A Thirteenth Amendment Framework for Combating Racial Profiling

William M. Carter, Jr.[*]

Law enforcement officers' use of race to single persons out for criminal suspicion ("racial profiling") is the subject of much scrutiny and debate. This Article provides a new understanding of racial profiling. While scholars have correctly concluded that racial profiling should be considered a violation of the Fourth Amendment, the Fourteenth Amendment's Equal Protection Clause, and existing federal statutes, this Article contends that the use of race as a proxy for criminality is also a badge and incident of slavery in violation of the Thirteenth Amendment.

Racial profiling is not only a denial of the right to equal treatment, but also a current manifestation of the historical stigmatization of all African Americans as predisposed toward criminality. This legally enforced stigma arose out of, and was essential to, slavery and the social structures necessary to maintain slavery. Courts have wrongly divorced the modern practice of racial profiling from its historical roots and instead focused solely on the subjective intent of individual police officers in discrete cases. By doing so, courts have misunderstood and undervalued the injuries inflicted by racial profiling; failed to acknowledge the systemic, historical bases of racial profiling; and failed to provide effective relief. The Thirteenth Amendment provides both courts and Congress with the authority to remedy this legacy of inequality arising from the slave system in the United States.

> [I]n a society that began to demonize African Americans almost as long as it first enslaved them, blacks have endured being cast as menacing shadows at the edge of bad dreams.[1]

I. Introduction

Racial profiling, or the use of race as an *ex ante* basis for criminal suspicion, has been the subject of much scrutiny and debate. Traditionally, those who support the use of race as an element of criminal profiles have argued that the practice is merely a reflection of racially disparate

---

[*] Assistant Professor, Case Western Reserve University School of Law. I thank Jonathan Entin, Michael Heise, Mel Durschlag, and Sharona Hoffman of Case Western Reserve University School of Law for their comments and suggestions and Katie Gibbons, Amy Klosterman, Gregg Heinemann, and Nic Creznic for their research assistance. I especially thank Abigail Horn for her loving encouragement. I also want to thank my parents and family, who taught me that being African American is a gift, not an obstacle, and that pursuing social justice is an obligation, not a choice.

[1] Erika L. Johnson, *"A Menace to Society:" The Use of Criminal Profiles and Its Effects on Black Males*, 38 How. L.J. 629, 632 (1995) (quoting Richard Lacayo, *Stranger in the Shadows*, Time, Nov. 14, 1994, at 46).

crime rates. If African Americans, for example, commit more crime, it only makes sense to include race as an element of profiles used to predict criminal conduct.[2] Furthermore, many would argue that African Americans and other minorities are simply too sensitive,[3] and would characterize opposition to racial profiling as "political correctness."[4] Since crime rates are racially disproportionate, ignoring such evidence in the name of cultural sensitivity costs us all, especially racial minorities whose communities are disproportionately affected by crime.[5]

Opponents of the practice respond with studies showing that rates of drug use (drug interdiction being the context in which racial profiling is most commonly employed) are not in fact racially disproportionate,[6] or at least not so disproportionate as to justify the massive racial disparities regarding whom law enforcement officers single out for suspicion.[7] Most

---

[2] *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTICULTURAL SOCIETY 260–61 (1995) (arguing that focusing on young blacks is a form of rational discrimination because "everyone knows that young blacks are convicted of a high percentage of violent crimes"); Heather Mac Donald, *The Myth of Racial Profiling*, CITY J., Spring 2001, at 14, *available at* http://www.city-journal.org/html/11_2_the_myth.html.

[3] The suggestion that African Americans need simply to "get over it" is not new. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Brown argued that any injury caused by the "separate but equal" regime was inflicted by African Americans upon themselves:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551.

[4] *See, e.g.*, Liam Braber, Comment, Korematsu*'s Ghost: A Post-September 11 Analysis of Race and National Security*, 47 VILL. L. REV. 451, 456 n.39 (2002) (reporting on a television interview with former Ohio Congressman John Kasich, who "responded to questions about racial profiling with, 'Political correctness is out the window . . . . I mean I think the country has had it, flat out had it with political correctness'").

[5] *See, e.g.*, Mac Donald, *supra* note 2 (arguing that residents of inner-city communities care more about ridding their communities of crime than about racial profiling); *cf.* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19–20 (1997) (arguing that the principal problem facing minority communities today is underenforcement rather than overenforcement) ("Whereas mistreatment of suspects, defendants, and criminals has often been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity.").

[6] *See, e.g.*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH AND HUM. SERVS., 2001 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, Vol. 2, at 127 tbl.H.19, *available at* http://www.samhsa.gov/oas/nhsda/2k1nhsda/vol1/toc.htm (reporting that in 2001, 12.1% of whites, 11.0% of Hispanics, and 11.6% of blacks reported illicit drug use). Admittedly, roughly equal rates of drug *use* do not necessarily imply roughly equal rates of drug *trafficking*, which tends to be the focus of law enforcement. *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STANFORD L. REV. (forthcoming 2003) (manuscript at 14, on file with author).

[7] *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 80 (2002); *see also* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 655 (2002) (noting that in the period from 1997 to 2000, African Americans were seventeen percent of

opponents of racial profiling would further argue that even if there is some racial disparity in crime rates generally,[8] the social costs of racial profiling outweigh the modest or arguable efficiency gains of the practice.[9] Litigants and scholars opposing racial profiling have therefore focused on the Fourth Amendment's prohibition of unreasonable searches and seizures and the Fourteenth Amendment's Equal Protection Clause in seeking to attack the practice.[10]

The historical context of race-based criminal suspicion is largely lost in the debates and jurisprudence regarding racial profiling. This Article contends that the Thirteenth Amendment,[11] in contrast to the equal protection paradigm that is currently the focus of racial profiling jurisprudence and scholarship,[12] provides a stronger constitutional basis for combating this lingering vestige of slavery.[13] Rather than focusing on arguments about efficiency or abstract "equal treatment" under the Equal Protection Clause, a Thirteenth Amendment framework for examining

---

the drivers on a highway near Baltimore but that twenty-eight percent of those stopped were black and fifty-one percent of those searched were black).

[8] Many scholars have argued that, because of enforcement biases, the racial disparity in *conviction* rates, *see, e.g.*, D'SOUZA, *supra* note 2, at 260, does not accurately reflect *crime* rates. *See, e.g.*, Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 684 (2000) ("When criminal investigations focus on African Americans, more African Americans necessarily will be arrested and convicted of crimes, thereby creating a self-fulfilling prophesy."); Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 379 (2003) (arguing that "the stereotype that minorities are more likely than whites to commit crime" is a "dubious proposition itself given enforcement biases").

[9] *See infra* Part II (discussing the individual and societal injuries caused by racial profiling).

[10] *See infra* Parts III.A–B (discussing the Fourth and Fourteenth Amendment racial profiling jurisprudence).

[11] U.S. CONST. amend. XIII, §§ 1–2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.").

[12] Because the Supreme Court has effectively foreclosed any Fourth Amendment remedy for racial profiling, *see infra* Part III.A, the current case law focuses on the Equal Protection Clause.

[13] The evolving body of Thirteenth Amendment scholarship has several strands. For example, some scholars have argued that the Thirteenth Amendment should be used to attack modern forms of one person's control and domination over another. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359 (1992); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002). Others have attacked certain modern practices or conditions as "badges or incidents" of slavery, in the sense that those practices either existed during slavery and continue to exist today, or arise from social inequalities that were fundamental to the slave system. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) [hereinafter Colbert, *Challenging the Challenge*]; Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 856–57 (1998).

racial profiling forces us to recognize and confront the continuing effects of slavery and the social and legal structures that supported it. Accordingly, this Article seeks to redirect the debate over racial profiling toward a frank consideration of the historical permanence of the assumption of innate black criminality; the roots and purpose of that stereotype in the system of chattel slavery and the subjugation of African Americans after the end of slavery; and its continuing effects on African Americans today.

The Supreme Court has long recognized that the Thirteenth Amendment was intended not only to destroy human enslavement as an economic institution, but also to eliminate the lingering effects of the slave system. Shortly after passage of the Thirteenth Amendment, the Court held that the Thirteenth Amendment empowered Congress not only to end chattel slavery but also to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[14] In *Jones v. Alfred H. Mayer Co.*,[15] the Court revitalized the Thirteenth Amendment, which had lain largely dormant for over a century after its passage, by holding that private white persons' refusal to sell property to African Americans constituted a badge or incident of slavery.[16] This Article, while recognizing the need for some discernable limits to the badges and incidents of slavery theory of the Thirteenth Amendment, does not attempt to provide a comprehensive theory of those limits in all circumstances. Rather, I seek here only to sketch the framework of such limits in the context of racial profiling.[17]

Racial profiling is best understood as a current manifestation of the historical stigma of blackness as an indicator of criminal tendencies. This stereotype arose out of, and was essential to, slavery in the United States. The demonizing of African Americans as the dangerous, uncontrollable "other" made it easier to reconcile the American ideal of liberty for all persons with the reality of enslavement. The myth of innate black criminality served both to dehumanize African Americans during slavery and to justify the brutal means of social control needed to maintain white dominance after the end of slavery.

My purpose here is not to *equate* racial profiling with slavery. Doing so would minimize the suffering of the millions of Africans enslaved in

---

[14] The Civil Rights Cases, 109 U.S. 3, 20 (1883). The Court, in the *Civil Rights Cases*, however, narrowly construed what conditions constituted such badges and incidents, holding that segregation in places of public accommodations did not qualify. *Id.* at 24. See *infra* Part IV.B for a discussion of the Court's major Thirteenth Amendment cases.

[15] 392 U.S. 409 (1968).

[16] *Id.* at 437–40. Thirteenth Amendment jurisprudence and scholarship has subsequently focused on (1) defining what qualifies as a badge or incident of slavery, and (2) whether the Thirteenth Amendment provides a direct cause of action for slavery's badges and incidents, or whether Congressional legislation is needed to authorize such suits. It remains uncontested in the modern case law that the Thirteenth Amendment does indeed reach the badges and incidents of slavery. For a fuller discussion of these issues, see *infra* Parts IV and V.

[17] See *infra* Part VI for a discussion of the reach and limits of a Thirteenth Amendment theory of racial profiling as a matter of history, constitutional theory, and policy.

this country. I do not argue that the injury caused by racial profiling is as severe as slavery, nor that African Americans today in any way experience the nearly unimaginable degradation of slavery. Rather, this Article contends that the widespread stigmatization of African Americans as predisposed toward criminality is a lingering vestige of the slave system and is therefore outlawed by the Thirteenth Amendment.[18]

It is clear that persons who are not African American can suffer a "simple" Thirteenth Amendment injury; that is, any person of any race can be enslaved or compelled to labor for another.[19] This Article focuses on racial profiling of African Americans, however, because (1) they are the original subjects of the Thirteenth Amendment and (2) they are the most likely to suffer slavery's badges and incidents.[20] While other ethnic minorities are also saddled with popular perceptions of group propensity for crime, those assumptions tend to operate differently, and perhaps more narrowly, than the widespread stereotype of black criminality.[21]

---

[18] This is not to say that police officers employing racial profiling are *intentionally* attempting to impose a "badge or incident of slavery" upon African Americans. In fact, I believe that a Thirteenth Amendment cause of action for racial profiling should encompass a disparate impact theory rather than being limited to purposeful discrimination. *See infra* Part VI.A. The nature and genesis of the injury to the victim, rather than the perpetrator's intent, should be considered determinative for Thirteenth Amendment purposes.

[19] *See, e.g.*, Civil Rights Cases, 109 U.S. at 33 (Harlan, J., dissenting) ("The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States."); *cf.* Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) ("While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.").

[20] *See* Veena Garyali, *The Color of Suspicion: Race Profiling or Racism?*, 27 J. AM. ACAD. PSYCHIATRY L. 630, 631 (1999) ("It may be more appropriate to broaden the discussion [about racial profiling] to minorities in general, because most minority groups have experienced discrimination. However, all minorities don't have quite the same history of slavery, of decades of oppression, of being made to feel inferior to the 'white man.'").

[21] *See, e.g.*, KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, AND OTHER MACROAGGRESSIONS xiii–xiv (1998) (noting that the images of criminality of other racial and ethnic groups have tended to be crime-specific, rather than, as for African Americans, general presumptions of innate criminality in all circumstances). *But see* Kevin R. Johnson, *The Case for African-American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 346–47 (2003) (noting that both African Americans and Latinos are "demonized as criminals, drug dealers, and gang members, are the most likely victims of police brutality, and are disproportionately represented in the prison population"). I do not intend to suggest that racial profiling is only a problem for African Americans, nor do I intend to undermine the coalition building that Professor Johnson and others rightly note is necessary to address the racialization of American criminal law. Instead, I believe that as a historical matter, the clearest case can be made with regard to African Americans that racial profiling is a badge or incident of slavery in violation of the Thirteenth Amendment. Future articles will address whether and how the "badges and incidents of slavery" theory should apply to racial minorities other than African Americans. Professor Colbert has argued that the key is whether the claim is made by a member of "any cognizable group that shares characteristics with groups subjected to involuntary servitude" in the United States. Colbert, *Challenging the Challenge*, *supra* note 13, at 5 & n.10; *cf.* Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969) (arguing that the Thirteenth Amendment should be limited to African Americans and possibly Asian

Part II of this Article discusses the phenomenon of racial profiling, the damage racial profiling inflicts, and the traditional bases for opposing the practice. Part III examines the inadequacy of current constitutional jurisprudence regarding racial profiling. In Part IV, I examine the history and purposes of the Thirteenth Amendment as well as major Thirteenth Amendment jurisprudence. I also examine the historical continuity of African Americans' stigmatization as congenital criminals and contend that race-based criminal suspicion is indeed a "badge or incident" of slavery in violation of the Thirteenth Amendment. Part V discusses Congressional and judicial power under the Amendment and rebuts arguments that slavery's lingering effects may only be prohibited by Congress under the Thirteenth Amendment's enforcement clause and may not be judicially addressed under the Amendment's self-executing core. Part VI briefly reviews some benefits of, and concerns about, the "badges and incidents of slavery" theory of racial profiling. This Article concludes that racial profiling, even in the absence of Congressional legislation, is a violation of the Thirteenth Amendment, and calls on the judiciary to construe the Amendment to fulfill its promise to rid the freedmen and their descendants of slavery's legacy.

II. The Nature of the Problem

A. Racial Profiling and Its Effects on African Americans

Racial profiling occurs when law enforcement authorities use race as a factor in predicting criminal conduct. Racial profiling developed out of criminal profiling, which uses a variety of behavioral factors as predictors of criminal activity.[22] Traditional criminal profiles rely on the correlation between behavioral factors and the past experience of law enforcement in discovering criminal behavior associated with those factors.[23] Thus, profiling rests upon the perceived accuracy of the profile as a predictor of criminality. Racial profiling rests upon the same justification and operates in the same manner. Police officers, based on their past experience, use race (perhaps in conjunction with other factors, perhaps

---

Americans); Note, Jones v. Mayer*: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 Colum. L. Rev. 1019, 1025 (1969) (arguing that *Jones* recognized that "the 'slavery' referred to in the thirteenth amendment now encompasses the second class citizenship imposed on members of disparate minority groups") ("[A]n extension of [*Jones*'] analysis may well lead to the conclusion that all who suffer under 'badges and incidents' of this second-class citizenship will become the beneficiaries of the Thirteenth Amendment's protection."). See *infra* Parts V–VI for a discussion of the reach, benefits and limitations of a Thirteenth Amendment "badges and incidents of slavery" remedy for racial profiling.

[22] *See* Harris, *supra* note 7, at 16 ("In *criminal profiling*, law enforcement personnel use characteristics associated with either a particular crime or group of crimes to develop a profile of someone likely to engage in illicit behavior.").

[23] *Id.*

alone) as an *ex ante* predictor of who is more likely to be engaged in criminal behavior. Police officers apply the profile and select persons matching it for investigation, questioning or detention.

Traditional behavioral profiling is usually not thought to be problematic from a constitutional perspective.[24] Behavioral profiles are more accurate than racial profiles because they rely on suspects' conduct rather than their ethnic descent as predictors of criminality.[25] Behavioral profiling also does not have the overtones of discrimination present in racial profiling. Injecting race into the profile raises the specter that the police are relying on their stereotypes about the criminal tendencies of minority groups, rather than relying on objective, rational criteria for suspicion.[26]

Racial profiling inflicts several injuries upon those subjected to it. While these injuries often overlap, they are analytically distinct. Firsthand experience with being singled out for suspicion because of one's race substantiates and reinforces the already pervasive belief among racial minorities (particularly African Americans) that the criminal justice system is racially biased.[27] As stated in the proposed federal End Racial Profiling Act of 2001:[28]

> Racial profiling harms individuals subjected to it because they experience fear, anxiety, humiliation, anger, resentment, and cynicism when they are unjustifiably treated as criminal suspects. Racial profiling damages law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts, and the criminal law.[29]

---

[24] The fact that non-racial profiling does not raise constitutional problems does not necessarily mean it is effective if routinely used. *See id.* at 26 (arguing that even non-racial behavioral profiles may be problematic in terms of effective law enforcement if relied on too heavily) ("Criminal profiling seems to be most effective in describing the characteristics of someone likely to have committed a specific, existing crime rather than predicting who might be committing crimes not yet known to the police.").

[25] Professor Harris notes that Bob Vogel, the person thought to have first refined the profiling concept in the context of drug interdiction on the highways, used specific elements of the suspect's behavior in the profile. *See id.* at 20–23. Vogel further stated that "it would have made no sense for him to focus on either African Americans or Latinos; the greatest number of 'upper-level dealers' that he arrested as a result of his stops were white men." *Id.* at 48.

[26] *Id.* at 149 ("Much of what we think of as racial profiling comes from attitudes and beliefs people hold about certain racial or ethnic groups.").

[27] *See, e.g.*, Steven A. Tuch & Robert Weitzer, *Racial Differences in Attitudes Toward the Police*, 61 PUB. OPINION Q. 642 (1997) (discussing surveys revealing persistently negative attitudes among blacks regarding law enforcement agencies).

[28] S. 989, 107th Cong. (2001). This bill is discussed in more detail *infra* Part V.A and notes 296–299.

[29] *Id.* §§ 2(a)(8)–(9).

These findings rightly emphasize that racial profiling is a societal problem that both impacts the individuals subjected to it and undermines effective policing.

Persons subjected to racial profiling feel unfairly singled out *because* they are African American or belong to another minority group, not because of any legitimate reason for suspicion. This wholesale categorization of all members of a certain race as potential criminals happens only when racial minorities are involved. Seldom, if ever, do we hear a description of the criminal suspect as white and then apply an assumption of criminality to all whites we meet thereafter. This is because we think of the white criminal as "an individual deviant, a bad actor. We do not think of his actions as representative of an entire racial group."[30]

A second form of injury caused by racial profiling involves feelings of victimization or powerlessness, both during the racially motivated encounter and while seeking redress afterwards. The police correctly try to assume immediate control of the situation when they stop a person suspected of criminal activity. This "control dynamic," when racialized, leaves the target of racial profiling feeling subjected to control because of his race and stripped of power and agency.[31] Further, victims of racial profiling often find that they get stonewalled when trying to seek remedies for racial profiling, causing them to simply give up and accept racial profiling as a fact of life.[32] This feeling of powerlessness often leads members of racial minorities to adopt accommodationist strategies to live with the effects of perpetual criminal suspicion based on their race.[33] Such strategies include changing when, where and how one lives, works, drives, or dresses.[34]

Yet a third injury caused by racial profiling—and the one most relevant for purposes of understanding racial profiling as a badge or incident of slavery—involves stigmatization and dehumanization. Quite apart from the feeling of racially charged powerlessness described above, the legally enforced stereotype of black criminality has a particularly injuri-

---

[30] Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575, 1585 (2002).

[31] HARRIS, *supra* note 7, at 96.

[32] *See id.* at 93 (describing the experiences of a prominent African American subjected to racial profiling).

[33] *See* Adero S. Jernigan, Student Article, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCHOL. REV. 127, 135 (2000).

[34] *See* RUSSELL, *supra* note 21, at 34 (describing "protective mechanisms" black men have developed to avoid police stops or minimize danger when such stops occur); *see also* HARRIS, *supra* note 7, at 98–99, 102–06 (arguing that because racial profiling "has such a strong impact on the mobility of those subjected to it—the diminished willingness of minorities to go where they feel they will get undesirable law enforcement attention—[that it] help[s] to reinforce existing segregation in housing and employment"); Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997); Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1. The fact that minorities may feel obligated to take such steps does not mean that they can successfully avoid racial profiling. *See infra* notes 41–43 and accompanying text.

ous effect on African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment. The image in the collective white mind of blacks (particularly black men) as congenital criminals is perhaps the most deeply entrenched stereotype pervading the black-white relationship in America.[35] The pervasiveness of this assumption reveals that it rests upon deeply rooted historical attitudes and is not simply the result of individual racial bias.[36] To see this legacy of slavery embodied in modern-day stereotypes, "whites need simply to peer into their own minds and watch as they confront blacks on the street, in a classroom, or on television."[37] Indeed, the association of blackness with criminality is not limited to whites; many blacks and members of other racial minorities share this perception.[38] Law enforcement officials swayed by this pervasive stereotype[39] have the power to give it the force of law.[40]

This stigma remains one that African Americans cannot escape, regardless of their individual circumstances. Racial profiling is a practice that denies the essential humanity and individuality of those subjected to it.[41] The stories of those subjected to racial profiling and their wide-ranging stations in life reveal that "nothing—not high personal achievement, not education, not wealth, and not personal appearance—protects a

---

[35] I say "perhaps" only because the stereotype of black men as sexual predators certainly comes a close second in the popular mythology of race. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 41–47 (1978) [hereinafter HIGGINBOTHAM, IN THE MATTER OF].

[36] See *infra* Part IV for a discussion of the historical entwinement of race and criminal suspicion.

[37] T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1120 (1991); *see also* Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1952–54 (1993) (discussing research into the strong subconscious association between blackness and criminality and noting that this association "between blacks and crimes is so powerful that it supercedes reality: it predisposes whites to literally see black people as criminals," even where the prompt in the studies described involves a white aggressor and a black victim); Erica Goode, *With Video Games, Researchers Link Guns to Stereotypes*, N.Y. TIMES, Dec. 10, 2002, at F1 (discussing study revealing that subjects were much more likely to associate blacks with guns).

[38] *See, e.g.*, RUSSELL, *supra* note 21, at xiii ("Ask anyone, of any race, to picture a criminal, and the image will have a Black face.").

[39] *See* Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 106 (1997) ("[T]he deeply embedded idea of a frightening Black man has some influence on every person in America, including every person in the criminal justice system. Each stage of our criminal justice process reflects and reinforces the 'knowledge' that Black male means criminal."); *see also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 142–44 (1996) (recounting prosecutors' appeals to white stereotypes of black criminality).

[40] *See infra* Part VI.B, explaining that the theory presented here of racial profiling as a Thirteenth Amendment violation does not extend to purely private racial stereotyping lacking the force of law, threat of violence, or economic enforcement.

