RACISM, INCORPORATED: *RAMOS V. LOUISIANA* AND JOGGING WHILE BLACK

VICTOR C. ROMERO*

ABSTRACT

There is more to the U.S. Supreme Court's recent decision in *Ramos v. Louisiana* than its holding requiring unanimous state jury verdicts via the incorporation doctrine. The underlying debate among the Justices in *Ramos* about the salience of race in the law is a window into the current cultural moment.

After identifying the racial debate underlying the Justices' views in *Ramos*, this Essay shows how the same pattern emerges in our social and legal debates around vigilante policing of Black Americans, including a close-up look at the recent killing of Ahmaud Arbery. Social psychology teaches us that society stereotypes young Black males, which turns supposedly race-neutral "law and order" policies into invitations to disproportionately police Blacks for everyday activities like jogging.

This Essay then looks to research on the righteous moral mind for a way forward, noting that we may each see the world differently, sometimes in ways unfathomable to the other. The challenge for our law and culture is to find ways to incorporate and embrace those differences while recognizing that our Constitution's highest ideals demand that we move, even if in fits and starts, toward a more inclusive, perfect union.

I. INTRODUCTION: MORE THAN A DOCTRINAL INCORPORATION CASE

When the U.S. Supreme Court's 6-3 *Ramos v. Louisiana*[1] opinion was released in April 2020, most commentary focused on the crux of the case: that the Court decided to ignore earlier precedent and require states to insist on unanimous jury verdicts in criminal cases with severe penalties.[2]

* Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Penn State Law – University Park. I am grateful to Dean Hari Osofsky for her support of my work, and to Corie, Ryan, Julia, and Matthew for their steadfast love. All errors that remain are mine.

[1] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[2] *See, e.g.*, Hannah Cox & Brett Tolman, *Did the Constitution Stutter? 'Ramos v. Louisiana' and the Win for Liberty*, LAW.COM (May 5, 2020), https://www.law.com/nationallawjournal/2020/05/05/did-the-constitution-stutter-ramos-v-louisiana-and-the-win-for-liberty/ (focusing on the incorporation and stare decisis issues); Josh Blackman, *5 Unanswered Questions from Ramos v. Louisiana*, REASON (Apr. 21, 2020), https://reason.com/2020/04/21/5-unanswered-questions-from-ramos-v-louisiana/ (raising questions following *Ramos*, none of which involves the discussion of the challenged law's racial history).

In contrast, very few pundits focused on the racial debate simmering beneath the Court's exegesis of incorporation and stare decisis.[3] It is this racial debate about law and culture that this Essay addresses.

The Essay proceeds in three parts. First, it reexamines *Ramos* by unearthing the racial debate between the Justices, revealing a fault line common in contemporary cultural discourse about the relevance of race in informing law and policy. Part II applies these *Ramos* race-debate insights to the recent killing of Ahmaud Arbery and the phenomenon of "jogging while Black." The seemingly race-neutral law-and-order policies that permit unlicensed gun carrying, citizen's arrests, and robust self-defense create greater risks for young Black men whom society perceives as more threatening than their white counterparts. Part III suggests a way forward via lessons from moral psychology. If, as moral psychologists argue, conservatives and liberals look at the world through very different lenses, then progress might be achieved through an acceptance and embrace of these different perspectives, while recognizing that our Constitution's highest ideals value inclusion toward a more perfect union for all.

II. *RAMOS V. LOUISIANA* AS A WINDOW INTO OUR RACIAL CULTURE WAR

In 2016, a Louisiana jury convicted Evangelisto Ramos of second-degree murder for killing Trinece Fedison, for which he was sentenced to life imprisonment without parole.[4] In nearly every U.S. state, Ramos's conviction would have required a unanimous jury verdict; in Louisiana and Oregon, however, a 10-2 vote to convict sufficed, as was the case for Ramos. Indeed, shortly after this case, Louisiana changed its law, opting to join the vast majority of states that require unanimous jury verdicts.[5] Because he was convicted under the old rule, however, Ramos had no choice but to appeal his conviction, arguing that non-unanimous jury verdicts violated the Sixth Amendment[6] as incorporated under the Fourteenth.[7] Standing in Ramos's way were the Court's 1972 decisions in *Apodaca v. Oregon*[8] and *Johnson v. Louisiana,*[9] in which a deeply divided bench affirmed the states' choice with tiebreaker Justice Powell arguing that unanimity in jury verdicts bound the federal government, but not the states.

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[3] One notable exception focused on Justice Alito's rhetoric on race in both *Ramos* and a few other cases. *See* Ian Millhiser, *Justice Alito's Jurisprudence of White Racial Innocence*, VOX (Apr. 23, 2020), https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury.

[4] Maggie Wittlin & Marc W. Pearce, *Will This Man Remain Convicted?*, 51 MONITOR ON PSYCH. 35, 35 (Mar. 1, 2020).

[5] *Id.*

[6] The Sixth Amendment provides, in pertinent part, "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Court had previously held that a unanimous jury verdict was an essential element of this constitutional right. *See* Patton v. United States, 281 U.S. 276, 288 (1930) (noting that a jury trial at common law included the requirement that "the verdict should be unanimous").

