection argument.<sup>24</sup> The court acknowledged *Whren's* statement that claims of selective race-based law enforcement would trigger an equal protection (rather than Fourth Amendment) inquiry, and held that "[t]he Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures."<sup>25</sup> The *Avery* court further held, however, that in this context, the decision to investigate Mr. Avery was not based *solely* on racial considerations.<sup>26</sup> Accordingly, under this "sole motive" standard, Avery's claim failed.

This "sole motive" standard, which has been cited favorably and applied by numerous other lower courts post-*Avery* in cases alleging racial profiling, is both nearly impossible to meet and represents an incorrect application of standard equal protection doctrine.<sup>27</sup> As to the first point: in *Avery* itself, the court rejected the equal protection argument because the defendant could not prove that the *only* reason that

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22. *Id.* Note that if the officers were actually following the "informal" profile factor, it would have made little sense to search Mr. Avery: rather, they would have tended to search young white women (the most likely drug couriers in this context, according to the officer's testimony), not black men.

23. *Id.* at 356.

24. *Id.* at 358.

25. *Id.* at 352.

26. *Id.* at 358.

27. *See* *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) ("We have no need to reach [the question of whether the exclusionary rule applies to Fourteenth Amendment violations] because the detectives in this case did not choose to interview the defendant solely because of her race."). *Brown v. City of Oneonta*, 221 F.3d 329, 338 (2d Cir. 1999) ("As the police therefore are not alleged to have investigated 'based solely upon . . . race, without more,' plaintiffs have failed to state an actionable claim under the Equal Protection Clause.") (*cert. denied*, 122 S. Ct. 44 (2001)).



he was stopped and searched was because of his race.<sup>28</sup> There were multiple factors, one of which was explicitly racial.<sup>29</sup> Despite the admitted fact that race infected the overall investigatory process, because Avery did not prove that race was the *sole* motive for *this* encounter, his equal protection challenge failed.<sup>30</sup>

As to the second point: The “sole motive” analysis is inconsistent with the Supreme Court’s “mixed-motive” analysis equal protection cases. The Court has squarely held that the Equal Protection Clause, while requiring proof of discriminatory motive in order to trigger strict scrutiny,<sup>31</sup> “does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes.”<sup>32</sup> Thus, once race is found to be a substantial motivating factor, the burden shifts to the government to show that it would have made the same decision absent the racial factor.<sup>33</sup> If it cannot make that showing, strict scrutiny is triggered and the government action would be presumptively unconstitutional.<sup>34</sup> The *Avery* court, and later courts that have applied the “sole motive” analysis in racial profiling cases, have, instead of applying the preceding analytical framework, simply found that race was not the sole motive for the search or seizure—which it would never be in a profiling case: a “profile” is by definition multifactoral—and that, therefore, the claimant loses.<sup>35</sup>

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28. *Avery*, 137 F.3d at 353–54, 358.

29. *See supra* text accompanying notes 22–23 (describing the drug profile factors at issue in *Avery*).

30. More specifically, the court held that Mr. Avery had not proven that racial considerations were the *sole* motive for the officers’ decision to investigate *him*. In other words, he did not foreclose the possibility that, despite officers’ admittedly applying the “informal” racial factor in stopping and searching *other* travelers, they may decide to stop and search *him* anyway for other, nonracial reasons. *Avery*, 137 F.3d at 347, 358.

31. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

32. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

33. *Id.* at 270 n.21.

34. *Id.*

35. *See* U.S. v. *Avery*, 137 F.3d 343, 356–58 (6th Cir. 1997) (noting that statistical evidence of disparate impact can be used only to create a “rebuttable, prima facie case” of race being a motivating factor, but finding *Avery*’s statistical evidence unpersuasive, particularly because the lower court found many reasons why *Avery* was stopped, independent of race; *see also* *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) (citing *Avery* in support of sole motive analysis); *Brown v. City of Oneonta*, 221 F.3d 329, 337–38 (2d Cir. 1999) (same).

*Whren's* promise of serious equal protection review of racially motivated pretextual searches and seizures has therefore proved hollow. I have written elsewhere that a shift toward viewing racial profiling through the different constitutional lens of the Thirteenth Amendment is, therefore, more likely to take account of the historical, sociological, and psychological factors that can lead to racial profiling.<sup>36</sup> The following will show how the Thirteenth Amendment can address these issues in ways that the Fourth Amendment and the equal protection doctrine as currently construed do not.