[41] *See* Roberts, *supra* note 37, at 1952 ("'Street sweeps,' 'gang profiles,' and 'black lists' all reflect and reinforce the association of blacks with criminal propensity. They erase the identities of black people as individual human beings and instead define them, on the basis of their race, as potential criminals.").

black or Latino citizen from [racial profiling]."[42] As one high-profile repeat victim of racial profiling has described it, being subjected to criminal suspicion because of your race "undermines and calls into question everything you've accomplished in your life, everything you've worked for. No matter how hard you've worked, no matter what you do, no matter how diligently [you've] pursued the American dream, you're treated like a common criminal."[43]

It is critical to understand that such reactions to racial profiling are not isolated or limited to those who are "too sensitive." In recent years, psychologists exploring racial profiling's personal impact have concluded that racial profiling can inflict serious emotional anguish.[44] One researcher conducted in-depth interviews regarding reactions to racial profiling and racialized law enforcement in different Washington, D.C., neighborhoods. This study reveals that feelings of anger, powerlessness and stigmatization are the norm for racial minorities subjected to criminal suspicion because of their race.[45]

Furthermore, the injuries caused by racial profiling are suffered regardless of whether the person singled out is actually engaged in criminal activity. I realize that this is an emotionally unappealing argument and that judges are reluctant to suppress evidence on "procedural" grounds. Yet the Constitution demands, in a variety of other circumstances, that certain means of ascertaining substantive guilt are simply impermissible because they conflict with overriding social values.[46] The charge that condemning racial profiling is misguided because only criminals have something to fear from the practice is incorrect because racial profiling imposes substantial burdens on persons who are in fact innocent.[47] This argument is also overly simplistic because the law in other circumstances protects the

---

[42] HARRIS, *supra* note 7, at 95 (discussing the personal impact on victims of racial profiling).

[43] *Id.* at 96 (quoting African American attorney Christopher Darden).

[44] *See, e.g.*, Hugh F. Butts, *Psychoanalytic Perspectives on Racial Profiling*, 27 J. AM. ACAD. PSYCHIATRY. L. 633 (1999); *see also* Eileen O'Connor, *Psychology Responds to Racial Profiling*, 32 MONITOR PSYCHOL. (May 2001), *available at* http://www.apa.org/monitor/may01/raceprofile.html (quoting Tom Tyler, Ph.D.) (reporting on the American Psychological Association's 2001 Annual Convention addressing the psychological impact of racial profiling).

[45] *See generally* Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 43 LAW & SOC'Y REV. 129 (2000).

[46] *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977) (stating that "[a] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction"); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (holding that when "the police carry out a process of interrogations that lends itself to eliciting incriminating statements," and deny the suspect's request for an attorney, the suspect's statements during the interrogation may not be used at trial).

[47] *See infra* Part II.B.

right to procedural fairness, even at the risk of suppressing evidence of substantive guilt.[48]

B. Traditional Bases for Opposing Racial Profiling

There are several reasons for opposing racial profiling as a matter of law and policy. First, racial profiling imposes substantial burdens upon large numbers of innocent persons who happen to share a racial characteristic. This is both inefficient and unfair. For example, where only ten percent of people matching a racial profile have actually committed a crime, then, by definition, the remaining ninety percent are innocent. Thus, racial profiling is an imprecise tactic that subjects law-abiding persons to unjustified, intrusive police encounters and diverts law enforcement resources away from more accurate crime-fighting techniques.

The majority of the data indicates that racial profiling is not an effective law enforcement tactic. For example, in the context of drug investigations, numerous studies show that rates of drug use are roughly equal among racial groups but that blacks and Latinos are overwhelmingly represented among those stopped and searched for drugs.[49] Furthermore, most of the data indicates that the "hit rates"[50] across races of those stopped and searched are comparable among racial groups[51] or even higher for whites.[52] Many scholars rely upon such data to argue that if racial profiling were an effective police tactic, then the hit rates should be higher for those groups. The fact that the hit rates are not in fact higher for racial minorities indicates that racial profiling does not have the efficiency gains its proponents claim. It therefore cannot be defended on the ground that it is simply "good police work."[53]

---

[48] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (establishing exclusionary rule for evidence obtained through illegal search and seizure).

[49] HARRIS, *supra* note 7, at 80.

[50] The term "hit rate" refers to "the rates at which police actually find contraband or other evidence of crime when they perform stops and searches." *Id.* at 79.

[51] *See, e.g.*, David Cole & John Lamberth, *The Fallacy of Racial Profiling*, N.Y. TIMES, May 13, 2001, at A13 ("[T]he racial profiling studies uniformly show that [the] widely shared assumption of [racially disparate criminality] is false. Police stops yield no significant difference in [hit rates] for minorities and whites.").

[52] *See, e.g.*, HARRIS, *supra* note 7, at 80–81.

[53] *See, e.g.*, Garyali, *supra* note 20, at 631. In other words, as the accuracy of the criteria used to spot possible criminal conduct decreases, so does the rate of discovering actual criminal conduct. Presumably, the reason why most studies reveal that hit rates are higher for whites is that race is not used as a criterion for stopping or investigating them. Rather, to the extent that profiles are used when whites are stopped, they are not racial profiles, but behavioral profiles, which are a more accurate predictor of criminal conduct. Professor Banks argues that the current use of hit rates statistics by those who oppose racial profiling is flawed. *See* Banks, *supra* note 6 (manuscript at 5–19). Although the debate over what exactly is proven by the statistical evidence is beyond the scope of this Article, Banks argues that "[t]he inference that irrational racial profiling accounts for racially disparate stop-search outcomes represents, at best, an incomplete account of the empirical evidence [because] [t]he alternative possibilities—that stop-search disparities reflect rational

Moreover, racial profiling can be opposed on the ground that the broader societal costs of the practice are simply too high. Even if racial profiling results in increased law enforcement efficiency in limited circumstances, the costs of this extra efficiency are not fairly distributed. Instead, the costs are imposed almost exclusively on racial minorities.[54] Racial profiling also exacerbates minority communities' distrust of law enforcement specifically,[55] and the criminal justice system generally, thereby making other, traditional means of law enforcement requiring community involvement more difficult.[56] It also makes police officers' jobs more difficult on a personal level, since they are often viewed with hostility and suspicion in minority communities. At its worst, this cycle of mutual suspicion can lead to violent confrontations between law enforcement officers and racial minorities.[57]

Nor is opposition to racial profiling solely the province of those who are identified as liberals. Despite his concerns about "pander[ing]" to what he dismissively characterizes as "left-wing racial mau-mauing" on the issue, Professor Nelson Lund has argued against racial profiling in terrorism investigations.[58] Employing a law and economics analysis, Lund argues that "governments are highly prone to excessive racial stereotyping and are largely immune from the forces that keep [practices like racial profiling] in check in the private sector."[59] Lund argues that the danger of government abuse arising from the *ex ante* use of race in terrorism investigations is too great when considered in light of the fact that "[m]any of the efficiency benefits of racial profiling . . . can be captured through the use of *other* screening criteria, such as country of origin . . . , age, sex, and travel patterns."[60] Other conservatives oppose racial profiling on "law and order" grounds, that is, that it "makes law enforcement less effective" because "discriminatory police practices create un-

---

profiling or would persist in its absence"—are not adequately accounted for. *Id.* at 19.

[54] Professor Randall Kennedy characterizes this as "a special kind of tax for the war against illegal immigration, drugs, and other forms of criminality." Randall Kennedy, *Suspect Policy: Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And It Should Be Abolished.*, NEW REPUBLIC, Sept. 13, 1999, at 30, 34 [hereinafter Kennedy, *Suspect Policy*].

[55] *See supra* note 27.

[56] HARRIS, *supra* note 7, at 12.

[57] "'If someone is stopped for a minor reason they attribute to their race, they may become defiant, hostility escalates and the police could even end up killing someone.' Subsequently, the swelling tide of mutual suspicion makes crime prevention *more difficult* for police." O'Connor, *supra* note 44 (quoting Tom Tyler, Ph.D.) (emphasis added).

[58] Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 331 (2003).

[59] *Id.*

[60] *Id.* at 338–39. Lund does temper his opposition to racial profiling in the terrorism context, stating that "one can imagine circumstances in which the benefits of engaging in racial profiling might greatly outweigh the harms that the practice will cause." *Id.* at 342.

necessary and unproductive hostility between police and the communities they serve."[61]

It is true that minority communities in general, and the African American community in particular, face a variety of social challenges that have a greater daily impact than racial profiling, such as disparities in educational or employment achievement and opportunity. Nonetheless, addressing racial profiling remains a worthy goal for several reasons. First, racial profiling leads to many other social problems. If African Americans are disproportionately subjected to law enforcement attention, it stands to reason that African Americans will be disproportionately prosecuted, convicted, sentenced to jail, disenfranchised from voting, and increasingly removed from the mainstream world of jobs, families and community involvement.[62] The offender's race plays into each stage of the criminal justice process. Eliminating racial profiling will help alleviate some of the disparities regarding who is swept into the criminal justice system in the first place.

Second, it is both possible and desirable to focus on interim or partial solutions to racial inequality while continuing to combat underlying social inequalities. The fact that a problem may not be as "serious" as other problems does not mean it is not a problem at all. The fact that women, for example, are disproportionately victims of domestic abuse does not mean that fighting gender stereotypes in the workplace is misguided. Likewise, the fact that racial profiling is arguably primarily a dignitary injury does not make the practice acceptable or constitutional.

In a legal context, racial profiling has also been opposed as a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. As scholars initially began to focus on racial profiling, many argued that a search or seizure based on an individual's race as a predictor of possible criminality violated the Fourth Amendment.[63] The Supreme Court, however, has held that an officer's subjective motivation cannot be used to attack a search or seizure.[64] As long as there is some objectively reasonable justification for the encounter, even where that

---

[61] James Forman, Jr., *Arrested Development: The Conservative Case Against Racial Profiling*, NEW REPUBLIC, Sept. 10, 2001, at 24.

[62] *See* Banks, *supra* note 6 (manuscript at 31–32) (noting that racial imbalance in incarceration may generate harmful secondary effects "because the racial concentration of incarceration reflects a spatial concentration as well, given the race and class segregated nature of most American cities, and the fact that those incarcerated for drug crimes tend to come from lower socioeconomic status communities").

[63] *See, e.g.*, Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1324 (1990) (arguing that the Fourth Amendment should prohibit police from "effect[ing] seizures based upon factors allegedly possessed by those engaged in criminal conduct, but also shared by a significant percentage of innocent persons, particularly when those factors concern characteristics like race . . . .").

[64] Whren v. United States, 517 U.S. 806, 813 (1996). See *infra* Part III.A for a discussion of *Whren*.

justification is purely pretextual, the Fourth Amendment provides no relief.

Opponents of racial profiling also rely upon the Equal Protection Clause, arguing that racial profiling constitutes intentional disparate treatment in the administration of criminal justice. Equal protection arguments concerning the government's use of race in its decision-making revolve around the "rationality" account: that unequal treatment based on one's race violates the Constitution where such treatment is irrational or based on prejudicial intent rather than rational judgment.[65] Under the Equal Protection Clause, unequal governmental treatment based on a person's race is subject to a high degree of suspicion ("strict scrutiny").[66] With regard to racial profiling, however, most courts have viewed the use of race as a predictor of possible criminality with great leniency, holding that racial profiling does not trigger strict scrutiny unless race was the only reason for suspicion.[67] While the policy arguments presented above therefore continue to inform the political and scholarly debate, the Fourth and Fourteenth Amendment attacks on racial profiling have been nearly unanimously rejected by the courts or given such limited application as to be virtually useless.[68] As a result, under current constitutional doctrine, the police are free to use racial background "as a proxy for a greater propensity to commit crimes . . . . This means, in clear and unequivocal terms, that *skin color itself has been criminalized*."[69]

III. The Inadequacy of Current Constitutional and Statutory Remedies in Combating Racial Profiling

A. Limitations of a Fourth Amendment Remedy for Racial Profiling

When the police detain or search a person based on his race, the intuitive reaction may be that it is an unreasonable search or seizure in

---

[65] *See generally* Jody David Armour, Negrophobia and Reasonable Racism (1997) (discussing the "reasonable racism" defense to stereotyping). Racial profiling may not always be wholly "irrational": as Professor Kennedy has argued, racially disparate crime rates are not purely "figments of some Negrophobe's imagination." Kennedy, Race, Crime, and the Law, *supra* note 5, at 145. Even if racial profiling in some circumstances may not be wholly irrational, however, the continuing stigma of congenital criminality arising from the slave system in this country and its concomitant injury to African Americans requires that the practice not be used. This Article contends that the Thirteenth Amendment, properly understood, mandates that not even "rational" badges and incidents of slavery shall exist in this country.

[66] *See, e.g.*, Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) (holding, in an affirmative action case, that governmental racial classifications are subject to "the strictest of judicial scrutiny").

[67] See *infra* Part III.B.2 for discussion and criticisms of the "sole motive" analysis.

[68] See *infra* Part III for a discussion of the Fourth and Fourteenth Amendment jurisprudence on racial profiling.

[69] Harris, *supra* note 7, at 224.

violation of the Fourth Amendment. Indeed, in *Gonzalez-Rivera v. INS*,[70] the Ninth Circuit held that the Border Patrol agents' decision to stop an individual solely because of his Hispanic appearance violated the Fourth Amendment.[71] However, the continuing vitality of *Gonzalez-Rivera*'s Fourth Amendment holding after the Supreme Court's decision in *Whren v. United States*[72] is highly doubtful.

In *Whren*, the defendant argued that the police violated the Fourth Amendment by stopping him under the pretext of a minor traffic violation because they lacked probable cause to stop him and search for drugs.[73] The defendant also argued that allowing pretextual stops would increase the risk that police officers would routinely use minor traffic violations as a cover for singling out racial minorities.[74] The Court rejected the defendant's arguments, holding that an officer's subjective intent in making a search or seizure is not relevant to determining whether a Fourth Amendment violation has occurred.[75] As long as there is some objectively reasonable basis for the search or seizure (in *Whren*, the traffic violation), it is valid under the Fourth Amendment. This holds true even if that basis is used as a pretext for an investigation for which the police lack probable cause.[76]

Whren is a highly troubling decision even in non-racial contexts since it validates the use of minor or technical infractions as a basis for intrusive searches or seizures. When examined in the context of racialized policing and in combination with other elements of the Court's Fourth Amendment jurisprudence, *Whren* is even more disturbing. Under the "automobile exception" to the Fourth Amendment, police officers have substantial discretion in conducting warrantless searches and seizures of drivers.[77] Pursuant to the "search incident to arrest" doctrine, the police may conduct a full search of someone they have arrested.[78] Further, the Court has recently held that the police may make a full custodial arrest of a driver for even a minor traffic violation.[79]

---

[70] 22 F.3d 1441 (9th Cir. 1994).

[71] *Id.* at 1443–52; *cf.* United States v. Weaver, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) (arguing, in a pre-*Whren* racial profiling case, that officers violated the Fourth Amendment by relying on defendant's race as the determinative basis for suspicion) ("Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.").

[72] 517 U.S. 806 (1996).

[73] *Id.* at 809.

[74] *Id.* at 810.

[75] *Id.* at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[76] *Id.* (stating that the Court's Fourth Amendment cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

[77] *See, e.g.*, United States v. Ross, 456 U.S. 798, 825 (1982).

[78] *See, e.g.*, Chimel v. California, 395 U.S. 752, 762–73 (1969).

[79] *See* Atwater v. Lago Vista, 532 U.S. 318 (2001).

The potential for abuse sanctioned by the Court's Fourth Amendment jurisprudence is apparent. For example, assume that the police in a particular community believe that most drug dealers are black. Accordingly, they stake out a partially hidden stop sign in order to, by their own admission, stop only black drivers who cross the white line in front of the stop sign before coming to a complete stop, while ignoring the same violation committed by white drivers. The police thereafter subject the black drivers to a full custodial arrest and conduct a search incident to arrest. This practice may result in evidence of a crime in, hypothetically, one out of one hundred black drivers stopped. This sort of racial "shakedown" has been deemed "reasonable" under the Fourth Amendment, despite the admittedly pretextual use of the stop sign infractions and the lack of individualized suspicion for the criminal conduct the police are actually seeking to interdict.

Unfortunately, the scenario just described cannot be considered unrealistic. As any driver knows, it is almost impossible to drive for even a short distance without committing some technical traffic violation.[80] Justice O'Connor has recently recognized the risk of racial unfairness created by such unbridled police discretion: "[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."[81]

The Court's decision in *Whren* is also in significant tension with the Court's precedents on the relevance of motive in assessing other constitutional violations. The Court's equal protection jurisprudence requires a litigant to show that the government acted with a racially discriminatory purpose.[82] Absent direct or inferential proof of discriminatory intent, strict scrutiny does not apply.[83] Thus, in the Fourteenth Amendment context, the Court has held that the *only* factor that matters is the governmental actor's subjective intent. With regard to the Fourth Amendment, however, *Whren* teaches that even direct proof of discriminatory intent is insufficient to establish a violation of that Amendment. It is difficult to discern a consistent theoretical basis for the Court's schizophrenic view of the relevance of motive to Constitutional violations, particularly given that neither the Fourth nor the Fourteenth Amendment textually ad-

---

[80] *See* HARRIS, *supra* note 7, at 30–33 (discussing the minutiae of traffic codes and stating that "[t]he point is not that all police officers are looking for the tiniest infraction so they can conduct a traffic stop; rather, if police officers *want* to they *can* stop any driver, whenever they like, simply by following the car for a short distance").

[81] *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting). Unlimited police discretion raises the risk of racial unfairness in situations extending beyond "driving while black." *See, e.g.*, *Weaver*, 966 F.2d at 397 (Arnold, C.J., dissenting) ("Airports are on the verge of becoming war zones, where anyone is liable to be stopped, questioned, and even searched merely on the basis of the on-the-spot exercise of discretion by police officers.").

[82] *See* Washington v. Davis, 426 U.S. 229 (1976).

[83] *See infra* Part IV.B.1.

dresses the issue of intent at all. A skeptical reader of the Court's jurisprudence could conclude that the Court's obsession with discriminatory intent in the Fourteenth Amendment context, while simultaneously disregarding discriminatory intent in the Fourth Amendment context, reflects the Court's desire to shield law enforcement officials from constitutional liability, rather than a coherent or principled jurisprudence.[84]

B. Limitations of a Fourteenth Amendment Remedy for Racial Profiling

1. The Inadequacy of Equal Protection Jurisprudence in Addressing Racial Profiling

The *Whren* majority, while rejecting the defendant's Fourth Amendment claims, indicated that the Fourteenth Amendment is the appropriate vehicle for claims of racially selective law enforcement.[85] Equal protection doctrine, however, is unlikely to prove effective in combating racial profiling for several reasons. The Supreme Court's equal protection jurisprudence has become increasingly focused on the "perpetrator's perspective."[86] By focusing exclusively on the subjective intent of the governmental actor, rather than on the nature of the injury to the victim, equal protection doctrine currently offers little hope for persons alleging racial profiling. Most often, individuals alleging racial profiling point to a pattern of disproportionate investigations of racial minorities yet are unable to provide proof of discriminatory intent in an individual case. The difficulty of providing such proof means that racial profiling will usually be insulated from serious equal protection scrutiny.[87]

---

[84] A more consistent approach would be to hold that proof of either discriminatory intent or disparate impact is sufficient to prove a violation of either Amendment.

[85] *Whren*, 517 U.S. at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to the intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

[86] Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988) (remarking that the search for intent under the Equal Protection Clause is premised on the "search for a bigoted decision-maker"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (criticizing the limitation of equal protection doctrine to cases where there is proof of subjective discriminatory intent because, *inter alia*, "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation"). Professor Lawrence proposes a "cultural meaning" test for proving equal protection violations: if the challenged action were perceived by a "significant portion of the population" as racially biased, then a presumption would arise that the decision was motivated by conscious or unconscious racism. Lawrence, *supra*, at 356–57. Given how entrenched the "purposeful discrimination" standard has become in equal protection jurisprudence, Professor Lawrence's framework stands a better chance of being incorporated into Thirteenth Amendment doctrine.

[87] A few courts have indicated that sufficiently persuasive statistical evidence "may

Additionally, the traditional equal protection analysis only recognizes one part of the injury to African Americans caused by race-based criminal suspicion: unequal treatment. Equal protection doctrine, at least as currently construed, detaches current inequality from its historical causes. As Professor Colbert has noted, the Court's equal protection jurisprudence:

> has eviscerated the potential of the Fourteenth Amendment . . . to secure substantive equality for African-Americans by turning its back on this nation's history of racial oppression and focusing solely on abstract principles . . . . [B]y ignoring this nation's history of racism, the justices reframe the Reconstruction Amendments' specific purpose of ending whites' oppression of African-Americans into a generalized prohibition of "race discrimination."[88]

Construing the Equal Protection Clause to require "colorblindness" in the abstract, without reference to the historical and societal position of those burdened by the governmental classification, has the admitted benefit of logical simplicity and superficially appeals to the nondiscrimination principle. However, when an African American is singled out for criminal suspicion because of her race, she is degraded and dehumanized in a way that others subjected to similar treatment are not, due to the unique history of African American enslavement and officially sanctioned discrimination. The historical use of race-based criminal suspicion as a method of social control over enslaved Africans and their descendants means that African Americans subjected to similar officially enforced presumptions today suffer an injury beyond simple unequal treatment. The stereotypical association of blackness and criminality evokes the legally enforced, racially disparate power structure that arose out of American chattel slavery and deprives African Americans of an individual identity by attributing negative group characteristics to all members of the race.

Current equal protection doctrine's focus on the perpetrator's intent and on abstract race discrimination, rather than on racial subjugation or on the historical context of modern-day racial inequality, does not adequately account for such differences. Where there is no intentional une-

---

also create a strong inference that officers chose to engage in a particular consensual interview solely because of the interviewee's race," thereby triggering strict scrutiny under the Equal Protection Clause. United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995). *See also* State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996); State v. Kennedy, 588 A.2d 834, 838 (N.J. Super. Ct. App. Div. 1991). The goal, however, is still to establish discriminatory intent. Racially disparate impact, standing alone, is not sufficient to trigger strict scrutiny. *See* Washington v. Davis, 426 U.S. 229 (1976).

[88] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 33 (1995).

qual governmental treatment—if both a black and a white person were singled out for criminal suspicion because of their race—then the traditional equal protection analysis would find no violation in either case.[89] In *United States v. Armstrong*,[90] for example, the Supreme Court held that the defendants were not entitled to discovery on their claim of race-based selective prosecution because, according to "ordinary equal protection standards,"[91] they failed to prove "that similarly situated individuals of a different race were not prosecuted."[92]

Yet a person who is a descendant of slaves, or upon whom society imposes analogous injuries or stigmas arising out of slavery,[93] suffers a substantial injury when singled out by law enforcement for criminal suspicion based on her race, regardless of whether others are also singled out because of their race. White persons, for example, do not suffer the same injury as African Americans if they are singled out for criminal suspicion because of their race. Whiteness in this country has not been traditionally seen as a sign of inherent negative characteristics or used as a basis for legal inequality.[94] Whites were never at risk of having their rights stripped away or their freedom denied because they were white, since the American social structure historically valued whiteness and

---

[89] *See* Palmer v. Thompson, 403 U.S. 217, 226 (1971) (holding that city's decision to close all public swimming pools rather than integrate them did not violate the Equal Protection Clause because the city closed all swimming pools "equally"); *see also* Bradley v. United States, 299 F.3d 197, 206 (3rd Cir. 2002) (affirming summary judgment on plaintiff's equal protection racial profiling claim because she failed to show "that she is a member of a protected class and that she was treated differently from similarly situated individuals in an unprotected class"). *But see* Nat'l Cong. for Puerto Rican Rights v. New York, 191 F.R.D. 52 (S.D.N.Y. 1999) (holding that the allegation that black and Latino plaintiffs were singled out for suspicion because of their race, despite failure to identify similarly situated white individuals who were not singled out, was sufficient to state an equal protection claim).

[90] 517 U.S. 456 (1996).

[91] *Id.* at 465.

[92] *Id.*

[93] As noted throughout this Article, I reserve for now the questions of (1) the causes and remedies for racial profiling of racial and ethnic minorities other than African Americans, and (2) whether such racial and ethnic minorities can properly assert a "badge or incident of slavery" cause of action under the Thirteenth Amendment generally. *See supra* note 20 and accompanying text; *infra* Part VI.B.