[7] The doctrine of incorporation posits that certain individual rights that constrain the federal government as enumerated within the first eight amendments may be applied against the states via the Fourteenth Amendment's Due Process Clause. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 524–32 (5th ed. 2015) (describing incorporation doctrine and its development).

[8] Apodaca v. Oregon, 406 U.S. 404 (1972).

[9] Johnson v. Louisiana, 406 U.S. 356 (1972). However, several years later, the Court clarified that a non-unanimous six-person jury verdict was unconstitutional. *See* Burch v. Louisiana, 441 U.S. 130 (1979).

By a vote of 6-3, the Supreme Court overruled its 1972 precedents, finding that unanimity extended to state jury verdicts where the defendant was being tried for a serious crime.[10] Four Justices penned opinions in favor of overrule, and central to three of these was a condemnation of the racist rationale that gave birth to the law, aimed primarily at suppressing the power of Black jurors' votes.

Writing for the majority, Justice Gorsuch, consistent with his penchant for historical analysis, decried the racist origins of nonunanimous jury verdicts:

> Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.[11]

In his concurrence, Justice Kavanaugh cited the law's racist origins as "significant to [his] analysis of the case" for overturning the 1972 Court rulings to the contrary:

> [T]he origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca*. Louisiana achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of [B]lack jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875 . . . .[12]

Like conservatives Gorsuch and Kavanaugh, Justice Sotomayor of the Court's liberal wing stated that the law's racist roots "uniquely matter[ed]"[13] in this case, noting that Louisiana did not fully confront this issue until it decided to repeal the offending law, even if there was no evidence to suggest that its reenactment in the 1970s was tainted by racial animus.[14]

The sole author siding with the majority who did not write about this racial history was Justice Thomas, who, along with Sotomayor, is the only other Justice of color on the Court. Consistent with his theory that

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[10] Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).
[11] *Id.* at 1394.
[12] *Id.* at 1417 (Kavanaugh, J., concurring).
[13] *Id.* at 1408 (Sotomayor, J., concurring).
[14] *Id.* at 1410 (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here. While the dissent points to the 'legitimate' reasons for Louisiana's reenactment . . . Louisiana's perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether." (citation omitted)).

enumerated constitutional rights must be incorporated via the Privileges or Immunities Clause of the Fourteenth Amendment[15]—and not the Due Process Clause, as current precedent dictates—Thomas was willing to go along with the majority, implicitly joining Part I of Justice Gorsuch's opinion outlining the racist origins of the non-unanimous conviction law on the Court's behalf.[16] The lone Black Justice on the Court, Thomas did not, however, find it necessary to write about the role of race in the genesis of this law. Regardless of the reasons for his silence, Thomas's decision to avoid the issue tracks his usual inclination that government officers assiduously refrain from deploying race, whether for good or ill.[17]

In his dissent, Justice Alito agreed with his colleagues in the majority that the historical record surrounding these laws is "deplorable,"[18] but ultimately irrelevant. He pointed specifically to Louisiana's modern reenactment of the non-unanimous verdict law, noting that it was adopted to promote "judicial efficiency" and there was no evidence of racial bias in the legislative record. The same holds true for Oregon's experience.[19] Alito minced no words in accusing the majority of finding racial animus when there was none in the present record: "Too much public discourse today is sullied by ad hominem rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents. The majority regrettably succumbs to this trend."[20]

This debate about the significance of the historical racial record in *Ramos* provides a window into our current cultural moment. There are two primary views represented by the different Justices' opinions.

The first may be termed a version of "color consciousness"[21]: *Our racist history informs how we should view seemingly race-neutral policies today*. Justices Gorsuch and Kavanaugh noted the racist origins of the nonunanimous verdict laws as important reasons to require unanimity today, notwithstanding prior precedent. Both of these conservative Justices were

[15] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Thomas, J. concurring) (noting Thomas's preference for incorporation via the Privileges or Immunities Clause).

[16] *Ramos*, 140 S. Ct. at 1421 ("I also would make clear that this right [to an impartial jury] applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.").

[17] For example, in his dissent in the affirmative action case, *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Thomas opened with a quote from Frederick Douglass, which he argued stood for the idea that Black Americans and other minorities need nothing more than to be left alone to pursue their lives as they wish. Minority groups did not, in Thomas's view, need government assistance to succeed; they needed only to be left alone. *See id.* at 349 (Thomas, J., dissenting) ("Like Douglass, I believe [B]lacks can achieve in every avenue of American life without the meddling of university administrators."). At least one commentator has argued, however, Thomas fails to mention Douglass's support for government initiatives to aid Blacks like the Freedman's Bureau Act. *See, e.g.*, Brando Simeo Starkey, *Justice Thomas and Frederick Douglass*, FAC. LOUNGE (June 23, 2012), https://www.thefacultylounge.org/2012/06/justice-thomas-and-frederick-douglass.html.

[18] *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

[19] *Id.* at 1426–27 (Alito, J., dissenting). Alito also noted constitutional scholar Akhil Amar's concern that nonunanimous verdicts help thwart rogue jurors. *Id.* at 1427 n.3 (citing Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189–91 (1995)).