The Thirteenth Amendment textually speaks of forbidding slavery and involuntary servitude,<sup>37</sup> but its Framers repeatedly expressed their intention that the Amendment would go further than abolishing unpaid labor.<sup>38</sup> According to its Framers, the Thirteenth Amendment would also abolish “all badges and incidents of slavery”: those laws, customs, and lingering vestiges of slavery that were part of the slave power and that had supported it.<sup>39</sup> Senator Lyman Trumbull of Illinois, for example, in speaking of the Amendment’s scope as authority for the Civil Rights Act of 1866, stated:

With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.

Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.<sup>40</sup>

In addition to listing such catalogs of the specific vestiges of the slave system, the Thirteenth Amendment’s Framers frequently spoke even more broadly about the Amendment’s purpose as destroying the entirety of the slave power’s legacy, wherever and in whatever form it was found to persist. Representative Myers of Pennsylvania, for example, arguing that the Thirteenth Amendment provided congressional power to enact the Civil Rights Act of 1866, stated:

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36. See Carter, *supra* note 34.

37. U.S. CONST. amend. XIII.

38. See *Race, Rights, and the Thirteenth Amendment*, *supra* note 6, at 1330–35 (analyzing the Framers’ vision of the Thirteenth Amendment).

39. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

40. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

The great change of which I have spoken is that from slavery to freedom. Slavery gone, its laws, its prejudices, and consequences should be buried forever. We are legislating for mankind. If there be wrong, now is the time to right it; if there be defects, this is the forum in which to remedy them; if doubts remain, the present is the hour to solve them. The craven may shift the responsibility, but civilization will hold us accountable for the performance of our whole duty.<sup>41</sup>

I believe that racial profiling amounts to a badge or incident of slavery and that the Thirteenth Amendment therefore provides a constitutional remedy for it. There are at least three reasons for viewing race-based policing as a Thirteenth Amendment issue.

First, in a very literal sense, such stops amount to a race-based restraint on freedom of movement. The widespread use of race-based pretextual searches and seizures results in significant limitations on the ability of persons of color to come and go as they please without state-sanctioned limitations on their physical freedom of movement based (even in part) upon their race.<sup>42</sup>

Second, in a broader sense, the historical association of blackness with criminality is, as noted earlier, part of the legacy of slavery and white supremacy that which we have all absorbed. To the extent that we give law enforcement officials wide discretion to utilize pretextual stops, those stops will be based upon hunches and intuition, which are in turn influenced by the centuries-long legacy of racial bias that they (and we all) have internalized.<sup>43</sup> In determining when to utilize a pretextual stop, officers must make judgments: as between the hundreds of citizens they encounter each day who commit nominal traffic infractions (which are impossible to avoid if one drives for any length of time) or quality of life offenses (e.g., littering), which ones to stop? The officer's judgment will be informed by whom he or she believes is likely to be engaging in some additional more serious offense for which the traffic infraction or quality of life offense provides an investigative pretext, as is licensed by *Whren*. It is unlikely that law enforcement officials are immune from cultural biases that one's status as a racial minority is

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41. CONG. GLOBE, 39th Cong., 1st Sess. 1622 (1866). *See generally* *Race, Rights, and the Thirteenth Amendment*, *supra* note 6 (discussing extensively the Amendment's intent and purposes).

42. Becca James, *Stop and Frisk in 4 Cities: The Importance of Open Police Data*, SUNLIGHT FOUND. (Mar. 2, 2015, 9:00 AM) <https://sunlightfoundation.com/blog/2015/03/02/stop-and-frisk-in-4-cities-the-importance-of-open-police-data-2/> [<https://perma.cc/9Z3S-AG98>] (noting stop and frisk data from four cities raises concerns that the stops are motivated by racial biases).

43. *See supra* note 15 (citing articles about unconscious bias and associations between race and criminality).

probative of her propensity to engage in crime; thus, the officer's intuition regarding who to stop and search will be influenced by unconscious and implicit biases deriving from centuries of slavery and racial stereotyping. This sort of state-sanctioned stigmatization was considered by the Framers to be among the badges and incidents of slavery that the Thirteenth Amendment would abolish.

The final benefit of a Thirteenth Amendment approach to the issues to which *Whren* gives short shrift is that the Thirteenth Amendment, by its very language and context, requires an understanding of and a candid jurisprudential dialogue about race, racism, and history. Thus, even if a particular claim based upon a badges and incidents of slavery theory ultimately proves unsuccessful, at least the claimant will have shaped the case in a way that is resonant with her lived experiences. Cases involving race-based pretextual stops are not just about abstract legal doctrine: they are, to the claimants and others similarly situated, just as much about the ability of persons of color to walk the streets and drive the roads of their country without wondering whether their ability to do so freely depends upon the color of their skin.