[94] I speak here of "whiteness," not of ethnic background. Certainly many immigrants who visually appeared "white" were at various points subjected to discrimination because of their ethnic background. *See, e.g.*, RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION 77 (2001) ("[E]arly in our history, Irish, Jews and Italians were considered nonwhite—that is, on a par with African-Americans."). Yet they were not discriminated against because they were "white" but instead because they were, for instance, Irish, Jewish, Italian, at a time when these groups were perceived as separate races from "whites." *See, e.g.*, St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610–12 (1987) (discussing various groups, now considered "white," that were treated as separate races at different points in history). Moreover, once these ethnic groups were accepted as white, societal prejudice and legalized discrimination largely faded away. *See* DELGADO & STEFANIC, *supra*, at 77. African Americans and other visibly identifiable other racial minorities of course do not have the option of "becoming white" in the same sense (not that they should or do want to).

devalued and demonized non-whiteness. Nor is the white plaintiff's freedom of movement likely to be significantly impacted beyond the isolated incident, given the infrequent occurrence and high unlikelihood of "reverse racial profiling."[95] "Whiteness," in short, has never in this country carried the same badge of inferiority or negative social, legal and economic consequences as "blackness."

Formal, "colorblind" equal protection jurisprudence certainly has been effective in attacking certain gross forms of purposeful, state-sponsored racial inequality. The Equal Protection Clause, however, is not adequate to address most forms of second-class citizenship imposed on minorities generally and African Americans in particular. With regard to racial profiling, this Article proposes what one scholar has called an "amendment shift" in our thinking about racial justice: a shift "away from the Fourteenth Amendment's commitment to equal treatment based on race and toward reliance on the Thirteenth Amendment for a call to an end of second-class status for racial minorities."[96] Such an "amendment shift" would recognize that the Fourteenth Amendment's proscription of *ad hoc*, irrational, racialized decisionmaking by governmental actors, standing alone, will not eliminate the lingering effects of the slave system in the United States.

2. Criticisms of the "Sole Motive" Standard in Equal Protection Challenges to Racial Profiling

Equal protection jurisprudence applies different levels of constitutional scrutiny to governmental distinctions based on group membership. Under "rational basis review," the government's action will be upheld as long as it is rationally related to a legitimate governmental interest.[97] When "intermediate scrutiny" is applied, the challenged action will be upheld if it is substantially related to a sufficiently important governmental interest.[98] Under strict scrutiny, governmental action will be declared unconstitutional unless it is narrowly tailored or the least restrictive means of achieving a compelling governmental interest.[99] The Supreme Court has held that the government's use of race in its decision making is always subject to this last standard.[100]

Traditionally, a litigant has not been required to show that her race was the only motive for the challenged governmental action in order for

---

[95] I cannot provide empirical proof of the infrequentness of whites being singled out for criminal suspicion because of their race. I take the absence of a public outcry or significant lawsuits over "reverse racial profiling" as sufficient for current purposes.

[96] Aleinikoff, *supra* note 37, at 1118.

[97] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

[98] *Id.* at 441.

[99] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[100] *Id.* at 235.

strict scrutiny to apply.[101] Under current Fourteenth Amendment jurisprudence regarding racial profiling, however, even uncontested proof that race was clearly the predominant, primary, or overriding motive is insufficient to trigger strict scrutiny. Courts that have considered the issue have almost unanimously concluded that racial profiling does not raise equal protection problems unless a person's race was the *sole* reason she was singled out for suspicion.[102] These courts have not held that the use of racial profiling satisfies the demands of strict scrutiny in the context of the particular case at hand; rather, they have held that strict scrutiny is not triggered at all unless the person's race was the *only* reason for the stop, search or encounter. In doing so, courts have made the prospect for successful equal protection challenges to racial profiling even dimmer than the criticisms leveled above would suggest. Since a racial "profile" always includes factors in addition to race, the "sole motive" analysis effectively closes the door to equal protection challenges.

As discussed in this Part of the Article, a requirement that litigants prove that their race was the only reason they were singled out for suspicion is a burden that is virtually impossible to meet. Under this standard, police officers in racial profiling cases will always prevail if they can articulate *any* reason other than race for the investigation. This remains true even where the officer admits that the person's race was the predominant or overwhelming motive.[103] It is highly unlikely that a litigant will ever have access to direct proof that the officer's only subjective motivation for making the stop was the suspect's race. Indeed, the challenge of effectively addressing racial profiling is not only to prevent

---

[101] *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (holding, in a housing discrimination case, that the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes").

[102] *See, e.g.*, United States v. Avery, 137 F.3d 343 (6th Cir. 1997); 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); Farm Labor Org. Comm. v. Ohio State H'way Patrol, 95 F. Supp. 2d 723, 733–34 (N.D. Ohio 2000); United States v. Coleman, 450 F. Supp. 433 (E.D. Mich. 1978). While the "sole motive" analysis has clearly taken root in the Sixth Circuit's racial profiling doctrine, other Circuits have taken a similar approach. *See, e.g.*, 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). *Cf.* 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)).

[103] *See, e.g.*, *Harvey*, 16 F.3d 109; *Weaver*, 966 F.2d 391; *Coleman*, 450 F. Supp. 433. In all three cases, the officers expressly stated that race was a crucial factor in the decision to stop the suspect. Indeed, in *Harvey*, it was beyond contradiction that race was the determinative factor: an officer testified that "if the occupants had not been African-Americans, he would not have stopped the car." *Harvey*, 16 F.3d at 113–14.

those presumably infrequent instances of blatant racial prejudice in law enforcement, that is, situations where an officer has no reason other than race to investigate a suspect. Rather, an effective remedy for racial profiling must also recognize the role that subtle and even unconscious biases play, along with other non-prejudicial factors, in subjecting racial minorities to increased suspicion.

United States v. Avery[104] provides a good example of lower courts' current application of equal protection doctrine to racial profiling. The defendant in *Avery* moved to suppress evidence of cocaine found in his carry-on luggage on the grounds that he was targeted and detained because of his race, in violation of the Equal Protection Clause.[105] Avery was a young African American male wearing sweatpants and a short-sleeved sweatshirt. According to the officers' testimony, Avery drew their attention for several reasons: (1) he appeared very focused and looked straight ahead; (2) he appeared anxious to board the airplane; (3) he was the first passenger to board the plane; and, (4) he had a one-way ticket purchased with cash shortly before departure from Puerto Rico.[106] After approaching Avery and receiving inconsistent information from Avery regarding his identity, the police seized the carry-on bag, which was found to contain cocaine.[107]

At trial, one of the officers testified that Avery met several elements of a narcotics trafficking profile.[108] Although the officer stated that he had never been "formally" taught to use race as an element of the profile, he admitted that officers "informally" "looked for Black or Jamaican gang members using young White females as couriers."[109] Although blacks constitute a minority of airport travelers, statistical evidence revealed that the drug interdiction unit stopped more blacks than any other group.[110]

---

[104] 137 F.3d 343 (6th Cir. 1997).

[105] *Id.* at 346. Avery also argued that the officers seized his bag without reasonable suspicion in violation of the Fourth Amendment. The court rejected Avery's Fourth Amendment claim, holding that Avery's fit with the "formal" profile elements, combined with his later inconsistent statements to the officers, made the seizure of the bag objectively reasonable in the totality of the circumstances. *Id.* at 350.

[106] *Id.* at 346.

[107] *Id.* at 346–47.

[108] The prime "formal" elements of the profile were "(1) one-way cash tickets purchased shortly before flight time; (2) persons leaving the airplane who do not ask for directions; (3) certain modes of dress [the opinion does not specify what those 'modes' are]; and (4) people who are walking hurriedly through the airport." *Id.* at 347.

[109] *Id.*

[110] One response to this statistical evidence is that blacks were the most stopped group because they smuggled more drugs than any other group. This may or may not be persuasive, depending on the actual rates of drug transport among ethnic groups (data not included in the opinion). It is interesting to note, however, that if the officers were actually following the "informal" profile factor, they would have disproportionately stopped *young white women* (the most likely couriers, according to the officer's testimony), *not* blacks. *See id.* at 348.

The Sixth Circuit rejected Avery's equal protection claim.[111] The court's holding on this question is instructive in analyzing future allegations of racial profiling under the Fourteenth Amendment:

> Although Fourth Amendment principles regarding unreasonable seizure do not apply to consensual encounters, an officer does not have unfettered discretion to conduct an investigatory interview with a citizen. The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection *independent* of the Fourth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.[112]

Thus, the Sixth Circuit has squarely held that where an individual is singled out by law enforcement because of his race, that person can assert an equal protection challenge, even where a Fourth Amendment challenge would be foreclosed by *Whren*.

Despite concluding that the Fourteenth Amendment applied independent of the Fourth Amendment, the court rejected Avery's equal protection claim. Relying on its earlier decisions,[113] the court reasoned as follows: (1) the Fourteenth Amendment prohibits an officer from targeting an individual because of his race, even in consensual encounters; (2) however, "because of" in this context means that the decision was based *solely* on racial considerations; therefore, (3) Avery's equal protection challenge failed because he could not prove that his race was the *only* reason he was singled out for suspicion.[114]

Other courts have generally followed *Avery*'s "sole motive" approach.[115] In *Brown v. City of Oneonta*,[116] the police conducted an investigation based on the victim's description of her assailant as a "young

---

[111] Because Avery did not raise a Fourth Amendment challenge to the legality of the officer's initial questioning (because it was essentially a consensual encounter), the court had to confront whether the Fourteenth Amendment offered independent protection. *Id*. at 352.

[112] *Id*. (emphasis added).

[113] *See Travis*, 62 F.3d at 173–74; *Taylor*, 956 F.2d at 578–79. Courts in the Sixth Circuit, following *Avery*, have continued to apply the "sole motive" analysis to racial profiling claims. *See, e.g.*, Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 733–34 (N.D. Ohio 2000) (denying summary judgment and holding that plaintiffs stated a *prima facie* equal protection claim because there was evidence of troopers singling out persons of Hispanic appearance "solely on the basis of race or national origin").

[114] *Avery*, 137 F.3d at 352–58. The court also rejected defendant's statistical arguments seeking to show a pattern of singling out black air travelers. *Id*. at 356–57.

[115] *See* cases cited *supra* note 102. Interestingly, state courts have been more willing than federal courts to offer redress for racial profiling, even when race was not the sole factor motivating the officer. *See* Sean P. Trende, Note, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 357 n.153 (2000) (citing cases).

[116] 221 F.3d 329 (2d Cir. 1999), *cert. denied*, 122 S. Ct. 44 (2001).

black man with a cut on his hand."[117] The court described the investigation as follows:

> The police immediately contacted [the local university] and requested a list of its black male students. An official at [the university] supplied the list, and the police attempted to locate and question every black male student at [the university]. This endeavor produced no suspects. Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended.[118]

The court rejected the equal protection claim, despite these facts, because the plaintiffs could not show that they were detained or questioned solely because of race.[119]

Brown's holding is troublesome even under the unduly restrictive "sole motive" standard. The description of the perpetrator in *Brown* was that he was "young," "Black," "male," and had a "cut on his hand."[120] However, the facts indicate that the police focused exclusively on the racial aspect of the description. For example, the court discounted the inconvenient fact that the police, in the search for a "young, black male," also detained a black *woman*.[121] Further, the police in *Brown* admittedly attempted to stop all "non-whites," not just black men, meaning that they expanded their search to include, for example, male Latinos or Asians.[122] *Brown* also demonstrates the ineffectiveness and degrading effect of racial profiling as a law enforcement technique. Despite subjecting over 200 persons to a presumption of criminality based almost exclusively on their race, the police "sweep" of non-whites produced *no* suspects.

The "sole motive" standard is fundamentally flawed as a matter of fact, policy and jurisprudence. Seldom could one prove that law enforcement officials' sole motivation for an investigation was the suspect's race. The official will invariably assert that he acted based on race plus "X." Human beings almost always act with a variety of motives. Yet, the

---

[117] *Id.* at 338. *Brown* is different from other racial profiling cases in that the police in *Brown* used race in a responsive rather than predictive manner (i.e., they had a description of a particular suspect including his race). Nonetheless, as the description of the facts in *Brown* makes clear, race undoubtedly overwhelmed the investigatory process. Thus, I would classify *Brown* as a racial profiling case, despite the fact that the police were responding to a specific suspect description including race, because the effect of the racialized investigation was that hundreds of innocent people were stopped because they shared racial characteristics with the perpetrator.

[118] *Id.* at 334.

[119] *Id.* at 338.

[120] *Id.*

[121] *Id.* at 338–39.

[122] *Id.* at 334.

presence of additional nondiscriminatory motives does not eliminate the discriminatory motive. As Professor Randall Kennedy has argued:

> [A]n employer who prefers white candidates to black candidates—except black candidates with clearly superior experience and test scores—is engaging in racial discrimination, even though race is not the only factor he considers (since he is willing to select black superstars). There are, of course, different degrees of discrimination. In some cases, race is a marginal factor; in others it is the only factor. The distinction may have a bearing on the moral or logical justification for the discrimination. But it cannot negate the *existence* of racial discrimination. Taking race into account at all means engaging in racial discrimination.[123]

The Supreme Court has embraced this reasoning in its "mixed-motive" framework for employment discrimination cases.[124] A similar analysis should apply to equal protection challenges to racial profiling.[125] Being stopped because you are African American (or Latino or Arab American or Asian American, etc.) "plus" you are wearing sweatpants instead of a suit does not render the stop any less dehumanizing or counterproductive.

The "sole motive" standard is also inconsistent with Supreme Court precedent in other contexts beyond employment discrimination. The Court's equal protection jurisprudence has traditionally required only that race be *a* motive, not the sole motive, in order for strict scrutiny to apply.[126] For example, in reviewing affirmative action programs and ma-

---

[123] Kennedy, *Suspect Policy*, *supra* note 54, at 33.

[124] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (defining mixed-motive standard in the context of Title VII). A mixed-motive analysis of racial profiling would recognize that decisions made "based on a mixture of legitimate and illegitimate considerations" are decisions made "because of" race. *Id.* at 241. As in the Title VII context, however, the defendant should have the opportunity to prove that "even if [he] had not taken [race] into account, [he] would have come to the same decision regarding a particular person." *Id.* at 242. Admittedly, the *Price Waterhouse* Court's analysis relied on interpretation of Title VII and its legislative history, and dealt with gender rather than race. Yet, in both situations (employment discrimination and racial profiling), courts are grappling with what it means to discriminate "because of" prohibited characteristics.

[125] At least one Circuit has considered and rejected something akin to a mixed-motive framework for evaluating racial profiling under the Equal Protection Clause. *See* Ford v. Wilson, 90 F.3d 245, 249 (7th Cir. 1996).

[126] *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (holding, in a housing discrimination case, that the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes"). There is some support in Supreme Court *dicta* for the "solely because of race" standard. In a case involving Border Patrol stops, the Court stated that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but *standing alone* it does not justify stopping all Mexican-Americans to ask if they are aliens." United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (emphasis added).

jority-minority voting districts, the Court has held that the government's use of race will trigger strict scrutiny where race was the "predominant" or "primary" motive.[127] As Justice O'Connor has observed, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[128] If racial profiling is an effective law enforcement technique used for compelling reasons, then it should survive strict scrutiny. Yet there is no way of discerning the validity of the practice in a particular case if the kind of "detailed judicial inquiry"[129] that strict scrutiny is designed to provide is never applied. There is certainly no principled reason to automatically assume greater validity in the government's use of race in the law enforcement context than there is in other contexts. Yet this is the effect of failing to apply strict scrutiny to racial profiling.

The widely accepted "sole motive" analysis of racial profiling also results in a bizarre constitutional regime where it is easier to strike down programs benefiting racial minorities, such as affirmative action and majority-minority voting districts, than to attack racial profiling, which disadvantages racial minorities. There is arguably a tension between opposing racial profiling on equal protection grounds because it treats persons as amalgamations of presumed group characteristics rather than as individuals, and believing that affirmative action, which also relies upon group membership, does not violate the Equal Protection Clause.[130] I do not believe these positions are inconsistent for two reasons. First, opposition to racial profiling generally rests on the ground that the use of race in law enforcement is irrational because race is not an accurate proxy for criminality.[131] Support for affirmative action, on the other hand, presupposes that minority status is a rational criterion in college admissions or employment because racial minorities—not whites—have been denied opportunities in the past and therefore currently occupy an unequal position. Second, I believe that the Court's jurisprudence is fundamentally

---

[127] *See, e.g.*, Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Gratz v. Bollinger, 123 S. Ct. 2411 (2003); *cf.* Miller v. Johnson, 515 U.S. 900, 916 (1995) (holding, in a case where white voters challenged "majority-minority" voting districts, that "[t]he plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

[128] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[129] *Grutter*, 123 S. Ct. at 2337 (quoting *Adarand*, 515 U.S. at 227) (upholding the use of race as a factor in the University of Michigan's law school admissions).

[130] *See* KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 160 ("With affirmative action, many adversely affected whites claim they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happened to have been white. With race-based police stops, many adversely affected people of color maintain that they are *innocent* victims of a policy that penalizes them for the misconduct of others who also happen to be colored."); *see also* Banks, *supra* note 6, at 37 ("In both [affirmative action and racial profiling], the attention to group status is in tension with the notion of liberal individualism that the antidiscrimination principle might be thought to vindicate.").

[131] *See* KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 160.

flawed in reading the Equal Protection Clause to require race neutrality or "colorblindness" in the abstract, as opposed to nonsubordination based on historical and modern-day realities.[132] Thus, one can oppose racial profiling on equal protection grounds because it results in the subordination of members of oppressed groups but support affirmative action because such programs are aimed at improving their lives.[133]

Furthermore, applying strict scrutiny where race is the predominant, as opposed to the only, *ex ante* basis for criminal suspicion does not mean that the use of race as an investigatory technique will or should automatically fail strict scrutiny in all circumstances.[134] There may be situations where the use of race as a law enforcement tool in fact would be narrowly tailored to serve a compelling governmental interest.[135] The point is that courts should not view the government's use of race to disadvantage racial minorities with *less* skepticism than usual simply because it happens to be done by law enforcement officials.

The "sole motive" analysis also places civil litigants alleging racial profiling at a tremendous disadvantage since defendants can predicate a motion to dismiss for failure to state a claim on the plaintiff's inability to allege at the pleading stage that race was the only motive for the encounter.[136] Applying the standard equal protection analysis to claims of racial profiling would at least permit litigants to get past the pleading

---

[132] *See supra* Part III.B.1.

[133] *See, e.g.*, Romero, *supra* note 8, at 385–86 (recognizing the apparent inconsistency, but arguing that affirmative action should be seen as an attempt to change the unequal status of racial minorities, while racial profiling perpetuates the status quo of white supremacy). There is at least one other reason why one can coherently oppose racial profiling while supporting affirmative action. "[A]ffirmative action is under tremendous pressure politically and legally, [while] racial policing is not." KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 160. As noted throughout this Part, courts have given essentially no scrutiny to claims of racial profiling, while giving exceedingly strict scrutiny to affirmative action. Courts have also been highly sensitive to affirmative action's impact on whites, while giving short shrift to the burden racial profiling imposes on innocent racial minorities.

[134] *See Grutter*, 123 S. Ct. at 2338 (strict scrutiny is not designed to be "strict in theory, but fatal in fact") (quoting *Adarand*, 515 U.S. at 2388).

[135] Professor Kennedy has argued that "[t]he law should authorize police to engage in racially discriminatory investigative conduct only on atypical, indeed extraordinary, occasions in which the social need is absolutely compelling: weighty, immediate, and incapable of being addressed sensibly by any other means." KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 161. The routine use of race in ordinary criminal investigations such as drug interdiction is far from narrowly tailored, even if the end pursued is compelling, and should usually fail strict scrutiny. *See id.* ("Implemented properly, [Kennedy's view] would prohibit officers from using racial criteria as a *routine* element of patrolling. It would prohibit officers from *regularly* placing a race-based question mark over the heads of colored people.") *See supra* Part II.B, discussing the ineffectiveness of racial profiling as a law enforcement technique.

[136] The proposed End Racial Profiling Act, *see supra* note 28, would eliminate this barrier for civil litigants because it defines racial profiling as "the practice of a law enforcement agent relying, *to any degree*, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities . . . ." S. 989, 107th Cong. § 501(5) (2001) (emphasis added).

stage and gather the necessarily fact-specific evidence of motive and intent through discovery. Until the Supreme Court squarely confronts the "solely because of race" standard in a racial profiling case, racial profiling will remain effectively immunized from equal protection challenges.[137]

C. Limitations of Federal Statutory Remedies for Racial Profiling

No federal statute explicitly provides a cause of action for racial profiling.[138] Until recently, there was an argument that Title VI of the Civil Rights Act of 1964,[139] which forbids discrimination on the basis of race by recipients of federal funds, could provide an individual with an effective cause of action for racial profiling. Law enforcement agencies or programs that receive federal funds are subject to Title VI.

The problem lies in the Supreme Court's decision in *Alexander v. Sandoval*.[140] While Title VI itself does not explicitly give individuals the right to sue for violations of the statute, the *Sandoval* Court held that Title VI contains an implied private cause of action.[141] However, the Court held that this implied private cause of action only reaches intentional discrimination.[142] The Court further held that regulations pursuant to Title VI prohibiting disparate-impact discrimination do *not* create an implied private cause of action.[143] Thus, in a Title VI suit, the plaintiff must prove intentional discrimination that would violate the Equal Protection Clause, which is difficult to do in racial profiling cases. "Racial profiling presents another example of discrimination that, by definition, relies on statistical

---

[137] Even if courts begin subjecting racial profiling to strict scrutiny, it remains unresolved whether the exclusionary rule applies to Fourteenth Amendment violations. The "sole motive" standard applied by most courts means that they never reach the question of whether the evidence should be excluded. *See, e.g.*, 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."). For authorities indicating that the exclusionary rule should apply to evidence obtained by racial profiling, see United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997); United States v. Jennings, No. 90-00071, 1993 WL 5927, at *4 (6th Cir. Jan. 13, 1993); United States v. Taylor, 956 F.2d 572, 578–79 (6th Cir. 1992); United States v. Valenzuela, 2001 WL 629655, at *6 (D. Colo. June 1, 2001); United States v. Cuevas-Ceja, 58 F. Supp. 2d 1175, 1183 (D. Or. 1999); United States v. Laymon, 730 F. Supp. 332, 339–40 (D. Colo. 1990); State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996). *See generally* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under The Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (2000); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000).

[138] The proposed federal End Racial Profiling Act of 2001 would provide such a remedy, but the bill has not been acted upon as of 2003. See *infra* Part V.A for a discussion of this bill.

[139] 42 U.S.C. § 2000d (2000).

[140] 532 U.S. 275 (2001).

[141] *Id.* at 280–81.

[142] *Id.* at 281.

[143] *Id.*

proof of practices by police, rather than the smoking gun of intent. Without a results standard, few individual plaintiffs could hope to prevail [in Title VI actions alleging racial profiling]."[144]

Two Title VI approaches to racial profiling remain post-*Sandoval*, but both appear to be ineffective or limited in providing relief. First, despite *Sandoval*'s holding that private individuals cannot sue to enforce Title VI's disparate impact regulations, federal agencies presumably can still enforce these regulations by, *inter alia*, threatening funding recipients with the loss of federal funding if they engage in racial profiling.[145] Federal agencies are unlikely to provide comprehensive relief for racial profiling, however, because of their limited resources and political constraints.[146] Second, individuals may be able to enforce Title VI's disparate impact regulations via 42 U.S.C. § 1983,[147] even if there is not an implied private cause of action to enforce them directly. Justice Stevens, dissenting in *Sandoval*, argued that:

> to the extent that the majority denies relief to the [plaintiffs in that case] merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . .[148]

It remains unsettled, however, whether Title VI's disparate impact regulations (or federal regulations generally) are federal "law" enforceable via Section 1983.[149]

---

[144] David Dante Troutt, *Behind the Court's Civil Rights Ruling*, N.Y. TIMES, Apr. 29, 2001, § 4, at 4 (criticizing *Sandoval*). *See also supra* Part III.B, criticizing the "purposeful discrimination" standard of equal protection jurisprudence.

[145] *See Sandoval*, 532 U.S. at 281–82 ("We must assume that regulations [pursuant to Title VI] may validly proscribe activities that have a disparate impact on racial groups . . . .").

[146] *See, e.g.*, MARIKA F. X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–98, BUREAU OF JUSTICE STATISTIC SPECIAL REPORT, at 3 (2000) (reporting that, of all civil rights actions filed during the period studied, the percentage of cases where the United States was plaintiff ranged from a high of 4.0% to a low of 1.2%).

[147] Section 1983 provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

[148] *Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting).

[149] *See, e.g.*, Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 50–51 (D. Mass. 2002) (summarizing the circuit split regarding enforceability of federal regulations via § 1983). Moreover, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court (modi-

Even assuming *arguendo* that Title VI's disparate impact regulations can be enforced in a Section 1983 suit alleging racial profiling, Section 1983 is more limited than an implied private cause of action directly under Title VI or its disparate impact regulations. Section 1983 requires that the defendant be a "person" who acted under color of state law in depriving the plaintiff of the federal rights at issue.[150] The State or state officials acting in their official capacities are not "persons" subject to suit under Section 1983, unless the suit is solely for prospective injunctive relief.[151] Thus, for example, a suit for damages alleging racial profiling by the state highway patrol presumably could not be maintained under Section 1983. Additionally, Section 1983 only applies to action under color of *state*, not federal, law. Thus, Section 1983 also would not provide a basis for a racial profiling suit against federal officials. Although *Bivens v. Six Unknown Named Agents*[152] may provide a cause of action against a federal official equivalent to one against a state actor under Section 1983, the Supreme Court has been quite restrictive in implying *Bivens* remedies.[153] Finally, defendants in Section 1983 suits may also raise defenses

---

fying its earlier decisions) held that the question of whether a federal statute creates a "right" for Section 1983 purposes requires the same inquiry as whether it creates an implied private cause of action. *See id.* at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context"). Presumably, under *Gonzaga*, if Title VI's disparate impact regulations do not give rise to an implied private cause of action (as the Court held in *Sandoval*), then they also do not create a federal "right" that can be enforced in a § 1983 suit. Although *Gonzaga* involved a federal statute (the federal Family Educational Rights and Privacy Act), it would also seem to foreclose enforcement of Title VI's disparate impact regulations via Section 1983.

[150] *See* 42 U.S.C. § 1983 (2000).

[151] In *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989), the Supreme Court held that "neither a state nor its officials acting in their official capacities are 'persons' under § 1983" and are therefore immune from such suits. *Id.* at 71. The Court recognized an exception to this doctrine: "[A] state official in his or her official capacity, when sued [solely] for [prospective] injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id*. at 71 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)).

[152] 403 U.S. 388 (1971).

[153] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (refusing to imply a *Bivens* cause of action against a private corporation acting under color of federal law). The *Malesko* Court noted that:

> [i]n 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens* . . . .

Id. at 70. Taking the Court's statement of the first ground for extending *Bivens* at face value, it is possible that the Court would find a *Bivens* remedy against federal officials who engage in racial profiling.

not available in a suit directly under Title VI or its implementing regulations, such as municipal and qualified immunity.[154]

IV. Racial Profiling as a Badge or Incident of Slavery

A. The Thirteenth Amendment's Radical Purposes

Despite the inadequacy of current federal constitutional and statutory remedies for racial profiling, the Thirteenth Amendment remains a powerful and viable remedy for victims of the practice. While the text of the Thirteenth Amendment outlaws only actual forced labor,[155] it is clear from the historical context and legislative history that the Amendment was intended to do more than end physical bondage.[156] The Thirteenth Amendment's history and context are crucial to understanding its scope, yet have generally received only passing reference in the cases interpreting it. By divorcing the Thirteenth Amendment from its history and the intent of its drafters, courts have lost sight of the Amendment's truly broad and radical purposes.

Given the pablum that both major political parties currently offer as prescriptions for racial injustice, it is perhaps unsurprising that the true radicalism of the Congressional majority that passed the Thirteenth Amendment is often forgotten:

> [T]he broad-based Republican majority in Congress that enacted the Thirteenth Amendment had been radicalized by the Civil War. As a result, it held much broader and more intense beliefs about the variety of harms associated with the institution of slavery. Accordingly, it believed the destruction of slavery by constitutional amendment would usher in the institution's exact opposite—freedom—but, in a form full enough to counteract slavery's long-term damaging effects to blacks and whites . . . .[157]

---

[154] *See, e.g.*, John F. Wagner, Jr., Annotation, *Availability of Qualified Immunity Defense to Private Parties in Actions under 42 U.S.C.A. § 1983*, 95 A.L.R. Fed. 82, § 2, at 84–86 (1989) (summarizing the various immunity defenses available in § 1983 litigation).

[155] As a textual matter, the Amendment permits slavery or involuntary servitude as punishment for a crime. Nonetheless, the Amendment clearly outlawed chattel slavery. See *supra* note 11 for text of the Amendment.

[156] "From the opening gavel, both sides in the legislative debates [over the Thirteenth Amendment] based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom." Colbert, *Liberating the Thirteenth Amendment*, *supra* note 88, at 8.

[157] Azmy, *supra* note 13, at 1007.

This radical Republican majority clearly did not have the end of chattel slavery as its only goal.[158] This is particularly true given that the legal and economic institution of slavery was already a dead letter by the time the Amendment was debated.

The Thirteenth Amendment passed the Senate when originally introduced in 1863, but did not at that time secure the requisite two-thirds majority in the House.[159] The Amendment was debated again in both houses of Congress in 1864 and early 1865. By the time of the Congressional debates and eventual passage of the Amendment in 1864–65, it was clear to both sides that the goal of the Amendment was not limited to the abolition of slavery as an economic institution. As Representative George Yeaman of Kentucky noted during the debates over the Amendment:

> The perpetuity of slavery is not the issue. That issue was made up four years ago, and the case has been decided against the institution, with half of the jury being its own friends. Were we to do nothing and say nothing, [Jefferson] Davis and General Lee . . . would soon overturn slavery on their present line of thought and conduct . . . . When these men turn practical abolitionists by offering the negro his freedom for his services as a soldier, it is high time for conservative men here to cease halting and doubting on the subject.[160]

Yeaman's statement reflects the fact that, by the time of Congress' consideration of the Amendment, African forced labor was already coming to an end as a practical matter.

By the time of the debates surrounding the Amendment in the spring of 1864 and January of 1865, it was apparent that the South would lose the Civil War and that slavery would end with the North's military victory in a relatively short time.[161] The end of slavery in the South was largely a foregone conclusion by the time of the debates over the Thirteenth Amendment.[162] While the Amendment's proponents therefore did intend

---

[158] *See id.* at 1008–13 (discussing the pro-equality vision of the Reconstruction Republicans).

[159] Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 173 (1951).

[160] CONG. GLOBE, 38th Cong., 2d Sess. 170 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES 82 (Alfred Avins ed., 1967).

[161] tenBroek, *supra* note 159, at 174 ("With the victory of Northern arms, slavery as a legal institution was at an end, save in a few border states where it could not long hope to survive surrounded by a free nation.").

[162] *See* Aleinikoff, *supra* note 37, at 1119 ("Slavery had ended by the time the North conquered the South, and not even unreconstructed Confederates thought it could be reinstituted.").

to constitutionalize the end of slavery, they also undoubtedly had larger remedial purposes in mind.

Additionally, the South was no longer represented in Congress by the time of the debates surrounding the Amendment.[163] Had its supporters and opponents understood the Amendment as solely abolishing compulsory labor, it likely would have won relatively easy passage since the direct stakeholders in preserving the system of human bondage were not there to oppose the Amendment.[164] Rather, the difficulty in passing the Amendment came from the fact that both its supporters and opponents understood that the Amendment would go substantially beyond abolishing compelled labor to enshrine in the Constitution federal authority to guarantee the rights of the freedmen.

The legislative history demonstrates that the arguments surrounding the Thirteenth Amendment focused on the issue of federalism and states' rights,[165] and no longer concerned whether slavery itself was a positive social good.[166] The Amendment's supporters argued in its favor on the ground that federalizing the question of the freedmen's legal status *after* slavery was the only way to guarantee that slavery would end in both law and fact. The opponents argued against this allegedly unwarranted intrusion into the states' rights on federalism grounds. For example, Representative Robert Mallory of Kentucky argued that the Amendment's proponents desired:

> to leave [the freedmen] where they are freed, and protect them in their right to remain there. You do not intend, however, to

---

[163] tenBroek, *supra* note 159, at 174.

[164] *Id.* ("The economic and social argument that slavery was indispensable to the prosperity and cultural refinement of the South [a key component of earlier arguments for preserving slavery] became subdued and peripheral [by the time of the debates leading to the Amendment's passage].").

[165] *See* Colbert, *Liberating the Thirteenth Amendment*, *supra* note 88, at 8 ("Some [of the Amendment's] opponents openly defended slavery, but most argued that the proposed Amendment would offend traditional notions of federalism."). These arguments were subtly different, although overlapping. Some argued against the Amendment based on the presumptive right of states to make their own decisions in such matters. Others opposing the Amendment focused on the expansion of the central government's power that the Amendment would engender. *See* tenBroek, *supra* note 159, at 174–83.

[166] As tenBroek's article notes, the character of the debate over slavery changed with the South's exit from Congress. In the debates leading to the Amendment, there was a notable absence of the earlier "positive good" arguments in support of slavery, for example, that slavery had a "Christianizing, civilizing and humanitarian" effect and that slavery was a positive economic and social good in the South. tenBroek, *supra* note 159, at 174. Many of the Thirteenth Amendment's opponents, of course, may have supported slavery. The point here is that support of human bondage was not a necessary component of the arguments forming the core of the debates over the Amendment, nor were the arguments against the Amendment couched in pro-slavery terms. Rather, the Amendment's opponents were no longer primarily fighting in support of slavery, but rather fighting "a last-ditch stand against the second of the two revolutions which had been in progress: The revolution in federalism." *Id.*

> leave them to the tender mercies of those states. You propose by a most flagrant violation of [states' rights] to hold the control of this large class in these various states in your own hands.[167]

Mallory's statement reflects opposition to the Amendment based on a "states' rights" argument rather than on an argument in favor of slavery itself as an institution to be preserved. Similarly, Representative Anson Herrick of New York argued in opposition to the Amendment that "[t]he slavery issue which [the Amendment] seeks to finally settle . . . is legitimately merged in the higher issue of the right of the states to control their domestic affairs, and to fix each for itself the status, not only of the Negro, but of all other people who dwell within their borders."[168]

The Amendment's supporters did not shrink from these charges.[169] Rather, they forthrightly stated that the Amendment would effectuate a substantial expansion of federal power to guarantee the rights of the freedmen beyond ending the institution of slavery.[170] Representative William Holman of Indiana argued that "mere exemption from servitude is a miserable idea of freedom. A pariah in the state, a subject but not a citizen, holding any right at the will of the governing power. What is this but slavery?"[171] Senator Henry Wilson of Massachusetts stated that the Amendment was designed to "obliterate the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it . . . ."[172] Representative Thomas Treadwell Davis of New York argued that in order to achieve the Amendment's purpose of full equality before the law, the Amendment was designed to "remove[ ] every vestige of African slavery from the American Republic."[173] Senator James Harlan of Iowa similarly argued that the Amendment's goals went far beyond abolishing physical servitude, to include full equalization of the freedmen's civil status.[174] Senator Lyman Trumbull of Illinois later

---

[167] tenBroek, *supra* note 159, at 175.

[168] *Id*. (citing CONG. GLOBE, 38th Cong., 1st Sess. 2615 (1864)).

[169] *Id.* at 174 ("Many of the [dire] consequences of the Amendment forecast by the opponents, far from being denied or minimized by the sponsors, were espoused as the very objects desired and intended to be accomplished by the measure.").

[170] Early in its interpretations of the Reconstruction Amendments, the Supreme Court also recognized that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex Parte* Virginia, 100 U.S. 339, 345 (1879).

[171] tenBroek, *supra* note 159, at 175 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2692 (1864)).

[172] *Id*. at 177 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864)).

[173] CONG. GLOBE, 38th Cong., 2nd Sess. 155 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 160, at 82.

[174] Senator Harlan included among the Amendment's purposes abolition of several incidents of slavery that would have lingering effects upon the freedmen, including the breach of spousal and parental relationships, the congenital denial of the right to hold

eloquently expressed an expansive view of the Thirteenth Amendment's reach:

> 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 from 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.[175]

Thus, Trumbull clearly saw the Amendment as outlawing slavery *and* all of its concomitant laws and conditions that strove to enforce slavery and the slaves' subjugated position in civil society.

The history of the Amendment therefore makes clear that its supporters and opponents understood it as going far beyond ending African Americans' compelled labor. The debates over federalism and states' rights simply do not make sense if the goal of the Amendment was seen as simply ending physical bondage. With slavery already dead in fact, the expansion of federal power to be brought about by the Amendment "would neither be great nor of continuing importance if the Amendment effected only 'a simple exemption from personal servitude.'"[176] Rather, these debates reveal that the Thirteenth Amendment was intended both to prohibit human bondage and to serve as a substantive expansion and guarantee in the nation's charter of affirmative rights for the freedmen.[177] Statements of individual legislators may not, of course, always be an entirely clear guide to the overall "intent" of a statute or constitutional provision.[178] What is persuasive here, however, is the unanimity of opinion among legislators on both sides of debate that the Thirteenth Amendment, for better or worse, would go far beyond ending physical slavery. In short, "the debates over the Amendment's ratification reveal disagree-

---

property, denial of legal status in court proceedings, and freedom of speech. More broadly, Harlan argued that the Amendment was designed to protect the freedmen's liberty and guarantee them equality before the law. *See* tenBroek, *supra* note 159, at 177–78 (citing CONG. GLOBE, 38th Cong. 1st Sess. 1439, 1440 (1864)).

[175] CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866), *quoted in* Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1101 (2002) (discussing the Thirteenth Amendment as the precursor to the Fourteenth).

[176] tenBroek, *supra* note 159, at 176 (citation omitted). *See also* Azmy, *supra* note 13, at 1012.

[177] Azmy, *supra* note 13, at 1007.

[178] *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 287 (1994) (Scalia, J., concurring).

ment over the Amendment's wisdom, not over its purpose of doing far more than emancipation and of granting substantial affirmative rights."[179]

B. Thirteenth Amendment Jurisprudence

The Supreme Court's interpretations of the Amendment's scope have ranged quite broadly. Some of the Court's early Thirteenth Amendment opinions were quite narrow, holding that the Amendment merely outlawed actual slavery and involuntary servitude.[180] The Court, during its early restrictive interpretations, at one point recognized that the Amendment outlawed slavery's badges and incidents, but even that holding encompassed only those conditions actually imposed on African Americans during slavery.[181] In *Jones v. Alfred H. Mayer Co.*,[182] the Court repudiated its earlier narrow decisions by holding that the Amendment authorized Congress to outlaw those modern-day practices that are a legacy or outgrowth of slavery, even if they are imposed by private actors, and broadened its understanding of what practices constitute badges and incidents of slavery.[183] Since *Jones*, the Court has been reluctant to adopt a broad interpretation of the Thirteenth Amendment.[184] This Part traces these doctrinal developments.

In the *Civil Rights Cases*,[185] African American plaintiffs relied upon the Civil Rights Act of 1875 to challenge segregation in places of public accommodation. In examining the Thirteenth Amendment as a constitutional basis for the Act, the Court stated that the Amendment not only abolished slavery, but also authorized Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[186] The Court, however, adopted a narrow construction of what conditions constituted a badge or incident of slavery, holding that Congress' Thirteenth Amendment power was limited to the following:

> [S]ecur[ing] to all citizens of every race and color . . . those fundamental rights which are the essence of civil freedom,

---

[179] Azmy, *supra* note 13, at 1008. *See also id*. at 1008–22; tenBroek, *supra* note 159, at 174–81 (all exploring the Congressional debates in detail).

[180] *See* Corrigan v. Buckley, 271 U.S. 323 (1926); Hodges v. United States, 203 U.S. 1 (1906); United States v. Harris, 106 U.S. 629 (1882); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

[181] The Civil Rights Cases, 109 U.S. 3 (1883).

[182] 392 U.S. 409 (1968).

[183] *Id.* at 440–43.

[184] *See* Memphis v. Greene, 451 U.S. 100 (1981); Palmer v. Thompson, 403 U.S. 217 (1971). Lower courts have read some of the language in the Court's post-*Jones* cases as meaning that the Thirteenth Amendment only reaches compulsory labor in the absence of Congressional legislation identifying a particular practice as a badge or incident of slavery. See *infra* Part V.B for discussion and criticisms of these lower court cases.

[185] 109 U.S. 3.

[186] *Id*. at 20.

> namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens.[187]

Because the Act, in prohibiting segregation, strayed too far from enforcing equality of these "civil freedoms" and into the realm of "adjust[ing] what may be called the social rights of men and races in the community,"[188] the Court held that the Act exceeded Congress' Thirteenth Amendment power.

Thirty years later, in *Hodges v. United States*,[189] the Court adopted an even more restrictive view of Congress' power to enforce the Thirteenth Amendment. The *Hodges* Court reversed the convictions under federal law of white men who attacked a group of black men to prevent them from working at a mill. The Court held that the Amendment empowered Congress to outlaw only those private acts that amounted to actual physical enslavement, or "a state of entire subjection of one person to the will of another."[190]

The Thirteenth Amendment largely lay dormant as a source of civil rights protections for nearly a century after the Court adopted its narrow interpretation in the *Civil Rights Cases*. In *Jones*, however, the Court embraced a broad understanding of the Amendment's purpose and scope. The *Jones* Court held that 42 U.S.C. § 1982 (originally enacted as part of the Civil Rights Act of 1866), prohibiting private racial discrimination in the sale or lease of housing, was a valid exercise of Congress' power under the Thirteenth Amendment. The Court, upon examining the legislative history, held that § 1982 fell comfortably within Congressional power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[191]

The Court found that the Civil Rights Act of 1866 intended to abolish the vestiges of the Black Codes enacted after the Civil War to restrict free blacks' exercise of fundamental rights, including the right to own or lease property.[192] Moreover, the Court held, the Act was intended to eliminate not only restrictions on blacks' rights that existed under state law, but also those restrictions that were imposed by "custom or prejudice," even in the absence of state action.[193] Prohibiting these privately imposed badges of slavery was constitutional, according to the Court,

---

[187] *Id*. at 22.
[188] *Id*.
[189] 203 U.S. 1 (1906).
[190] *Id*. at 17.
[191] *Jones*, 392 U.S. at 439. As discussed *infra*, *Jones* dealt with the reach of Congressional power under Section 2 of the Thirteenth Amendment. The Court noted that "[w]hether or not the Amendment *itself* did any more than [abolish slavery]" was "a question not involved in this case." *Id*.
[192] *Id*. at 441–42.
[193] *Id*. at 423.

because the Amendment vested Congress with the power to enact law "operating upon the acts of individuals, whether sanctioned by state legislation or not."[194] The Court concluded that legislation prohibiting private racial discrimination in the sale of property was well within Congress' Thirteenth Amendment power:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[195]

Despite this expansive conclusion, the Supreme Court retreated from its broad conception of the Thirteenth Amendment three years later in *Palmer v. Thompson*.[196] *Palmer* dealt with Jackson, Mississippi's decision to close all public swimming pools rather than integrate them. The bulk of *Palmer*, and of plaintiffs' arguments, dealt with whether the closures violated the Fourteenth Amendment. The Court concluded that the closures did not violate the Fourteenth Amendment because the pools were closed to all citizens, not only to black citizens. Therefore, according to the Court, there was no unequal treatment in violation of the Equal Protection Clause.[197]

The plaintiffs in *Palmer* also argued that the closures violated the Thirteenth Amendment because they rested on ideas of black inferiority and segregation that were an outgrowth of slavery.[198] The Court concluded that the closures did not amount to slavery or a badge or incident thereof and accordingly rejected plaintiffs' Thirteenth Amendment claim.[199] The Court retreated from *Jones*' broad conception of the Amendment's reach and adopted a much narrower view of what conditions are badges or incidents of slavery. The Court reasoned that "[t]o reach [the]

---

[194] *Id.* at 438 (citing *Civil Rights Cases*, 109 U.S. at 23) (internal quotation marks omitted).

[195] *Id.* at 443.

[196] 403 U.S. 217 (1971). Both *Palmer* and *Memphis v. Greene*, 451 U.S. 100 (1981), differ from *Jones* in that the portions of *Palmer* and *Greene* discussed here dealt with the scope of a direct cause of action under the Thirteenth Amendment, while *Jones* concerned Congressional power under the Amendment's enforcement clause. While *Palmer* and *Greene* therefore cannot be said technically to have repudiated *Jones*, it is clear that those cases took a much narrower view of the Thirteenth Amendment than did *Jones*. See *infra* Part V for further discussion of the Thirteenth Amendment's enforcement clause.

[197] *Palmer*, 403 U.S. at 226. This portion of *Palmer* illustrates the limitations of formalistic "equal treatment" doctrine in addressing racial inequality. *See supra* Part III.B.1.

[198] 403 U.S. at 226–27.

[199] *Id.* at 226.

result [the plaintiffs advocated] would severely stretch [the Amendment's] short simple words and do violence to its history."[200]

In *Memphis v. Greene*,[201] the Court continued its post-*Jones* narrowing of the Thirteenth Amendment. In *Greene*, the plaintiffs challenged the city's decision to close a street passing through an all-white area, effectively segregating it from the adjacent predominantly black area.[202] Because the plaintiffs could not prove that the city acted with a discriminatory motive, the Court rejected the plaintiffs' equal protection challenge.[203]

The plaintiffs also alleged that the city's action violated the Thirteenth Amendment both because of the disparate burden imposed on blacks by the street closing and the stigma imposed on the black community as an "undesirable" presence from which the "desirable" white community needed to be insulated. The Court held that the inconvenience caused to residents of the black community was merely a function of where they happened to live rather than their race.[204] Moreover, the Court held that the symbolic significance of the closing could not "be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate."[205] Treating the street closing as a "badge or incident of slavery" in violation of the Thirteenth Amendment would have, in the Court's view, "trivialize[d] the great purpose of that charter of freedom."[206]

The Court's mixed signals regarding the Thirteenth Amendment's scope reflect societal ambivalence toward remedying the lingering effects

---

[200] *Id*. at 226–27.

[201] 451 U.S. 100 (1981).

[202] *Id*. at 102–03.

[203] The city's non-discriminatory reason for the street closing, according to the Court, was to "protect[ ] the safety and tranquility of a residential neighborhood." *Id*. at 119. Relying on *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that the absence of proof of discriminatory intent defeated plaintiffs' Equal Protection Clause claim, regardless of the closing's disparate impact on African American residents of the community. *See supra* Part III.B.1 for discussion and criticism of the "purposeful discrimination" standard in equal protection jurisprudence.

[204] *Greene*, 451 U.S. at 128.

[205] *Id*.

[206] *Id*. As the dissent noted, the Court seems to have been willfully blind to the historical use of facially neutral administrative measures to "protect" whites from blacks:

> [The] city of Memphis, acting at the behest of white property owners, has closed the main thoroughfare between an all-white enclave and the predominately Negro area of the city. The stated explanation for the closing is of a sort all too familiar: "protecting the safety and tranquility of a residential neighborhood" by preventing "undesirable traffic" from entering it. Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination.

Id. at 135–36 (Marshall, J., dissenting).

of America's "peculiar institution." The questions raised by a forthright consideration of the fact that this country was founded upon African Americans' enslavement and subjugation are not easy ones, and include whether the end of the institution of slavery is sufficient to remedy inequality arising from it; how much of modern inequality and institutional racism can be traced to slavery; whether the actions of private individuals and ingrained custom and practice, as well as positive lawmaking by the State, contribute to, or are based upon, slavery's legacy; and what is the proper role of various branches of government in remedying slavery's lingering effects.[207] In many ways, the remainder of this Article attempts to provide jurisprudential answers to these difficult policy questions through the lens of a Thirteenth Amendment approach to racial profiling.[208]

C. The Historical Use of Race as a Proxy for Criminality

Because the scars of slavery run deep in African Americans, so too does the modern injury of being treated as less than fully human via the presumption of inherent criminality. This Article therefore addresses an additional aspect of racial profiling that is implicit in the scholarship and jurisprudence about the practice but rarely forms the focus of discussion. That aspect is that racial profiling is a modern manifestation of the historical presumption, still lingering from slavery, that African Americans are congenital criminals rightfully subject to constant suspicion because of their skin color.

The continuing stigma of criminality because one is African American is so pervasive and indiscriminate precisely because it did not arise by accident.[209] The use of race as a "free-floating proxy"[210] for criminality

---

[207] Many of these questions mirror those raised by the current legal and policy debate regarding reparations for American slavery. *See, e.g.*, Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

[208] I take Justice Douglas' ringing concurrence in *Jones* as my guidepost in this analysis and believe that racial profiling presents another modern-day case in the "spectacle of slavery unwilling to die" in our hearts, minds and practices. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

[209] The American association of race and criminality under the slave regime was repeated in other colonial projects. Under British rule in India, for example, the Criminal Tribes' Act of 1871 provided for the "'registration, surveillance and control of certain tribes . . . [designated] criminal.'" Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1235–36 (1999). In addition to providing physical control over some 13 million people by imposing a pass system and forced labor penalties similar to those under the American Slave and Black Codes, the Act legislatively validated the "notion of hereditary and biological propensity to crime . . . ." *Id.* at 1236. In doing so, the Act provided both legal and moral support for the British colonial project in India.

[210] *See* Kennedy, *Suspect Policy*, *supra* note 54, at 34.

arose during slavery as a means of social control over enslaved Africans and, later, the freedmen. The *ex ante* use of race as a pretext to harass, arrest and sometimes lynch blacks for supposed crimes has historically served several purposes that were crucial in maintaining the institution of slavery and the de facto and de jure unequal social relationships arising out of slavery. The view of blacks as chattel constituted the essence of slavery; one significant means by which this perception of subhumanity was created and reinforced was by the image of blacks as possessing uncontrollable, innate urges for criminality and violence.[211] Without the pervasive societal acceptance of blacks as less than human, slavery could not have survived as long as it did.

Additionally, race-based criminal suspicion, legally enforced through the Slave Codes, was used to keep blacks in fear and in their "place" during slavery. It also had the corollary effect of placing whites in constant fear of blacks, thereby making them more willing to accept black subordination in the name of white safety.[212] The Slave Codes heavily punished whites who aided slaves or interfered with the system of white dominance, since merciless discipline was seen as necessary because of blacks' supposed natural savagery.[213] By promoting widespread fear of African Americans' supposed propensity for criminality, those with an interest in sustaining enslavement effectively undermined any nascent desire for racial equality some whites may have had.

The post-Civil War Black Codes continued the racialization of the criminal law as a means of controlling the freedmen.[214] For example, the Black Codes, *inter alia*, essentially defined vagrancy as being black and "up to no good" in the eyes of a white person.[215] In addition to allowing

---

[211] Eric Cummin, *Criminal Justice System and African Americans*, *in* ENCARTA AFRICANA, *at* http://www.africana.com/research/encarta/tt_265.asp (last visited Nov. 15, 2003) ("Within the legal system, conviction rates were much higher for blacks than for whites in the Jim Crow era of the late 19th century. Whites were convinced that African Americans were congenital thieves, a belief deeply embedded in Southern folklore. Black racial features were labeled by some early criminologists as marks of the 'born criminal.'").

[212] "The issue of safety and the natural fear of slave revolts was also intertwined in the chain of legal judgments [during the colonial period] . . . . Many feared that any judicial protection of the slave would trigger further challenges to the legitimacy of the dehumanized status of blacks and slaves." HIGGINBOTHAM, IN THE MATTER OF, *supra* note 35, at 8. For a discussion of this dynamic in modern society, see Patricia J. Williams, *Meditations on Masculinity*, *in* CONSTRUCTING MASCULINITY 238, 242 (Maurice Berger et al. eds., 1995) (describing the function of the connection between race and crime and stating that this connection results in "[a]ny black criminal becom[ing] all black men, and the fear of all black men becom[ing] the rallying point for controlling all black people").

[213] *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 211 (Knopf 1961) (1956) (noting that the Slave Codes "were quite unmerciful toward whites who interfered with slave discipline"). *See also infra* Part IV.D.3, discussing the use of pseudo-scientific theories in the early twentieth century to convince whites that racial equality was dangerous because of the inherent dangerousness of blacks.

[214] *See, e.g.*, RUSSELL, *supra* note 21, at 19–21.

[215] One example is Mississippi's vagrancy statute under the Black Codes: "[A]ll freedmen, free negroes and mulattoes . . . [found] with no lawful employment or business,

individual whites, with the help of legal authorities, to constrain the freedmen's freedom of movement, vagrancy laws were often used to sell the freedmen back into de facto slavery.[216] Moreover, the popular view of the Black Beast, legitimized by the pseudo-science of racial Darwinism around the turn of the twentieth century, helped justify repressive policies and legislation targeting the freedmen's descendants, including legalized segregation.[217]

The stigmatization of African Americans as congenital criminals has been continuous throughout American history.[218] It is fair to say that in one form or another, racial profiling of African Americans has been a "component of our national fabric"[219] since this country was founded. As Judge Leon Higginbotham noted, a permanent, lingering remnant of the slave system was the white belief that "nonwhites were the cause of all disorder and inconvenience."[220] Because of the social structures that developed to support slavery, and have since been used to maintain social control over African Americans, "[b]lacks are defined as criminals and crime is defined as what black people do."[221] During slavery, the principle of *partus sequiter ventrem* (the child inherits the condition of the mother) applied.[222] Thus, "in all the slave states (except Delaware) the presumption was that people with black skins were slaves unless they could prove that they were free."[223] This presumption from slavery has metastasized into modern day racial profiling, under which having black skin means that you are a potential criminal, unless you can prove you are not.

The particular type of criminality imputed to African Americans has varied according to the broader social context and the needs of whites to

---

or found unlawfully assembling themselves together . . . shall be deemed vagrants . . . ." *Id.* at 20.

[216] *See infra* notes 256–260 and accompanying text.

[217] *See infra* note 237.

[218] *See* Colbert, *Challenging the Challenge*, *supra* note 13, at 13–32; *see also* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2093 (1993) ("In colonial and early national America color became associated with inherently criminal behavior in almost every area of law. Following Virginia's lead, most of the British mainland colonies began to create a legal system that made race a prima facie indication of criminality.").

[219] F.M. Baker, *Some Reflections on Racial Profiling*, 27 J. AM. ACAD. PSYCHIATRY & L. 626, 627 (1999). *See also* KENNEDY, RACE, CRIME, AND THE LAW *supra* note 5, at 138 ("Public authorities in the United States have long used race as a signal of an increased risk of criminality.").

[220] HIGGINBOTHAM, IN THE MATTER OF, *supra* note 35, at 81.

[221] Roberts, *supra* note 37, at 1960; *see also* RUSSELL, *supra* note 21, at xiii ("Blacks are the repository for the American fear of crime. Ask anyone, of any race, to picture a criminal, and the image will have a Black face."); Howarth, *supra* note 39, at 103 ("To many non-Blacks, crime means Black; Black male means criminal.").

[222] STAMPP, *supra* note 213, at 193.

[223] *Id.* at 194. *See also* Hudgins v. Wrights, 11 Va. 134, 141 (1806) ("In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom[;] but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.").

establish social control over blacks at a particular point in time. For example, after the end of the Civil War, two primary white social needs were served by the image of the black criminal as a serious threat to persons and property as opposed to merely congenitally larcenous. First, continued legal control over blacks after the end of slavery was justified on the ground that unrestrained blacks would return to their naturally "savage" state. Second, the nascent movement for racial equality was thought to raise the possibility of taboo interracial sexual relationships. As one scholar has noted:

> White perceptions of blacks had always included an assumption of criminality that involved petty thievery rather than serious crimes against persons or property . . . . The image of black criminality altered radically between the late 1880s and World War I. Concern with theft receded and the sexual assault of white women moved to the forefront.[224]

Accordingly, the supposed black propensity for serious criminality was used to justify laws and less formal sanctions intended to reassure whites generally that the end of slavery did not mean the end of white dominance and specifically to allay the fears of white men that "their women" would be attacked by free black men.

In the modern era, street crime became a major political issue in the 1960s and 1970s.[225] The popular image of street crime, unsurprisingly, had a black face. Drugs and resulting crime during the crack epidemic of the 1980s and 1990s spurred widespread use of racial profiles to identify drug dealers.[226] Blacks have borne the brunt of this law enforcement technique. As has historically been the case, our fear has again found a black face. Thus, while the particular type of crime blacks are presumed to be predisposed toward changes over time, the underlying assumption of black propensity for crime has remained unchanged from slavery to today.

There should be little question that the historical assumption that "black means criminal" continues to hold sway today.[227] The inescapable

---

[224] Martha A. Myers, *The New South's "New" Black Criminal: Rape and Punishment in Georgia, 1870–1940*, *in* ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 145, 146 (Darnell F. Hawkins ed., 1995) [hereinafter ETHNICITY, RACE, AND CRIME].

[225] *See* William J. Chambliss, *Crime Control and Ethnic Minorities: Legitimizing Racial Oppression by Creating Moral Panic*, *in* ETHNICITY, RACE, AND CRIME, *supra* note 224, at 235, 245 (citing Barry Goldwater's 1964 presidential campaign as the watershed in the politicization of street crime).

[226] HARRIS, *supra* note 7, at 19–23.

[227] *See, e.g.*, ARMOUR, *supra* note 65, at 2 ("Polls and studies repeatedly show that most Americans believe Blacks are 'prone to violence.'") The research into modern public perceptions of crime and race is too voluminous to discuss here; for a good summary and discussion, see RUSSELL, *supra* note 21, at 1–4, 110–29.

nature of this stigma is what makes racial profiling a badge or incident of slavery. At least with regard to African Americans, the perpetual association of their race and potential criminality is more than simple individual racial prejudice. It is a modern-day manifestation of a means of social control that arose out of slavery. In essence, it tells African Americans that, regardless of any actual basis for criminal suspicion, they continue to be viewed as less than fully human based upon their race. Whether it is characterized as "Spirit-murder,"[228] "macroagressions"[229] or "the Black Tax,"[230] the constant suspicion of criminality based on skin color subjects African Americans to a unique and largely unredressed injury. In sum, "race-based law enforcement is a part of a larger series of institutions and cultural practices that relegate racial minorities to caste-like, second-class citizenship."[231] As such, it is precisely the type of lingering effect of slavery that the Thirteenth Amendment was designed to eradicate.

D. Theories of Racial Profiling as a Thirteenth Amendment Injury

It is crucial to understand that a current practice or social condition need not actually be enslavement, or inflict an injury as severe as that inflicted by slavery, in order for it to be a badge or incident of slavery. The *Jones*[232] Court did not hold that whites' refusal to sell real property to blacks amounted to enslavement, nor did it reason that limitations on blacks' ownership of real property inflicted an injury upon African Americans equivalent to slavery in severity. Instead, the Court concluded that white refusal to sell to blacks was a lingering vestige of legal structures and prejudices that existed during slavery prohibiting slaves from owning property in order to better control and subjugate them. Under *Jones*,[233] the badges and incidents analysis examines modern-day inequalities to determine whether such inequalities are rationally traceable to the system of slavery.[234]

---

[228] *See* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

[229] *See* RUSSELL, *supra* note 21, at 138–41.

[230] *See* ARMOUR, *supra* note 65, at 13 ("The Black Tax is the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes.").

[231] Johnson, *supra* note 21, at 353.

[232] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[233] *Id.*

[234] *Cf.* Williams v. City of New Orleans, 729 F.2d 1554, 1577 (5th Cir. 1984) (Judge Wisdom, concurring in part and dissenting in part) ("[w]hen a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth Amendment."). Williams involved a consent decree that required the city to promote African American and white police officers at an equal rate. Judge Wisdom argued that judicial enforcement of this "affirmative action" consent decree was a proper Thirteenth Amendment remedy for the legacy of discrimination in hiring blacks for law enforcement positions. *Id.* at 1581.

Negative stereotypes about blacks arising out of slavery that persist today "can be argued to be an 'incident' of slavery in the extended sense of a debilitating effect of slavery" or in a "narrower sense of a feature that accompanied slavery itself and [that] continues to disadvantage blacks."[235] Racial profiling presents the paradigmatic Thirteenth Amendment "badges and incidents of slavery" case for the following reasons:

> (1) It involves an actual, race-based deprivation of a person's physical liberty and freedom of movement (the stop, arrest, or detention);
> (2) the restraint occurs as a result of contemporary manifestation of a practice that existed during slavery and continued thereafter (the perception of blacks as congenital criminals subject to constant suspicion by law enforcement); and
> (3) the widespread use of racial profiling results in the reinforcement and perpetuation of the racially unequal social structure established by, and essential to, enslavement of Africans in this country. Any black person, anywhere, is subject to restraint by official power because of his race. As more blacks are restrained, the perception of all blacks as criminals, and thereby rightfully subject to race-based criminal suspicion, is perpetuated.[236]

To summarize the propositions explored below, the image of the Black Beast—the genetically predisposed black criminal—was (1) developed during slavery as a means of dehumanizing and controlling the enslaved; (2) assimilated into popular culture; (3) given legal sanction in the Slave Codes and Black Codes to enforce white dominance; and (4) reinforced

---

[235] *See* Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 592 (1975).

[236] *Jones*, which dealt with private refusal to sell a home on the basis of the purchaser's race, reached its holding primarily under the narrower theory articulated above. The *Jones* Court linked the modern private refusal to sell property to blacks to the specific prohibition on blacks, during slavery, from owning property and making contracts. The *Jones* Court could have rested its holding on a broader theory as well, for example, that the continued inability of blacks to own property on equal terms with whites was a badge of slavery because the perception of blacks as mentally incapable of owning or maintaining property arose out of societal assumptions about slaves. Modern Thirteenth Amendment scholarship has focused on situations falling within both broad and narrow theories. For example, Professor Colbert has argued that race-based peremptory challenges violate the Thirteenth Amendment. He argues that the exclusion of African American jurors is a vestige of slavery in the sense that this specific practice existed during slavery and reinforced the slave system's dominance of whites over blacks by immunizing whites when they committed crimes against blacks. Colbert, *Challenging the Challenge*, *supra* note 13, at 5–6. Such exclusion is also a badge of slavery because, Colbert argues, the historical exclusion of blacks from juries depended on social assumptions about blacks' supposed lack of mental capacity to serve on juries. *Id*. at 69–70. Colbert concludes that because this same assumption operates today to result in the exclusion of blacks from juries, it is a stigma or "badge" that blacks carry as a result of slavery. *Id*. at 116–17.

and legitimated by the leading racial theorists at the turn of the twentieth century.[237] This image eventually provided the basis for the law of segregation and Jim Crow. Indeed, "one constant remained as the slave codes became the Black codes and the Black codes became segregation statutes: Blackness itself was a crime."[238]

In light of this history, racial profiling is merely old wine in a new bottle. The situation for many African Americans today remains one where they are subject to arbitrary official detention because of their race or, more precisely, because of the officially enforced prejudice that they are more likely to be engaged in criminal conduct because of their race. The result of a regime where law enforcement officials are free to use race as a generalized indicator of increased propensity to commit crime is that "skin color itself has again been criminalized."[239] In a world where crime—any crime—exists, skin color is enough to make one a suspect.

1. Race-Based Restraint on Freedom of Movement as a Practice During Slavery

In its simplest form, the argument for considering racial profiling an incident of slavery is that it results in a regime of race-based restraint on freedom of movement and that a similar regime existed during slavery. Even during the era when the Supreme Court construed the Thirteenth Amendment most narrowly, the Court held that the Amendment prohibited the "inseparable incidents of the institution [of slavery]" visited upon blacks, such as "*restraint of his movements* . . . ."[240] Widespread racial profiling means that African Americans are subjected to official criminal suspicion based upon their race, with the concomitant restraint on liberty that results from such suspicion in the form of "driving while black" encounters, "stop and frisk" detentions on the streets,[241] and other

---

[237] Most scientific literature continued to perpetuate the myth of innate black criminality well after the turn of the twentieth century. *See* Darnell F. Hawkins, *Ethnicity, Race and Crime: A Review of Selected Studies*, *in* ETHNICITY, RACE, AND CRIME, *supra* note 224, at 11, 16–26. The tide of scholarly opinion began to turn away from social Darwinist explanations for racially disparate crime rates in the mid-twentieth century, during increased social unrest and agitation for civil rights. *See id.* at 26–32.

[238] RUSSELL, *supra* note 21, at 22 (tracing the history of this development); *see also* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 198–282 (Wesleyan Univ. Press 1987) (1971) (same).

[239] *See* HARRIS, *supra* note 7, at 224.

[240] The Civil Rights Cases, 109 U.S. 3, 22 (1883) (emphasis added). Senator Lyman Trumbull of Illinois, during the Thirteenth Amendment debates, argued that "it 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*, 392 U.S. at 430. Senator Trumbull also noted, shortly after the Amendment was passed, that the Thirteenth Amendment abolished provisions of the Black Codes that restrained African Americans' freedom of movement. *See* CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

[241] In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that "reasonable suspi-

law enforcement investigations. In contrast to the "responsive" use of race as part of the description of a known suspect, the "predictive" use of race as a basis for criminal suspicion means that any person possessing the racial background in question is at any time subject to official restraint because of his race. The same sort of race-based restraint on liberty was an essential part of the slave system.

Along with the means of restraint and domination used by slaveholding individuals (shackles, beatings, and threats of violence), the Black Codes and Slave Codes enshrined race as the primary factor in criminal suspicion. While slaveholders did all in their private power to dominate the enslaved black class, they realized that private brutalization, without legal validation and enforcement, was not enough to maintain the system of human bondage.[242] They knew that "[w]ithout the power to punish, which the state conferred upon the master, bondage could not have existed. By comparison, all other techniques of control were of secondary importance."[243] History makes clear that "[c]ourts, police and militia were indispensable parts of the machinery of control" over enslaved Africans.[244]

In addition to authorizing and immunizing slaveholders' private brutality, one way in which the criminal law supported slavery was by controlling the slaves' movements when away from the slaveholder.[245] For example, under South Carolina's Slave Code, slaves were prohibited from leaving the plantation without a pass unless they were accompanied by some white person.[246] Pennsylvania's Slave Code similarly provided that any black person discovered more than ten miles from the master's home without permission in writing should be apprehended and whipped and that the apprehending party would receive payment.[247]

---

cion," rather than probable cause, is the Fourth Amendment standard to be applied to brief detentions and external "pat-downs." *Id*. at 27.

[242] *See* STAMPP, *supra* note 213, at 141–70 (describing various private techniques of enforcing the slave system).

[243] *Id*. at 171.

[244] *Id*. at 192.

[245] In addition to the assumptions of black savagery and criminality as a foundational justification for slavery, there was a practical reason for the entwinement of race and criminal suspicion during slavery: "[t]he fact that southern slavery was, in the main, Negro slavery gave an advantage to those who wished to preserve it. If he ran away, the Negro slave with his distinctive skin color could not so easily escape detection as could a white indentured servant." *Id*. at 193.

[246] HIGGINBOTHAM, IN THE MATTER OF, *supra* note 35, at 171. This Act obligated every white person to whip slaves found traveling in violation of the pass system, and authorized them to "beat, maim, or assault" the slave or, indeed, to kill him if the slave refused to show his pass and could not be captured alive. If a white person failed to do so, he could be fined under the Act. *See also* STAMPP, *supra* note 213, at 208 ("The codes rigidly controlled the slave's movements and his communication with others. A slave was not to be 'at large' without a pass which he must show to any white man who asked to see it . . . .").

[247] HIGGINBOTHAM, IN THE MATTER OF, *supra* note 35, at 287.

Race-based restraint on freedom of movement is also the reality under a racial profiling regime. The point is not that racial profiling is the equivalent of flogging slaves found off the plantation. Instead, the point is that during slavery, blacks were denied freedom of movement based on their race and that widespread racial profiling has the same effect today. Thus, racial profiling, when it leads to an arrest or detention, can be characterized as a Thirteenth Amendment seizure, in violation of the Amendment's promise to eliminate this vestige of the slave system.

2. Race-Based Criminal Suspicion as a Practice That Arose out of Slavery

A second way in which racial profiling is an "incident" of slavery is tied to the use of race in the criminal law during and immediately following slavery. Both the definition of crime and criminal suspicion have depended heavily on race since the founding of this country.[248] Indeed, "[r]ace was the most important variable in determining punishment under the Slave Codes."[249] In Virginia, for example, "[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct was either at most punishable by imprisonment or was not a crime at all."[250] The Slave Codes, of course, also punished blacks more harshly when they committed a crime against a white person than against another black person.[251]

States began using the pretext of suspected criminality in particular as a means of social control over African Americans, free and enslaved, as early as the seventeenth century. In the late 1600s, for example, officials in Philadelphia authorized private persons to "take up" any black person seen "gadding abroad," meaning not in the presence of the slavemaster without his permission.[252] Likewise, blacks under South Carolina's Slave Codes were subjected to scheduled searches and seizures every fourteen days, under the presumption of slaves' propensity for criminality.[253] Georgia law in the early 1800s provided that because "the permitting of free Negroes and persons of color to rove about the country in idleness and dissapation, *has a dangerous tendency*," free black boys over eight years old without guardians were "bound out" (that is, effectively en-

---

[248] Cummin, *supra* note 211.

[249] RUSSELL, *supra* note 21, at 15.

[250] Roberts, *supra* note 37, at 1955 (quoting A. Leon Higginbotham & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992)).

[251] *See* Johnson, *supra* note 1, at 635. The law was also used in a broader sense to criminalize any challenge by blacks to the system of white supremacy. For example, the criminal law prohibited slaves from learning to read or write. *See* Roberts, *supra* note 37, at 1955.

[252] HIGGINBOTHAM, IN THE MATTER OF, *supra* note 35, at 276.

[253] *Id.* at 183–84.

slaved) until age twenty-one.[254] The Slave Codes' racialization of crime and criminal suspicion was designed not only to support the economic institution of slavery, but also more broadly to establish white control and dominance over a growing African American population even in the North, where slavery ceased early to be economically significant.[255]

Furthermore, in attempting to preserve the social relationships created by slavery—black subservience and white dominance—many states in the post-slavery era used the criminal law as a way of controlling the freedmen. Because the Thirteenth Amendment prohibited slavery except as punishment for a crime, white lawmakers quickly realized that they could use the criminal law to effectively return the freedmen to a condition of slavery in fact.[256] The Black Codes enacted in the wake of the Thirteenth Amendment meant that freed blacks did not have the freedom "to live without fear of prejudiced application of criminal justice."[257] Under the Codes, vagrancy and similar laws were used as a pretext to maintain control over the freedmen. For example, when African Americans were convicted of vagrancy under the Black Codes and were unable to pay the fine, they could be leased out to anyone willing to pay the fine.[258] If the prisoner attempted to escape this *de facto* slavery by quitting or leaving, he was guilty of a criminal offense.[259] The Black Codes also reenacted the Slave Codes' pass system described above.[260] Thus, the post-War legal system used race as a proxy for criminality in attempting to preserve the legacy of slavery through the criminal law.

African Americans continue today to carry this "badge" or stigma arising from slavery. Racial profiling depends on the assumption that persons of certain races (usually African Americans) are more likely to engage in crime. This assumption is not made based upon detailed statistical analyses of crime patterns,[261] but rather most often upon what an indi-

---

[254] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 408–09 (W. W. Norton & Co. 1977) (1968) (emphasis added).

[255] *See, e.g.*, *id.* at 71 (discussing Massachusetts' Black Codes); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Senator Lyman Trumbull of Illinois, shortly after the Thirteenth Amendment's passage, noting that even some non-slaveholding states "passed laws abridging the rights of the colored man" and that the Thirteenth Amendment was designed to eliminate these structures "devised in the interest of slavery and for the purpose of degrading the colored race").

[256] *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 319 (1982) ("Many northerners, including Republican rank-and-file in Congress, saw in the Codes thinly disguised efforts to reenact the substance of slavery, including race control and labor discipline . . . ."); RUSSELL, *supra* note 21, at 20 ("In their totality, the Black codes created a new system of involuntary servitude. . . ."); *see also* Roberts, *supra* note 37, at 1955.

[257] HYMAN & WIECEK, *supra* note 256, at 320.

[258] Azmy, *supra* note 13, at 1015.

[259] *See* HYMAN & WIECEK, *supra* note 256, at 320.

[260] *Id.* at 319–20.

[261] As discussed *supra* Part II, I believe that even if there were some statistical proof of racially disparate crime rates for certain defined crimes in a particular area, racial profiling should not be used because it is inefficient and counterproductive, and because the costs of

vidual officer believes he "knows" about who commits more crime. The conventional wisdom about race and crime has been heavily influenced by the racialization of the criminal law, which arose out of the law and underpinnings of the slave system.

This received knowledge is often seen in the defenses of racial profiling. A prominent example is Carl Williams, the former New Jersey Chief of Troopers, who was fired after stating that racial profiling is justified because mostly "minorities" trafficked in marijuana and cocaine, without offering any proof for this statement and despite the fact that the hit rates for narcotics investigations have been widely shown to be roughly equal across racial groups.[262] Williams' statements show the problematic, circular nature of racial profiling. One draws the inference that more minorities are engaged in criminal conduct because minorities are disproportionately the subjects of law enforcement attention. Minorities are the subjects of increased law enforcement suspicion because of the belief that they are more likely to engage in crime. In other words, because officers focus on minorities, more minorities will be arrested, reinforcing the belief that more suspicion of minorities is justified.[263]

3. The Myth of Inherent Black Criminality

The second, broader theory of racial profiling as a Thirteenth Amendment injury focuses on the "badges" or stigmas of slavery that the Amendment was designed to eliminate. Under this analysis, the focus is not on whether a specific practice that existed during slavery continues today. Rather, this theory concentrates on whether a current social condition can be rationally linked to inequalities arising out of slavery, regardless of whether the specific practice complained of existed in the same form under the slave system.

The first two arguments above can be characterized as a narrow "historical nexus" test, which asks this question: was the modern condition alleged to be a badge or incident of slavery used during slavery or a direct outgrowth of the slave system? With regard to racial profiling, the answer is yes, as demonstrated above. The analysis in this Part employs a "historical nexus" test broadly defined. Rather than focusing upon whether the specific practice or condition alleged to be a badge or incident of slavery existed during slavery, the broader analysis asks whether the condition or stigma arose out of the *system* of slavery, which includes the

---

the practice in terms of its impact on those subjected to it are simply too high in light of other more effective means of identifying suspects. In any event, racial profiling in real life does not rely on highly sophisticated and specific statistical models of criminality.

[262] *See* Jernigan, *supra* note 33, at 134; *supra* note 51 (discussing statistical studies revealing roughly equal hit rates).

[263] *See* Jernigan, *supra* note 33, at 134; Johnson, *supra* note 1, at 633–34.

social, legal and cultural structures supporting enslavement and white dominance.

Professor Pittman, relying on Justice Harlan's dissent in the *Civil Rights Cases*, has argued that the "historical nexus" test should be animated by the recognition that "slavery rested on a theory of 'black inferiority.'"[264] Admittedly, one could argue that under this approach, all forms of racial prejudice are badges of slavery, since the social and legal branding of blacks as inferior beings was necessary to maintain the system of human bondage. But the Thirteenth Amendment is not a generalized non-discrimination mandate. The legislative history and historical context establish that the Amendment's Framers intended to outlaw the badges and incidents *of slavery* (albeit in a broad sense), not all forms of racial prejudice that might ever exist. Yet, to be faithful to the Framers' broad remedial purposes, the badges and incidents of slavery inquiry should not be limited to a historical treasure hunt.[265] Slavery involved more than just shackles and the labor needs of an agrarian economy. Slavery was also a system for the racialized regulation of every aspect of human behavior and included not only the economic institution of chattel slavery, but also the legal, social, and cultural conditions supporting it. Where the modern day injury is rationally related to the *system* of slavery—not just the economic institution of chattel slavery—it should be seen as prohibited by the Thirteenth Amendment.

Racial profiling also falls within this broader theory because racial profiling causes all African Americans to be treated as potential criminals. This same assumption, deeply rooted at the time of slavery, provided essential support for the slave system.[266] This attitude is a stigma or "badge" of slavery in the truest sense of the word. It is a mark of Cain that cannot be washed away by success, education or assimilation. An African American in the "wrong" neighborhood, or on our nation's highways, does not escape racial profiling because he is "respectable" in terms of appearance or profession. The visible "brand" of blackness (perhaps in conjunction with other factors, perhaps alone) is sufficient to trigger police suspicion, even in the total absence of individualized indicia of possible criminality. This response to the stimulus of blackness also makes racial profiling a badge or incident of slavery.

The Black and Slave Codes' correlation of blackness with a presumption of criminality did not end with Reconstruction, nor did the pre-

---

[264] Pittman, *supra* note 13, at 856–57 (quoting The Civil Rights Cases, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting)).

[265] *See id.* at 857 (arguing that "[i]nstead of trying to locate similar acts of past discrimination during slavery for comparison with present discrimination, the [Supreme] Court should accept the 'black inferiority' theory as the essence of both slavery and subsequent acts of racial discrimination that seek to relegate African-Americans and other minorities to inferior positions").

[266] *See supra* Part IV.

sumption of black criminality arise newborn from the Codes. Rather, the image of the black criminal has been historically continuous and exists in the present day. It is clear that dehumanization of Africans was necessary to support the institution of slavery. If Africans were seen as fully human, then the American ideal would dictate that they also be free; if they were less than human, however, the ideological tension between American ideals of liberty and equality and the institution of slavery could be lessened.

Among the means used to dehumanize blacks during slavery was the fiction that all blacks were naturally savage and had inborn criminal tendencies. Leading voices during slavery argued that "[t]reachery, theft, stubbornness and idleness . . . are such consequences of their manner of life at home [in Africa] as to put it out of all doubt that these qualities are natural to them and not originated by their state of slavery."[267] The Slave Codes both arose from these ideas and reinforced them in the law.[268] The preamble to South Carolina's slave code is instructive:

> [Because] negroes and other slaves . . . are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the [general] laws . . . it is absolutely necessary, that such other . . . laws . . . be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, *to which they are naturally prone and inclined* . . . .[269]

This myth of innate black immorality and criminality significantly aided the dehumanization of African Americans in the collective white mind. If all blacks were innate savages, not only were they less than human and

---

[267] JORDAN, *supra* note 254, at 305 (quoting BERNARD ROMANS, CONCISE NATURAL HISTORY OF EAST AND WEST FLORIDA 105 (1775)). Despite his many other writings arguing that Africans were inferior to whites, Thomas Jefferson rejected this "environmentalist" argument that Africa had produced persons genetically predisposed to immorality and criminality:

> "That disposition to theft with which they have been branded," he declared categorically, "must be ascribed to their situation." With dry detachment he explained the justice of Negro thievery: "The man, in whose favour [sic] no laws of property exist, probably feels himself less bound to respect those made in favour [sic] of others." Might not the slave "justifiably take a little from one, who has taken all from him?"

Id. at 439 (quoting THOMAS JEFFERSON, NOTES ON VIRGINIA 142–43 (1801)). The fact that Jefferson felt compelled to refute the stereotype of blacks' innate criminality gives some indication that it was widely held.

[268] JORDAN, *supra* note 254, at 109 ("The slave codes served white men in still another way by furnishing indirect justification for the severities of slavery.").

[269] *Id.* at 109–10 (citation omitted) (emphasis added).

therefore fit to be enslaved, but white guilt was also lessened by appealing to white fear as a justification for black enslavement.[270]

Around the turn of the twentieth century, the idea of the natural black criminal was incorporated into the "scientific" literature of racial Darwinism.[271] These ideas did not arise in a vacuum; rather, scholars were attempting, in the face of a free black population, to develop theories that would justify continued black subjugation.[272] Leading scholars argued that blacks, "once freed from the control of the slaveholders . . . quickly reverted to savagery."[273]

The most influential work of the day on the subject of race, Hoffman's *Race Traits and Tendencies of the American Negro*, argued (among other things) that blacks had an innate tendency toward "crime and immorality."[274] Hoffman concluded that oppressive social conditions or individual vice did not cause disproportionate crime rates among blacks but that "on the contrary, the colored race shows of all races the most decided tendency towards crime in the large cities."[275] Hoffman used evidence of disproportionate crime rates to argue that slavery had a "civilizing" effect on blacks by restraining their natural proclivity for

---

[270] The preamble to South Carolina's slave code explicitly appealed to white fear. Immediately after the above-quoted portion, the preamble stated that the slave code was necessary "to tend to the safety and security of the [white] people of this Province and their estates . . . ." *Id*. at 110.

[271] The attempt to scientifically prove an innate black predisposition for crime continues today. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 235–51 (1994) (arguing that because, in their view, race is correlated with intelligence and intelligence with criminality, race is correlated with criminality); MICHAEL LEVIN, WHY RACE MATTERS: RACE DIFFERENCES AND WHAT THEY MEAN 213, 322 (1997) (arguing, *inter alia*, that African Americans are inherently more aggressive and impulsive than whites and more likely to commit crimes); *see also* RUSSELL, *supra* note 21, at 96 (discussing studies and books such as *The Bell Curve* and noting that "[t]he uncritical reader is easily led to conclude not only that race and IQ are correlated [a questionable conclusion in itself, if taken to mean that IQ is genetically determined], but that genetics, crime and race are causally related.").

[272] *See generally* FREDRICKSON, *supra* note 238, at 198–283. These theories of black inferiority and danger provided an aura of scholarly respectability for racially repressive policies. *See id*. at 256 ("[T]he Darwinist concepts of racial degeneracy and extinction provided the 'scientific' basis for most of the virulent anti-Negro propaganda that spewed forth in unprecedented volume around the turn of the century."). They also "succeeded in translating the proslavery racial argument into turn-of-the-century evolutionary terminology." *Id*. at 252.

[273] *Id*. at 248 (discussing the work of Dr. Eugene Corson); *see also* KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 45 ("According to one popular theory [around the turn of the twentieth century], blacks had undergone a salutary civilizing process through enslavement that was tragically ended by emancipation . . . . Freed from the discipline of enslavement, blacks were reverting to their natural, primitive, brutish ways.").

[274] FREDRICKSON, *supra* note 238, at 251 (quoting FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (Am. Econ. Ass'n, 1st Series XI, 1896)). Hoffman was a German-born insurance statistician whose book helped convince most white insurance companies to deny coverage to blacks on the ground that mere membership in the black race posed an "unacceptable actuarial risk." *Id*. at 249–50.

[275] *Id*. at 225.

criminality.[276] The book's ideas were so influential that the Chief Statistician of the Census Bureau stated at a conference in 1900 that the African American race in the United States would eventually die out, with its supposed innate sexual vice and criminality as the leading factors.[277] At the same conference, the faculty chairman of the University of Virginia argued that science (that is, Hoffman's book) showed that "all things point to the fact that the Negro *as a race* is reverting to barbarism with the inordinate criminality and degradation of that state."[278] These ideas, vigorously adopted by academics,[279] legislators, and laypeople, undermined any nascent desire some whites may have had to advocate racial justice for the freedmen's descendants:

> In order to deserve the kind of treatment he was receiving in the United States in 1900, the black man presumably had to be as vicious as the racists claimed; otherwise many whites would have had to accept an intolerable burden of guilt for perpetrating or tolerating the most horrendous cruelties and injustices.[280]

A similar dehumanization occurs today via racial profiling and is both a cause and effect of the practice.[281] African Americans have continued to be the repository for the American fear of crime and to be treated as amalgamations of presumed group traits (criminality and violence) rather than as individuals. The history above demonstrates that this stigmatization is not merely the manifestation of individual prejudices, but also arose from the social structures supporting slavery and continued control over the freedmen.

---

[276] *Id*. at 217.

[277] *Id*. at 252.

[278] *Id*. (emphasis added).

[279] While some other scholars spoke out against the myth of natural black criminality, they were in the minority. W. E. B. DuBois, for example, argued that disproportionate minority crime rates were the result of oppressive social conditions visited upon blacks and the mass urban migration around the beginning of the twentieth century. *See* Darnell F. Hawkins, *Ethnicity, Race and Crime: A Review of Selected Studies*, *in* ETHNICITY, RACE, AND CRIME, *supra* note 224, at 11, 13–16.

[280] FREDRICKSON, *supra* note 238, at 251–52. These ideas were accepted so widely because they reinforced already existing stereotypes that arose in the historical context discussed *supra* Part IV and that were part of the mythology of race in the U.S. well before racial Darwinism arose, *see id.* at 259–62.

> The pro-slavery theorists had argued that the "brute" propensities of the blacks were kept in check only as a result of the absolute white control made possible by slavery and that emancipation in the South would bring the same "reversion to savagery" that had allegedly taken place after the blacks had been freed in Haiti and the British West Indies.

Id. at 259.

[281] *See supra* Part II, discussing the stigmatization of all African Americans as potential criminals and the manifestation of this stigma via racial profiling.

V. The Power To Prohibit Badges and Incidents of Slavery

A. Congressional Power To Enforce the Thirteenth Amendment

The Thirteenth Amendment, like the other Reconstruction Amendments, contains a substantive provision defining the rights protected (Section 1), and an enforcement clause (Section 2), which provides that "Congress shall have the power to enforce this article by appropriate legislation."[282] The case law makes clear that Section 2 empowers Congress to legislatively proscribe practices or conditions constituting badges or incidents of slavery.[283] Congress, however, has seldom chosen to rely upon the Thirteenth Amendment when enacting civil rights legislation.[284]

---

[282] U.S. Const. amend. XIII, § 2.

[283] *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 105 (1971):

> By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, "Congress has the power under [Section 2 of] the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."

Id. (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1967)). Of course, the major and minor premises of this article are that (1) the Amendment's self-executing core (Section 1) provides a direct cause of action for such badges and incidents, and (2) racial profiling is such a badge or incident. It is important to note that neither *Jones*, *Griffin*, nor any other Supreme Court case has ever squarely held that Section 1 does or does not reach the badges and incidents of slavery. The Court has only held that Section 2 of the Thirteenth Amendment grants Congress the power to enact legislation prohibiting badges and incidents of slavery. These issues are analyzed more fully *infra* Parts V.B–C.

[284] The Supreme Court has identified the following statutes as based on Congress' Thirteenth Amendment power: 42 U.S.C. § 1981 (2000) (protecting the equal rights of all citizens to make and enforce contracts); 42 U.S.C. § 1982 (2000) (protecting equal rights to buy, sell and lease property); 42 U.S.C. § 1985(3) (2000) (providing for a civil cause of action for conspiracies to deprive persons of equal protection of the law); 42 U.S.C. § 1994 (2000) (prohibiting peonage); and 18 U.S.C. § 1581 (2000) (providing for criminal penalties for imposing peonage). *See* Memphis v. Greene, 451 U.S. 100, 125 n.38 (1981). Section 1985(3)'s criminal analogue, 18 U.S.C. § 241 (2000), is also based upon Congress' Thirteenth Amendment power. *See Griffin*, 403 U.S. at 105 ("[T]he varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude."). The Second Circuit recently upheld as a valid exercise of Congress' Thirteenth Amendment power 18 U.S.C. § 245(b)(2)(b) (2000), which makes it a federal crime for anyone (including a private perpetrator) to injure or intimidate a person because of that person's race or religion and because the person was enjoying a public facility. United States v. Nelson, 277 F.3d 164 (2d Cir. 2002). Interestingly, the Executive Branch has also argued that the Thirteenth Amendment and congressional legislation pursuant to it are sufficient to fulfill the United State's obligations under international treaties on racial discrimination, such as the United Nations Convention for the Elimination of Racism, Xenophobia and Related Forms of Intolerance. *See* United Nations, Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention at 22, U.N. Doc. CERD/C/351/Add.1 (2000) (United States reporting to the United Nations Committee on the Elimination of Racial Discrimination regarding International Convention on the Elimination of all Forms of Racial Discrimination).

While there is relatively little historical guidance on the precise relationship the Framers intended between the Thirteenth Amendment's substantive and enforcement provisions,[285] it is clear that Congress created Section 2 to provide unambiguous Congressional power to guarantee the rights of the freedmen created by Section 1. During the debates over the Civil Rights Act of 1866 (passed pursuant to Section 2), Representative Martin Thayer of Pennsylvania explained his view of the relationship of the Amendment's two sections as follows:

> I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom for the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee. And when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave to them.[286]

Similarly, Senator John Sherman of Ohio, discussing the purpose of the Amendment's two sections, stated that "[h]ere is not only a guarantee of liberty to every inhabitant of the United States [Section 1], but an express grant of power to Congress to secure this liberty by appropriate legislation [Section 2]."[287] There is some indication that the wording of Section 2 was a political compromise designed to avoid textually addressing the specific question of equality before state law, although all understood that Section 2 gave Congress the power to enforce such equality.[288] The historical record reveals that Congress intended Section 2 as an explicit grant of federal power to enforce Section 1's broad remedial purposes,

---

[285] *See* HYMAN & WIECEK, *supra* note 256, at 389 ("The Congressional Globe provides evidence that the thirty-eighth Congress argued little about the enforcement clause . . . . This fact does not, however, justify a conclusion [that] the Amendment affected only formal slavery . . . .").

[286] CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866), *quoted in* Azmy, *supra* note 13, at 1017.

[287] *Id*. at 41, *quoted in* Azmy, *supra* note 13, at 1017 n.201.

[288] *See* HYMAN & WIECEK, *supra* note 256, at 277:

> Scare tactics aside, Democrats were correct that many Republicans intended the Amendment to create (i.e., to stipulate) equality before state law for all state residents. Sumner wanted a section 2 that stated so specifically. He deferred to majority preference for a general enforcement authority. Lacking prescience, Sumner and his colleagues assumed that abolition could lead only to equality before state law . . . and that equality was roughly equivalent to the protections the Bill of Rights afforded (or should afford) to whites as well as blacks. . . . What remained was concurrence that Congress now had power to enforce freedom in the states—if necessary.

not that Congress would have power to create new rights beyond those inherent in the Amendment's self-executing core.

The history of the Fourteenth Amendment's enforcement clause offers guidance into the purpose of the Thirteenth Amendment's enforcement clause, which it mirrors. The Fourteenth Amendment, as originally proposed by Representative John Bingham of Ohio, would have had a single section, providing that Congress would have the power to "make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[289] Opposition to the Bingham draft centered on two issues: federalism and separation of powers.[290] The federalism argument, as in the Thirteenth Amendment context, rested on the assertion that the proposed Amendment would have given Congress too broad an authority to intrude into traditionally state affairs.[291]

Opponents of the Bingham draft also argued that it departed from the Constitutional tradition of resting "primary authority" in the judiciary to interpret the meaning and substance of constitutional amendments.[292] Under the Bingham proposal, opponents charged, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States."[293] The Bingham draft was rejected and revised to the current form of the Fourteenth Amendment to make clear that Congress was "granted the power [under the enforcement clause] to make the substantive constitutional prohibitions against the States effective."[294] As with the Thirteenth Amendment, Congress was not granted the power to create rights under Section 5 of the Fourteenth Amendment. Rather, Congress and the courts were to have concurrent power to enforce the Fourteenth Amendment's substantive guarantees.[295]

---

[289] City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)). *Boerne* is discussed in more detail *infra* Part V.C.

[290] *Id*. at 520–24.

[291] *Id*. at 521–23.

[292] *Id*. at 524.

[293] *Id*.

[294] *Id*. at 522.

[295] In *Jones*, the Court cited the statement of Senator Lyman Trumbull of Illinois during the debates over the Civil Rights Act of 1866, where he stated that under Section 2 "'it was for Congress to determine, and nobody else,' what sort of legislation might be 'appropriate' to make the Thirteenth Amendment effective." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 430 n.48 (1968). The context of this statement makes clear, however, that Trumbull was not in fact arguing that only Congress had the power to prohibit slavery's badges and incidents, to the exclusion of the federal judiciary. Trumbull, in making this statement, was refuting the argument that Section 2 would only reach physical enslavement or involuntary servitude. Trumbull was making the point that Section 2 was indeed "intended to authorize federal legislation interfering with subjects other than slavery itself." *Id*. The "nobody else" referred to by Senator Trumbull was therefore obviously the States, since the statement was made in the midst of an argument about the reach of federal power.

Despite Congress' undoubted power under the Thirteenth Amendment to pass legislation aimed at eliminating the badges and incidents of slavery, it has not exercised that power with regard to racial profiling. The proposed federal End Racial Profiling Act of 2001 would provide a federal cause of action for racial profiling.[296] The bill defines racial profiling as "the practice of a law enforcement agent relying, *to any degree*, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities . . . ."[297] The bill identifies the Fourth, Fifth and Fourteenth Amendments, the Commerce Clause, and Article IV, Section 2 of the Constitution (the right to interstate travel) as the sources of Congressional power for it.[298] The bill should be amended to rely upon Section 2 of the Thirteenth Amendment as the primary source of constitutional authority, given Congress' unquestioned power to prohibit what it rationally determines are slavery's badges and incidents.[299] However, there have been no hearings or action on the End Racial Profiling Act since it was introduced (prior to the terrorist attacks of September 11, 2001). Congressional action on this bill seems highly unlikely in the current climate, given Congress' reluctance to be seen as limiting law enforcement power with regard to anti-terrorism measures. Therefore, in the absence of Congressional or binding Executive action,[300] a judicially enforceable private remedy for racial profiling is necessary.

---

[296] *See* S. 989, 107th Cong. § 102(a) (2001) (providing the federal government or a private litigant with a cause of action for damages and injunctive or declaratory relief in state or federal court). In addition to discouraging racial profiling by authorizing lawsuits, the bill would also provide positive incentives for law enforcement agencies to eliminate the practice. As one of its sponsors noted, the bill would provide federal funds for training and the collection of data on racial profiling. *See Introducing S. 989, the "End Racial Profiling Act,"* 147 CONG. REC. S5895 (daily ed. June 6, 2001) (statement of Sen. John Corzine of New Jersey), *reprinted in* 26 SETON HALL LEGIS. J. 55, 59–60 (2001).

[297] S. 989, 107th Cong. § 501(5) (emphasis added). The bill exempts from its coverage law enforcement reliance on the above criteria "in combination with other identifying factors" when used in "seeking to apprehend a specific suspect whose race, ethnicity, or national origin is part of the description of the suspect." *Id.*

[298] *See id.* § 2(b)(1)–(4).

[299] *See Jones*, 392 U.S. at 440 ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[300] The White House has recently issued a "guidance" statement purporting to ban racial profiling by federal law enforcement agencies. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. The Guidance is likely to be of limited effect for several reasons. First, it only applies to federal agencies, whereas most law enforcement activity is carried out by state and local agencies. Second, the Guidance is fairly toothless, since it imposes no penalties; is not legally binding; and contains numerous exceptions, particularly for "national security" investigations. While the Guidance is a welcome recognition of the problem and a step in the right direction, further action is needed.

B. Judicial Power To Enforce the Thirteenth Amendment

Because the Thirteenth Amendment textually prohibits only "slavery or involuntary servitude,"[301] some courts and commentators have questioned whether the "badges and incidents" remedy exists in the absence of Congressional legislation.[302] One could argue that a dynamic, "living constitutionalism"[303] requires an evolving construction of Section 1 that responds to modern-day conditions, such as racial profiling, which similarly limit the full citizenship of African Americans as did the conditions that motivated the drafters of the Amendment in the nineteenth century.[304] Yet one need not go so far to conclude that the Amendment itself proscribes slavery's badges and incidents. The history of the Amendment and an understanding of what Congress can "enforce" under Section 2 clearly refute the idea that the power of judicial review under the Thirteenth Amendment is limited to conditions of physical enslavement.

As the Supreme Court has stated (albeit in dicta), Congress' broad and unquestioned Section 2 authority to abolish the badges and incidents of slavery "is not inconsistent with the view that the Amendment has self-executing force."[305] The more controversial question therefore is not whether the Thirteenth Amendment provides a direct cause of action. Rather, what remains unsettled is whether such a direct cause of action is limited to conditions of actual enslavement or whether the judiciary, like Congress, has the power to address the badges and incidents of slavery. The legislative history of the Thirteenth Amendment's enforcement clause reveals that Congress intended Section 2 to provide a mandate for Congressional action to secure the freedmen's rights, not just their freedom

---

[301] U.S. CONST. amend. XIII, § 1.

[302] *See, e.g.*, Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372 (1995); *see also* NAACP v. Hunt, 891 F.2d 1555, 1564 (11th Cir. 1990) (rejecting plaintiff's arguments that the state's flying of the Confederate battle flag violated the Thirteenth Amendment); Alma Soc'y v. Mellon, 601 F.2d 1225 (2d Cir. 1979) (holding that there is no Thirteenth Amendment badges and incidents of slavery cause of action in the absence of Congressional legislation); Atta v. Sun Co., 596 F. Supp. 103 (E.D.Pa. 1984) (holding that the judicial enforcement of the Thirteenth Amendment, absent Congressional legislation, is limited to slavery, involuntary servitude or forced labor); Rogers v. Am. Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (rejecting black woman's claim that employer's rule barring employees from wearing an all-braided hairstyle violated the Thirteenth Amendment); Lopez v. Sears, Roebuck & Co., 493 F. Supp. 801, 806–07 (D. Md. 1980) (rejecting a Thirteenth Amendment basis for an employment discrimination suit).

[303] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437–38 (1986).

[304] Indeed, supporters of the Amendment "expressed their convictions in organic imagery . . . . Education from the past, forward motion and adaptability to change were the constitutional qualities Republicans praised." HYMAN & WIECEK, *supra* note 256, at 392.

[305] Memphis v. Greene, 451 U.S. 100, 125 (1985). This statement is dicta because, as discussed *infra* note 315, the Court's actual holding in *Greene* was that the street closing did not amount to a badge or incident of slavery, making irrelevant the question of whether there is a direct cause of action for such badges and incidents.

from bondage. By enacting Section 2, the Amendment's Framers did not intend to restrict the ability of the judiciary to do the same. Furthermore, the theory that Section 2 gives Congress a blank check to legislate against badges and incidents of slavery, while also postulating that such badges and incidents do not fall within the scope of Section 1, contravenes Supreme Court decisions holding that Congress' enforcement clause power must be tied to "enforcing" rights, not creating them.[306] Those decisions holding that the judiciary is wholly powerless to offer redress under the Thirteenth Amendment for slavery's lingering effects are based more on judicial reluctance to truly enforce the Amendment's broad remedial purposes than on the Amendment's history or constitutional jurisprudence.[307]

Jones did not reach the question of whether the Thirteenth Amendment provides a direct cause of action to remedy the badges and incidents of slavery because it did not have to. *Jones* dealt with a Congressional statute (42 U.S.C. § 1982) prohibiting racial discrimination in the sale or lease of real property. The only question before the *Jones* Court was whether § 1982, which reached private racial discrimination, was a valid exercise of the authority granted to Congress under Section 2. In answering that question affirmatively, the *Jones* Court explicitly stated that it did not reach the question of "[w]hether or not the Amendment *itself* did any more" than abolish slavery.[308] All one can conclude from *Jones* on this question is that Congress can proscribe the badges and incidents of slavery. The converse proposition—that the judiciary cannot—is simply not answered by *Jones*.

In fact, *Jones* implicitly refutes the idea that federal courts are powerless to address slavery's badges and incidents. In *Hodges v. United States*,[309] an early Thirteenth Amendment case, the Court had held that neither the Thirteenth Amendment nor legislation enacted pursuant to it reached private restrictive covenants. The Court stated: "True, the 13th Amendment grants certain specified and additional power to Congress, but any congressional legislation directed against individual action which was not warranted before the 13th Amendment must find authority in

---

[306] See *infra* Part V.C, discussing the Court's recent decisions, beginning with Boerne v. Flores, 521 U.S. 507 (1997), reexamining the scope of Congress' power to enforce the Fourteenth Amendment.

[307] Fears of the reach of Section 1, were it interpreted as prohibiting badges and incidents of slavery, fail to recognize the limitations on a Thirteenth Amendment cause of action. As demonstrated in this Article, a plaintiff would have to establish that the social disability or discrimination alleged to be a badge or incident of slavery is one that is logically and historically tied to the institution of slavery or the social conditions created by that institution. Thus, whatever branch of government has the power to address slavery's badges and incidents could only act in areas related to second-class, race-based treatment that are an outgrowth or remnant of slavery. *See* Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, *supra* note 21, at 1024 n.37.

[308] 392 U.S. at 439.

[309] 203 U.S. 1 (1906).

it."[310] Nothing in *Jones* indicates that the *Jones* Court disagreed with this basic proposition, although it overruled *Hodges* to the extent that *Hodges* held that Congress could not regulate private conduct using its Section 2 power.[311] In other words, the *Jones* Court took a much broader view of what kind of legislation the "authority" found within the Amendment warranted and held that this authority included action against slavery's badges and incidents.

In *Jones*, as Professor Pittman has accurately noted,

> the Court did not overrule either the *Civil Rights Cases*, *Hodges*, or *Corrigan* as they relate to . . . the Court's ability to interpret the scope of the Thirteenth Amendment itself [as opposed to legislation enacted under Section 2]. In other words, the Court's unfettered judicial review authority to define the scope of the amendment itself remains intact after *Jones*. Accordingly, the Court implicitly has the authority to entertain a direct cause of action [based on a badge or incident of slavery] under the Thirteenth Amendment.[312]

Had the *Jones* Court meant its holding to be understood as meaning that the power of judicial review under the Thirteenth Amendment is limited to conditions of actual enslavement, it would have overruled the contradictory portions of those earlier cases.

The *Jones* Court in fact explicitly noted "[i]nsofar as *Hodges* is *inconsistent with our holding today*, it is hereby overruled."[313] As the Court explained, the portion of *Hodges* that was inconsistent with *Jones* was *Hodges*' "concept of *Congressional* power" as limited to "conduct which actually enslaves someone."[314] The Court reiterated subsequent to *Jones* that whether or not the Thirteenth Amendment itself provides a direct "badges and incidents of slavery" cause of action at least remains an open question: "Although the [*Jones*] Court expressly overruled *Hodges* . . . , the Court neither agreed nor disagreed with Justice Harlan's statement in dissent in *Hodges* that 'by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom.'"[315]

The Court has therefore managed to dodge the issue for the nearly forty years since *Jones*, with the exception of dicta in *Palmer v. Thomp-*

---

[310] *Id*. at 16.
[311] *See supra* notes 180, 189–190 and accompanying text.
[312] Pittman, *supra* note 13, at 843.
[313] 392 U.S. at 443 n.78 (emphasis added).
[314] *Id*. (emphasis added).
[315] Memphis v. Greene, 451 U.S. 100, 126 n.40 (1981) (citing *Hodges*, 203 U.S. at 27). The *Greene* Court also found it appropriate to leave this question open because it held that the street closing's "disparate impact on black citizens could not, in any event, be fairly characterized as a badge or incident of slavery." *Id*. at 126.

son.[316] The *Palmer* Court's Thirteenth Amendment discussion, although cursory[317] and without analysis of the history behind the Amendment, requires examination because some of the Court's language does seem to indicate that only Congress can address slavery's badges and incidents:

> Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a lawmaking power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in [*Jones*] could empower *Congress* to outlaw "badges of slavery." The last sentence of the Amendment reads: "Congress shall have the power to enforce this article by appropriate legislation." But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.[318]

The *Palmer* Court recognized that *Jones*' holding was limited to deciding that Congress could outlaw badges and incidents of slavery. From there, the *Palmer* Court made the leap that *only* Congress had the power to ad-

---

[316] 403 U.S. 217 (1971).

[317] The Court may not have fully addressed the Thirteenth Amendment issue because petitioners did not. The Court began its one paragraph Thirteenth Amendment discussion by noting that "some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment . . . ." *Id*. at 226. To the extent that the *Palmer* Court's Thirteenth Amendment discussion offers some insights, those insights are limited because the issue does not appear to have been fully briefed or argued. Further, as a more technical matter, the majority's Thirteenth Amendment discussion may not have been fully joined by two of the concurring Justices making up the 5-4 majority. Both concurring Justices joined the opinion of the Court, but they made no mention of the Thirteenth Amendment issue. *See id.* at 227 (Burger, C.J., concurring); *id.* at 228 (Blackmun, J., concurring). Chief Justice Burger's concurrence dealt solely with the Fourteenth Amendment. *Id*. at 228 ("To find an *equal protection* issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of *that* important constitutional guarantee.") (emphasis added). Justice Blackmun's concurrence also did not mention the Thirteenth Amendment, but rested instead on his concern that plaintiffs' position would lock the city into operating public facilities forever, irrespective of economic concerns, because of its past history of racial segregation. *Id*. at 228–30. While the concurring Justices did sign on to Justice Black's opinion, his cursory Thirteenth Amendment discussion, not mentioned by either of the two concurring Justices, is too slender a reed upon which to rest an entire jurisprudence that the judiciary is powerless to offer redress for slavery's lingering effects. This is certainly true where such a reading of this single paragraph in *Palmer* so clearly contradicts the history and purpose of the Thirteenth Amendment, as discussed in this Article.

[318] *Id*. at 226–27 (emphasis added).

dress slavery's lingering effects. *Jones* does not justify this leap and the Amendment's history and purpose refute it.[319]

The above-quoted portion of *Palmer* has been read by lower courts as meaning there is no direct cause of action under the Thirteenth Amendment to remedy slavery's badges and incidents. In *Alma Society v. Mellon*,[320] plaintiffs argued that the permanent sealing of records of their adoption violated the Thirteenth Amendment. Plaintiffs analogized their situation to that of enslaved children in the pre-War South, who were permanently and intentionally severed from all family ties by being sold off while too young to remember their parents.[321] The court rejected plaintiffs' argument, holding that the Amendment left the abolition of badges and incidents of slavery to Congress, and that the absence of any applicable Congressional legislation defeated plaintiffs' claims.[322]

The *Alma Society* court began by correctly noting that the Supreme Court has never held that the Amendment itself, absent Congressional action, reaches slavery's badges and incidents.[323] The court reasoned, however, that the Supreme Court had implied that the Amendment itself only reaches actual physical bondage or compelled labor.[324] The court read Justice Harlan's dissent in *Plessy* as supporting this view. While Justice Harlan argued that "separate but equal" infringed upon the personal liberty guaranteed by the Thirteenth Amendment, and that the Amendment itself "prevents the imposition of any burdens of disabilities that constitute badges of slavery or servitude," he also stated the Fourteenth Amendment was adopted because the Thirteenth was inadequate to protect the rights of the freedmen.[325] Thus, the *Alma Society* court asserted, if the Thirteenth Amendment itself had abolished all badges and incidents of slavery, it would have been "adequate" in Justice Harlan's view to invalidate the "separate but equal" regime.[326]

The *Alma Society* court also believed plaintiffs' Thirteenth Amendment proved too much. Plaintiffs' position that the Thirteenth Amendment abolished all badges and incidents of slavery, the court said, would

---

[319] *See supra* Part IV.

[320] 601 F.2d 1225 (2d Cir. 1979).

[321] *Id*. at 1236–37.

[322] *Id*. at 1237.

[323] *Id*. The *Alma Society* court failed to note the converse: the Supreme Court has also never held that the Amendment itself does *not* reach such badges and incidents.

[324] Whatever the Supreme Court may have implied in its Thirteenth Amendment cases should not be treated as a binding holding of the Court. *See* Alexander v. Sandoval, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by *holdings*, not language.") (emphasis added).

[325] *Alma Soc'y*, 601 F.2d at 1237–38 (citing Plessy v. Ferguson, 163 U.S. 537, 557 (1896)).

[326] The court also pointed to Justice Harlan's dissent in the *Civil Rights Cases*, where he, according to the *Alma Society* court, advocated the view "not that the Thirteenth Amendment itself had abolished the 'burdens [and] disabilities [which] constitute badges of slavery and servitude,' but that Congress had the authority to proscribe" such badges and vestiges of slavery. *Id*. at 1238 (citing the *Civil Rights Cases*, 109 U.S. 3, 22 (1883)).

render the Supreme Court's Fourteenth Amendment cases (and the Fourteenth Amendment itself) superfluous. Thus, the court stated, the Supreme Court would not have needed to incorporate the First Amendment into the Fourteenth to make it applicable to the states because the guarantee of freedom of speech, under plaintiffs' argument, fell within the Thirteenth Amendment's prohibition of badges and incidents of slavery.[327] Similarly, the Supreme Court's privacy decisions, resting on the theory that the right to privacy fell within the penumbras of various Amendments (not including the Thirteenth) would have been unnecessary, because the Thirteenth Amendment also protected the right to privacy within its "badges and incidents" prohibition.[328]

Atta v. Sun Co.[329] also supports the theory that judicial review under the Thirteenth Amendment is limited to conditions of forced labor. In *Atta*, plaintiff sued for employment discrimination. Plaintiff alleged, *inter alia*, that racial discrimination in the terms and conditions of private employment violated the Thirteenth Amendment. The court granted defendant's motion to dismiss the Thirteenth Amendment claim on two grounds. First, the court held that the discriminatory conduct did not constitute slavery, involuntary servitude, or forced labor and therefore did not violate the text of the Thirteenth Amendment.[330] Second, the court held that plaintiff's claims of racial discrimination in employment were adequately pleaded under 42 U.S.C. § 1981, thereby obviating the need to imply a direct cause of action under the Thirteenth Amendment.[331] The *Atta* court did acknowledge that whether the Amendment itself reached anything beyond literal slavery was an open question after *Jones*.[332] Nonetheless, the court, relying on *Alma Society*, held that only Congress could address slavery's badges and incidents.

The *Alma Society* court's reasoning in holding that no direct cause of action exists to remedy the badges and incidents of slavery is flawed for several reasons. As an initial matter, the *Alma Society* court seems to have argued that reading the Thirteenth Amendment to provide such a direct cause of action would render the other Reconstruction Amendments superfluous.[333] If that theory is accepted, however, then the same problem persists regardless of whether a court or Congress is enforcing the allegedly superfluous protections. Yet the *Alma Society* court did not question *Congress*' ability to legislate against slavery's lingering effects. The proper question involves the substantive scope of the Amendment,

---

[327] *Id.* (citing Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931)).

[328] *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

[329] 596 F. Supp. 103 (E.D. Pa. 1984).

[330] *Id.* at 104–05.

[331] *Id.* at 105.

[332] *Id.* (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

[333] 601 F.2d at 1237–38.

not which branch of government is seeking to enforce the Amendment's protections.

Moreover, the Reconstruction Amendments do not always overlap. The Thirteenth Amendment was intended to eliminate slavery and its incidents carried by the freedmen and their descendants, even when private actors committed the violation. The Fourteenth Amendment's Equal Protection Clause was intended to eliminate state-sponsored discrimination, which may or may not in a particular case constitute a continuing disability arising from slavery. The Fifteenth Amendment may overlap with the previous two, but may also be distinct: that Amendment was intended to address one particular form of state sponsored discrimination—the denial of the freedmen's right to vote.[334]

An African American victim of racial profiling may indeed have multiple constitutional remedies, because racial profiling implicates distinct rights protected by the Reconstruction Amendments. He could claim that the stop violated the non-discrimination mandate of the Fourteenth Amendment's Equal Protection Clause (applicable to all "persons") and that the practice of racial profiling, applied to him, an African American, rests on a badge or incident of slavery—the stigma of blacks as congenital criminals. But the Amendments' protections do not always overlap. For example, a young white man claiming racial profiling could not logically assert that a practice of disproportionately subjecting white men to race-based criminal suspicion is a result of social attitudes tied to slavery. Whites were never enslaved, nor do they suffer current legal or social disabilities as a result of slavery. Yet that same white plaintiff could state a viable equal protection claim where he alleges that his race was the primary reason he was singled out for suspicion. Similarly, not even all members of racial minorities would be able to claim that racial profiling constituted a badge or incident of slavery as to them, yet they would still be able to assert a violation of the Equal Protection Clause.[335] Some potential overlap between Reconstruction Amendments does not render any of them superfluous.

Furthermore, the Supreme Court cases cited by the *Alma Society* court for its "redundancy" theory did not concern the rights of descendants of slaves. For example, the *Griswold*[336] Court was not concerned with whether denial of reproductive autonomy was a badge or incident of

---

[334] Courts have found that the Reconstruction Amendments do indeed overlap on occasion. *See, e.g.*, Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981) (holding, in a voting rights case, that "[c]laims of racially discriminatory vote dilution exist under both the fifteenth amendment and the Equal Protection Clause of the fourteenth amendment [and] are essentially congruent [in this context]"). The *Finlay* court did not suggest that these overlapping protections rendered either amendment superfluous.

[335] *See supra* note 20, discussing the fact that because of their different histories in the United States, not all minority groups would be able to claim that a current injury is a badge or incident of slavery as to members of that group.

[336] Griswold v. Connecticut, 381 U.S. 479 (1965).

slavery because plaintiffs did not make such a claim. Because the Thirteenth Amendment was simply not applicable to the case, the Court had to look elsewhere. Additionally, many of the cases the *Alma Society* court cited for its "redundancy" theory predated *Jones*' reinvigorated understanding of the Thirteenth Amendment as ending not only physical bondage, but also slavery's badges and incidents. Finally, in considering the relationship between the Thirteenth and Fourteenth Amendments, it must be remembered that the "persons who enacted the Thirteenth [Amendment] did not know that *a* Fourteenth, much less *the* Fourteenth [Amendment] would be needed. In 1865, the Thirteenth Amendment received consideration in its own context."[337] As explained earlier, that context supports a broad interpretation.

C. The Coexistence of Congressional and Judicial Power To Enforce the Reconstruction Amendments

Despite the analytical and historical flaws in limiting the courts' power of judicial review under the Thirteenth Amendment to conditions of compelled labor, the cases doing so reveal an important policy concern. Courts confronted with "badges and incidents of slavery" claims are concerned that they could be transformed into "super-legislatures" asked to create law rather than interpret it if a broad (but historically accurate) interpretation of Section 1 were adopted.[338] This instinct is correct: courts are not legislatures and should not assume legislative functions. Courts have accordingly responded to the Thirteenth Amendment's potentially broad reach[339] by limiting its applicability, in the absence of Congressional legislation, to actual involuntary servitude. While judicial caution regarding Section 1 of the Thirteenth Amendment may be justified, complete abdication of the judiciary's role is not. Such abdication is untethered from the history of the Thirteenth Amendment, which indicates that the Amendment's drafters intended it to indeed have a broad remedial reach. Nothing in the Thirteenth Amendment's legislative history indicates that Congress intended to limit the Amendment's broad remedial functions to Congressional enforcement.[340]

---

[337] HYMAN & WIECEK, *supra* note 256, at 389.

[338] "It is reasonable to believe that the reason why the Thirteenth Amendment has not been interpreted as broadly as its legislative history would allow is that the Court and lower federal courts know that, if taken to its logical conclusion, the amendment would work a substantial change in America." Pittman, *supra* note 13, at 849 n.283.

[339] As discussed more fully below, the Thirteenth Amendment does not require state action and therefore potentially makes a wide variety of private conduct subject to constitutional scrutiny. *See infra* Part VI.

[340] Additionally, in the context of racial profiling, it is only racial profiling by governmental officials or private actors who have the *de facto* power to enforce the stereotype of black criminality that can be said to be a "badge or incident of slavery." Therefore, the concern about subjecting private racial prejudice to Constitutional scrutiny is misplaced in this context. *See infra* Part VI.

Moreover, Congress does not have unlimited definitional power in enforcing the Reconstruction Amendments. The idea that Congress can freely legislate against slavery's lingering effects under Section 2, while such conditions do not fall within the scope of Section 1, is inconsistent with both *Jones* and recent Supreme Court cases on the reach of Congress' enforcement power under Section 5 of the Fourteenth Amendment. While the Court's cases in this regard of course speak directly only to Section 5 of the Fourteenth Amendment, there is no reason to believe that the basic separation of powers principles discussed in those cases should apply differently to the Thirteenth Amendment.

Whatever the extent of Congress' power under the Reconstruction Amendments' enforcement clauses, at least one principle is clear: Congress cannot simply "make it up." If *Jones* is correct,[341] and Congress can legislatively proscribe slavery's badges and incidents, Congress must draw its enforcement power from somewhere. The reason that Congress can "enforce" the Thirteenth Amendment by outlawing the badges and incidents of slavery is that the Thirteenth Amendment itself, in Section 1, prohibits these remnants of slavery. In short:

> Given the constitutional separation of powers between the judicial and the legislative branches of government as reflected in Marbury v. Madison . . . the codification of Section 2 in the Thirteenth Amendment should not be interpreted as a 'negative implication' that the federal judiciary does not likewise have the authority to enforce the amendment.[342]

The judiciary's power to enforce the Thirteenth Amendment should therefore be seen as roughly concurrent to Congress'. Either both branches of government can constitutionally act against slavery's lingering effects, or neither can.[343]

In *Jones*, the Court held that Congress had the power, under Section 2 of the Thirteenth Amendment, to pass legislation aimed at prohibiting slavery's badges and incidents. In a recent series of cases, beginning with

---

[341] One response to this argument is that *Jones* was incorrectly decided. *See, e.g.*, Sam J. Ervin, Jr., Jones v. Alfred H. Mayer Co*.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969). Whatever the merits of this position, *Jones* remains good law.

[342] Pittman, *supra* note 13, at 833.

[343] There is much debate over exactly how closely Congress' exercise of its Enforcement Clause power under the Reconstruction Amendments must hew to the substantive scope of the Amendment Congress seeks to enforce. See the discussion in the remainder of this Part. The better view is that Congress does enjoy some "definitional" power under the Reconstruction Amendments, and that the Court's recent decisions (discussed *infra*) holding that Congress must adhere precisely to what the Court says the Amendments mean smacks of judicial imperialism. My point here is that regardless of where this line is drawn, Congress cannot have unlimited power under the Thirteenth Amendment to legislate against the badges and incidents of slavery while the judiciary is powerless to do so, unless one accepts that Congress can create (rather than interpret) constitutional rights.

City of Boerne v. Flores,[344] the Court has reiterated that Congress' enforcement power under Section 5 of the Fourteenth Amendment is remedial or preventative in nature, rather than definitional—in other words, "[a]s broad as the Congressional enforcement power is, it is not unlimited."[345] Rather, Congress' exercise of its enforcement power under the Reconstruction Amendments must be tied to enforcing rights that inhere in the substantive provisions of those amendments. Given *Jones* and the *Boerne* line of cases,[346] there are only a few possibilities: either (1) *Jones* is incorrect, and Congress exceeded its Section 2 power to "enforce" the Thirteenth Amendment in enacting the Civil Rights Act of 1866 because Section 1 prohibits only actual enslavement; or (2) *Boerne* and its progeny are wrong on the basic principle that the exercise of Congressional Enforcement Clause power must be tied to enforcing substantive rights rather than creating them; or (3) Congress' power to prohibit the badges and incidents of slavery is valid because such conditions are prohibited by the Amendment itself. Since *Jones* remains good law, and the basic principle of the *Boerne* line of cases is certainly valid, as it arises from the principle of defined Congressional powers that far predates *Boerne*, the idea that the judiciary cannot provide Thirteenth Amendment redress for current inequalities arising from slavery is constitutionally misguided.

Boerne involved the Religious Freedom Restoration Act, which Congress enacted to reinstate strict scrutiny as the test for neutral governmental regulations burdening the free exercise of religion.[347] The Court held that the Act exceeded Congress' Section 5 power because the Act went beyond "enforcing" rights inherent in Section 1 of the Fourteenth Amendment, but instead created rights beyond the Amendment's substantive scope.[348] The Court articulated several principles that are important for understanding the role of both the judiciary and Congress in enforcing the Thirteenth Amendment. First, the federal government is one of enumerated powers.[349] Second, Section 5 of the Fourteenth Amendment is undoubtedly a "positive grant of legislative power" to Congress.[350] Third, Congressional legislation that deters or remedies constitutional violations can fall within the scope of Congress' enforcement power, even if the conduct prohibited is not itself unconstitutional. Cer-

---

[344] 521 U.S. 507 (1997).

[345] *Id.* at 518 (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

[346] *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999).

[347] In Employment Div., Dep't of Human Servs. of Or. v. Smith, 494 U.S. 872 (1990), the Court had held that rational basis review applied to such regulations. *Id.* at 889–90.

[348] *Boerne*, 521 U.S. at 516–36.

[349] *Id.* at 516.

[350] *Id.* at 517.

tain conduct that is not itself unconstitutional must be deterred to prevent constitutional violations.[351] Fourth, however, Congress' broad enforcement clause power is not unlimited. The text of Section 5 speaks of Congressional "enforcement" of Fourteenth Amendment rights, not their creation. In other words, the Congressional enforcement power under the Reconstruction Amendments is remedial or preventative rather than definitional in nature.[352] Finally, although the line between legislation that deters or remedies constitutional violations and that which creates substantive rights is not easy to draw, Congress' use of its enforcement clause power must demonstrate congruence and proportionality between the injury Congress seeks to prevent or remedy and the means used to accomplish that goal.[353]

While there is much to criticize in the *Boerne* line of cases,[354] the basic principle underlying those cases is certainly correct: the Congressional power to "enforce" a constitutional right cannot be wholly divorced from the right itself in a constitutional system of defined powers.[355] Thus, one need not agree with the outcomes in the *Boerne* line of cases to understand that it is constitutionally unsound to construe Section 2 of the Thirteenth Amendment as creating the negative implication that only Congress can address slavery's lingering effects. Such a construction implies unlimited Congressional power to legislate against conduct not prohibited in some sense by the Amendment itself.

There is an argument that Section 2 is a kind of Thirteenth Amendment Necessary and Proper Clause and that Congress may therefore prohibit conditions that do not amount to slavery where such prohibition is a necessary and proper exercise of its power to eliminate slavery.[356] I agree with this construction and disagree with *Boerne* to this extent: Section 2 legislation (and Enforcement Clause legislation generally) is valid as long as it has a "rational link to slavery"[357] (or to the substantive scope of the Amendment being enforced). Yet the link between the harm sought to be remedied or prevented and Congress' chosen means must indeed be rational. If Section 1 *solely* prohibits compulsory labor, then Congress'

---

[351] *Id*. at 518.

[352] *Id*. at 519–20.

[353] *Id*.

[354] For a discussion of Congress' interpretive or definitional power under Section 5, see Kimberly E. Dean, Note, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After* Garrett*?*, 43 B.C. L. REV. 697 (2002).

[355] *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[356] *See Boerne*, 521 U.S. at 518; *see also* G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1071 (1975) ("Congress, in defining badges of slavery, can expand the self-executing force of the thirteenth amendment, that is, Congress can define given conduct as constituting a badge of slavery even though such conduct would not be prohibited by the thirteenth amendment, unaided by congressional legislation.").

[357] *See id*. at 1071.

Section 2 "necessary and proper" power could only rationally extend to preventing or deterring conduct that may lead to the recurrence or imposition of compulsory labor.

This clearly was not the case in *Jones*. At no point in the Court's discussion did it indicate that Congressional action against private housing discrimination was constitutional because such discrimination could lead to the recurrence or imposition of involuntary servitude. Rather, *Jones* held that Congress could prohibit slavery's badges and incidents in *enforcing* the Thirteenth Amendment's promise of equality. Nothing in *Jones* supports a Congressional power to define Thirteenth Amendment violations wholly untethered from the Amendment's substantive scope. Nor is *Jones* properly understood as reading the Thirteenth Amendment to strip the judiciary of power to remedy badges and incidents of slavery, while writing Congress a blank check to do so. In sum, the better view is that Congress does enjoy some definitional power under Section 2 of the Thirteenth Amendment. This should not, however, raise the negative inference that courts are essentially powerless under Section 1. As long as *Jones* remains good law, and our constitutional system remains one of defined powers, both Congress and the judiciary can provide relief for slavery's lingering effects.

VI. Dispelling Jurisprudential Concerns Regarding a Badges and Incidents of Slavery Cause of Action for Racial Profiling

A. Advantages of a Thirteenth Amendment Remedy for Racial Profiling

1. Recognizing Unconscious or Systemic Racism

The Supreme Court has indicated that the Thirteenth Amendment, unlike the Equal Protection Clause, is not limited to intentional discrimination.[358] At a minimum, it is fair to say that the Court has not yet rejected a disparate impact theory under the Thirteenth Amendment.[359] A "purposeful discrimination" requirement under the Thirteenth Amendment

---

[358] *See* Memphis v. Greene, 451 U.S. 100 (1981). Professor Pittman writes:

> Implicit in *Greene* is the notion that the Court will entertain . . . a disproportionate impact theory [under the Thirteenth Amendment] if the disparate impact on African Americans and other minorities is significant enough to be a "badge and incident" of slavery. Therefore, the important unresolved issue might be the degree of impact that is necessary to establish that a disproportionate impact is a "badge and incident" of slavery.

Pittman, *supra* note 13, at 851 n.295.

[359] *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) (stating that "whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose" was an open question, but holding that 42 U.S.C. § 1981 does require proof of discriminatory intent).

would be even more misguided than it currently is as applied to equal protection claims.[360] The Thirteenth Amendment's Framers did not intend to eliminate slavery and its lingering effects only where they are intentionally inflicted.[361] Recognizing a direct Thirteenth Amendment disparate impact cause of action for racial profiling would overcome the unduly stringent "sole motive" approach currently applied to racial profiling claims under the Equal Protection Clause.[362] Such a cause of action would also recognize that even if law enforcement officials most often do not consciously apply a stereotype of black criminality, racial profiling nonetheless causes considerable harm to those subjected to it and to society at large. As Professor Lawrence argued in his critique of the Supreme Court's equal protection jurisprudence, "racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture."[363] A Thirteenth Amendment approach to racial profiling recognizes the continued impact of the ingrained cultural stereotype of African Americans as predisposed toward criminality, even if that stigma is not imposed today as a result of conscious racial prejudice. In light of the historical assumption that race correlates with criminality, statistical proof of a racially disproportionate pattern of investigations of racial minorities should be sufficient to state a prima facie badges or incidents of slavery claim for racial profiling.

2. Recognizing the Reality of Racially Disparate Power in the Absence of State Action

An additional benefit of an "amendment shift"[364] toward the Thirteenth Amendment is that it, unlike the Fourteenth Amendment, is not limited to state action.[365] However, private individuals' unenforceable stereotypes about black criminality would not fall within the Thirteenth Amendment approach to racial profiling advocated in this Article. In cir-

---

[360] *See supra* Part III.B.1, criticizing the intent requirement for proving equal protection violations.

[361] *See supra* Part IV.A, reviewing the Thirteenth Amendment's legislative history and broad remedial purposes.

[362] *See supra* Part III.B.2, discussing and criticizing cases requiring persons alleging racial profiling to prove that their race was the only reason they were singled out for suspicion in order to trigger strict scrutiny under the Equal Protection Clause.

[363] Lawrence, *supra* note 86, at 330.

[364] Aleinikoff, *supra* note 37, at 1118.

[365] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968); *see also* Runyon v. McCrary, 427 U.S. 160, 179 (1976) ("It has never been doubted" that the Thirteenth Amendment "includes the power to enact laws . . . operating upon the acts of individuals. . . .") (quoting *Jones*, 392 U.S. at 438); United States v. Nelson, 277 F.3d 164, 175 (2d Cir. 2002) (affirming Congress' power under the Thirteenth Amendment to enact hate crimes laws and stating that "[t]he Thirteenth Amendment, unlike the Fourteenth, in and of itself reaches purely private conduct").

cumstances where there is insufficient evidence of state "entwinement"[366] with a private actor to justify a finding of state action for Fourteenth Amendment purposes, but where that private individual nonetheless has power to enforce the stereotype of black criminality through violence, intimidation, or *de facto* authority,[367] a direct Thirteenth Amendment cause of action should be available.

One significant reason underlying judges' reluctance to enforce the Thirteenth Amendment's broad remedial purposes is the fear that doing so would require courts to act as unelected legislatures, prescribing laws that regulate the minutiae of private interactions.[368] Those uneasy about treating racial profiling as a Thirteenth Amendment violation may be concerned that the white person who crosses the street when she sees a black male walking in her direction could be liable under a Thirteenth Amendment theory of racial profiling, since that Amendment is not limited to state action. This Article contends that the equation of African descent with innate criminality is widespread; this does not mean, however, that private, unenforceable, non-coercive action in reliance on this myth should provide a basis for a Thirteenth Amendment lawsuit.

Many African Americans doubtlessly suffer almost daily "microagressions" arising out of presumptions about black criminality, like being avoided by whites who believe all blacks are criminals. These situations, in all likelihood, occur with greater frequency for most blacks than racial profiling by the police. My point here is not to minimize these painful daily degradations.[369] Rather, the point is that if the Thirteenth Amendment's prohibition of slavery's badges and incidents is to have any meaning, it must have some logical stopping point. The limiting principle to the badges and incidents of slavery theory vis-à-vis racial profiling

---

[366] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298–305 (2001) (holding that sufficient evidence of pervasive state entwinement with a private entity satisfies the Fourteenth Amendment's state action requirement).

[367] *See generally* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (arguing that the Supreme Court has undervalued the Thirteenth Amendment and the history of private racial violence in extending First Amendment protection to racist hate speech such as cross burning); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 HOW. L.J. 311 (2001) (arguing that the Thirteenth Amendment should be used to criminalize racial hate speech).

[368] *See* Palmer v. Thompson, 403 U.S. 217, 226–27 (1971); *see also* Azmy, *supra* note 13, at 1057–60 (citing Turner v. Unification Church, 473 F. Supp. 367 (D. R.I. 1978) and Manliguez v. Joseph, 226 F. Supp. 2d 377 (E.D.N.Y. 2002), as cases recognizing the judicial power to imply *Bivens* remedies for Thirteenth Amendment violations, but refusing to do so in those cases because the defendants were private actors).

[369] *See* KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 165 ("Racially discriminatory self-protective action by private persons reinforces existing mistrusts and resentments and circulates them throughout the various spheres of society, public as well as private."); *see also* Janis V. Sanchez-Hucles, *Racism: Emotional Abusiveness and Psychological Trauma for Ethnic Minorities*, 1 J. EMOTIONAL ABUSE 69, 79 (1998) (discussing daily racist "microagressions" as psychologically damaging to racial minorities).

exists in the profiler's ability, in some concrete way, to enforce or impose the stigma of black criminality.

The premise of this Article bears repeating. The use of race as an *ex ante* proxy for criminal suspicion by law enforcement officials or those with *de jure* or *de facto* enforcement power is a badge or incident of slavery outlawed by the Thirteenth Amendment. I do not contend that everyday individual assumptions about black criminality constitute a badge or incident of slavery. While it is clear that the Thirteenth Amendment's Framers did intend the Amendment to reach private conduct, private racial stereotypes about black criminality—detached from the enforcement power of the government or de facto enforcement power through violence, intimidation, or economic realities[370]—should not be considered a badge or incident of slavery.[371]

The key is power. Slavery, and the social and legal structures necessary to support it (slavery's "badges and incidents"), rested on racially disparate power. Slavery involved the power of the slavemaster to control every aspect of the slave's life, including freedom of movement. While private brutality by individual slaveholders was an important aspect of control, slaveholders knew that private brutality was not sufficient to effectuate the subjugation necessary for chattel slavery to exist.[372] Rather, these private techniques had to be augmented and legitimized by the power of the law, both in giving legal approval and immunity to private brutality, and in enlisting law enforcement power to aid in maintaining the slave system.[373]

Jones did, of course, hold that purely private racial discrimination in the sale of housing was a badge or incident of slavery.[374] The *Jones* Court's holding rested upon the fact that such discrimination had a sub-

---

[370] "Economic racial profiling" (for lack of a better term), such as mistreatment of blacks by taxi drivers or store clerks because they believe blacks are criminals, for example, *would* be encompassed within the theory presented here. Unlike the individual who acts upon his prejudice of black criminality by avoiding or discriminating against blacks in purely social interactions, economic actors do have the power to enforce this stigma by denying goods or services or making them more difficult to obtain. This was the basis for the holding in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[371] To be clear, I am not arguing that the Thirteenth Amendment only reaches badges and incidents of slavery that are imposed by state actors. *Jones* directly refutes such a notion: "It has never been doubted, therefore, that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation includes the power to enact laws . . . operating upon the acts of individuals, whether sanctioned by State legislation or not." *Jones*, 392 U.S. at 438 (citations and internal quotations omitted). The Thirteenth Amendment, however, does not outlaw mere racial prejudice. Accordingly, I am contending that in this particular context—the use of race as an *ex ante* basis for criminal suspicion and the stigma imposed by this stereotype—private individuals' unenforceable conduct should not provide a basis for a Thirteenth Amendment lawsuit. This is because wholly unenforceable private stereotypes, no matter how offensive, do not replicate the type of racially disparate power structures created by, and essential to, slavery.

[372] *See supra* notes 242–260 and accompanying text.

[373] *See generally supra* Parts III–IV.

[374] 392 U.S. at 437–44.

stantial impact upon blacks' ability to own or lease real property, thereby perpetuating the system of residential segregation that had existed under the Black Codes.[375] *Jones*' holding that the private conduct at issue there constituted a badge or incident of slavery makes sense given that the vast majority of real property in this country available for private purchase or rental is privately owned. Thus, the power to impose limitations on blacks' ability to own property rests almost exclusively in private hands.

Jones' holding is therefore in harmony with the contention here that private individuals' unenforceable stereotypes about black criminality should not be considered a badge or incident of slavery. The analysis does not revolve around state versus private action in the abstract, since it is clear as a *prima facie* matter that the Thirteenth Amendment reaches private conduct.[376] Rather, the question is whether a particular current stigma or type of discrimination in application and historical context requires state power to be effectuated or whether and in what circumstances private power might suffice.

In *Jones*, then, private enforcement power was sufficient to transform individual prejudice into a badge or incident of slavery because the badge of slavery involved in that case was historically and currently enforced primarily by private discrimination. In contrast, however offensive and pervasive private stereotypes about black criminality are, such private individual "racial profiling" generally should not be considered a badge or incident of slavery because private individuals do not have the power to enforce this stereotype:

> A private person walking down the street is not an agent of the state, much less a guardian of law and order. This is not to say that the actions of private pedestrians and entrepreneurs are inconsequential; . . . many blacks are painfully aware that other citizens avoid them on a racial basis out of fear. That conduct, though, has far less public backing than the legally authorized conduct of police officers.[377]

There may be situations, however, where private individuals *do* have the power to enforce their stereotypes about black criminality. In such circumstances, the Thirteenth Amendment should provide a remedy. For example, both during slavery and thereafter, individual white persons

---

[375] *Id.* at 441–43 ("Just as the Black Codes . . . were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.").

[376] *See supra* Part IV.B.

[377] KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 165. As noted *supra* note 370, however, I would include private entrepreneurs within the Thirteenth Amendment theory presented here, because they do have the economic power to enforce their prejudices, as did the private white sellers in *Jones*.

were legally empowered (and sometimes required) to apprehend and beat blacks under the rationale that an unsupervised black person must be "up to no good" because of blacks' supposed propensity for crime, or because all blacks were presumed to be slaves unless they could prove otherwise.[378] Moreover, in the wake of the Civil War, white terrorist individuals and groups like the Klan attacked blacks suspected of crime (primarily because they were black) with impunity.[379] Individual whites also justified lynchings based upon blacks' supposed propensity for crime; this vigilantism enjoyed support from a legal system that largely left such acts unpunished. Some scholars of the day argued that private law enforcement was the result of blacks' innate propensity for crime:

> The crime of lynching is the effect of a cause, the removal of which lies in the power of the colored race. Rape is only one of the many manifestations of an increasing tendency on the part of the negro to misconstrue personal freedom into personal license, and this tendency, persisted in, must tend towards creating a still wider separation of the races. . . . [U]ntil [the negro] learns to believe in the value of a personal morality operating in his everyday life, [lynchings will continue].[380]

The question of slavery's legacy cannot be detached from the racially disparate power structure created by slavery. Thus, concern about constitutionalizing the myriad of racially charged daily interactions is overblown in the context of a direct Thirteenth Amendment cause of action for racial profiling. Because the historical practice of race-based criminal suspicion was intimately tied to the power to enforce the assumption of black criminality, the theory presented here would only reach this vestige of slavery when enforced by governmental actors or those private individuals who have de facto power to enforce this stereotype.

B. Asymmetry of Thirteenth Amendment Protection

The Supreme Court has construed the Equal Protection Clause as requiring precise symmetry in application to whites and racial minorities.[381] Whatever the value of a symmetrical construction of the Equal Protection

---

[378] *See supra* Part IV.

[379] *See, e.g.*, KENNEDY, RACE, CRIME, AND THE LAW, *supra* note 5, at 41–49.

[380] HOFFMAN, *supra* note 274, at 234.

[381] Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) (holding, in a challenge by white plaintiffs to the University of Michigan's undergraduate affirmative action program, that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized" and that "[t]his standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)) (citations and quotation marks omitted). See *supra* Part III.B.1, criticizing this standard.

Clause, such an approach would be sorely misguided if applied to defeat a theory of racial profiling as violating the Thirteenth Amendment. The Thirteenth Amendment was clearly drafted specifically to protect the freedmen and their descendants.[382] That Amendment, more than any other, is explicitly grounded in the history of racial inequality and not merely a guarantee of abstract, formalistic "colorblindness" like the Equal Protection Clause (at least as currently construed by the Court). The Thirteenth Amendment intentionally evokes "vivid images of asymmetric social, political, and economic power—images of masters and slaves, images more congenial to openly asymmetric attempts to right past imbalances."[383] Thus, while the Equal Protection Clause (arguably) embraces a symmetry principle, the Thirteenth Amendment clearly does not. Given the perpetuation of racially asymmetric societal positions via practices like racial profiling, a racially asymmetric remedy is wholly justified.[384] The fact that not every person will be able to assert a "badges and incidents of slavery" claim merely reflects the fact that not all racial groups were subjected to enslavement and its consequent disabilities or currently suffer its lingering effects.

Whites singled out for criminal suspicion because of their race should not be able to claim that they have been subjected to a badge or incident of slavery in violation of the Thirteenth Amendment[385] because whites were not enslaved in this country nor are they saddled with slavery's lingering effects.[386] Moreover, not even every minority group should

---

[382] *See supra* Part V. All the Reconstruction Amendments, of course, were drafted with this explicit purpose in mind. The Court has chosen to minimize this fact in its equal protection jurisprudence by requiring precisely the same level of judicial skepticism toward government action that burdens whites as toward governmental action that burdens racial minorities.

[383] Amar, *supra* note 367, at 157 n.181.

[384] *See id*. at 158 n.183. The *nature* of the remedy for Thirteenth Amendment violations is largely beyond the scope of this Article, but a few things are clear. Federal courts are empowered to issue injunctive relief to remedy constitutional violations. *See* Younger v. Harris, 401 U.S. 37 (1971). Further, since the defendants in racial profiling cases (law enforcement officials) usually act "under color" of state law, victims of racial profiling could use 42 U.S.C. § 1983 (2000) to provide a cause of action for damages for this Thirteenth Amendment violation. For suits against federal officials, a damages cause of action would have to be implied under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), since federal officials do not act under color of state law for § 1983 purposes. For good discussions of these issues, as well as whether a direct cause of action for damages under the Thirteenth Amendment should be recognized, see Azmy, *supra* note 13, at 1049–60, and Pittman, *supra* note 13 at 853–56.

[385] Such a white person could, of course, claim a violation of the Equal Protection Clause.

[386] This proposition is perhaps overbroad. It is true that no white ethnic groups were ever subjected to chattel slavery in this country. Certain white groups, however, were subjected to indentured servitude, which, while not as severe as and different in nature from chattel slavery, can probably be characterized as involuntary servitude. Whether these ethnic groups currently suffer lingering effects of their former involuntary servitude is beyond the scope of this Article. For authorities discussing the fluid nature of "whiteness" in the U.S., see *supra* note 94.

be able to claim that a current injury is a badge or incident of slavery, depending on the history of the group and the nature of the injury.[387] Requiring precise symmetry of constitutional protection is a formalistic exercise that ignores our history of racial inequality.

VII. Conclusion

Racial profiling remains a significant problem for racial minorities in general and African Americans in particular. Courts have construed the Fourth and Fourteenth Amendments in ways that preclude any effective remedy. Congress has also proved unwilling to adopt legislation addressing the problem.

The Thirteenth Amendment, based upon its legislative history, historical context, and interpretation in *Jones*, remains a viable and powerful remedy for racial profiling. The Thirteenth Amendment's promise was to eliminate *all* of slavery's lingering vestiges, not just to end the institution of chattel slavery. A Thirteenth Amendment approach to racial profiling takes into account the legacy of the entwinement of race and criminal suspicion and the fact that the officially enforced presumption of black criminality arose out of the slave system and was integral to maintaining it. A Thirteenth Amendment analysis also forces us to confront the purposes served by the stereotype of black criminality historically and recognize that those same purposes are served today, albeit in a "gentler" form. Because the effects of this stigma persist today, it is properly considered a modern-day badge or incident of slavery. Courts should recognize and fully enforce the Amendment's radical purposes by providing a direct Thirteenth Amendment cause of action for victims of racial profiling. The alternative—ignoring this badge of slavery—means "the Thirteenth Amendment made a promise the Nation cannot keep."[388]

---

[387] *See supra* notes 19–21 and accompanying text.
[388] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).