[20] *Id.* at 1426 (Alito, J., dissenting).

[21] *See generally* Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1, 62–68 (1991) (arguing in favor of a color conscious approach to constitutional interpretation); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8 (3d ed. 2017) (noting that Critical Race Theory posits the ordinariness of racism in society). *Accord* Tiffany Jones & Andrew Howard Nichols, *Hard Truths*, EDUC. TR. (Jan. 15, 2020), https://edtrust.org/resource/hard-truths/ (advocating a color conscious approach to higher education policies).

willing to require unanimity even though the most recent versions of these laws appeared to be race-neutral.

The second is a version of "color blindness"[22]: *Race-neutral laws and policies are just that—race-neutral. Any discriminatory effects on racial minorities are unintended consequences of majoritarian politics where some groups win and others lose.* Justice Alito, while cognizant of the Louisiana and Oregon laws' racist origins, was not persuaded that recent race-neutral reenactments should be similarly denounced absent specific proof of bias.

Justices Sotomayor's and Thomas's approaches may be viewed as variations on these two themes. Sotomayor's insistence on linking the current, arguably race-neutral, reenactment of the Louisiana nonunanimous verdict law to its racist past is a riff on the first theme, color consciousness; Thomas's decision to ignore race in his opinion echoes the second, color blindness.

It is this *Ramos* debate about the salience of race—whether to view governmental policies through the lens of color consciousness or color blindness—that permeates the contemporary discourse around race, law, and culture in the United States.

Delving deeply into the tragic killing of Ahmaud Arbery and the "jogging while Black" phenomenon, Part II illustrates how these two world views—color consciousness on the one hand, color blindness on the other—lead to very different analyses of the same facts, much in the same way Gorsuch, Kavanaugh, and Sotomayor placed much more significance on the racial record in *Ramos*, whereas Alito dismissed the same as irrelevant and Thomas remained silent on the issue. Arbery's death teaches us that law-and-order policies perpetuate racial discrimination given society's ingrained view that young Black males threaten public safety. Specifically, laws that allow people to arm themselves without a license, chase down suspects to effect citizen's arrests, and then use stand-your-ground laws as a self-defense tactic create the risk of death for Black folks, as Arbery's case illustrates.

III. ECHOES OF *RAMOS*: JOGGING WHILE BLACK AND THE KILLING OF AHMAUD ARBERY23

The *Ramos* Justices' debate about the historical and contemporary significance race played in nonunanimous verdict laws resonates in a number of policy discussions that have significant impacts upon people of color in the United States. We will examine how *color consciousness* and *color blindness* enter into current debates about criminal justice, using the killing of Ahmaud Arbery as a case study in how race-neutral laws can have tragic consequences for racial minorities.

On the afternoon of February 23, 2020, Ahmaud Marquez Arbery went for a jog through Satilla Shores, a Georgia neighborhood next to his. After

[22] *See, e.g.*, Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), to wit: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

[23] For an excellent list of reporting on the Ahmaud Arbery tragedy, see *Ahmaud Arbery: A Curated Collection of Links*, MARSHALL PROJECT, https://www.themarshallproject.org/records/8993-ahmaud-arbery.

Arbery stopped to take a look at a residential construction site, two men, Gregory McMichael and his son, Travis McMichael, attempted to confront Arbery, as they believed he fit the description of someone who had committed burglaries in the neighborhood. A short cellphone video released on May 5, 2020 revealed that, during the ensuing confrontation, a jogging Arbery initially tried to avoid the McMichaels' pickup truck, but then Arbery and Travis McMichael, who was armed with a shotgun, began to fight over the gun, discharging it, and Arbery was killed at the scene.[24]

In the police report of the incident,[25] Gregory McMichael stated that he believed, based on surveillance video at the home construction site, that Arbery was a suspect in recent neighborhood burglaries:

> McMichael stated there have been several [b]reak-ins in the neighborhood and further the suspect was caught on surveillance video. McMichael stated he was in his front yard and saw the suspect from the break-ins "hauling ass" down Satilla Drive toward Burford Drive. McMichael stated he then ran inside his house and called to Travis (McMichael) and said, "Travis the guy is running down the street lets [sic] go". McMichael stated he went to his bedroom and grabbed his .357 Magnum and Travis grabbed his shotgun because they "didn't know if the male was armed or not". McMichael stated, "the other night" they saw the same male and he stuck his hand down his pants which lead them to believe the male was armed.[26]

From there, Gregory McMichael recounted how he and Travis attempted to chase down and intercept Arbery. At one point, they apparently yelled to Arbery, "[S]top, stop, we want to talk to you."[27] Gregory also told police that he and his son were aided by a man named "Roddy,"[28] later identified as William Bryan, the person who took the cellphone video recording Arbery's shooting.[29] It is worth reproducing that report in full below, as it contains additional details regarding the effort the McMichaels and Bryan took to chase down and corner Arbery with their vehicles:

> McMichael stated he and Travis got in the truck and drove down Satilla Drive toward Burford Drive. McMichael stated when they arrived at the intersection of Satilla Drive and Holmes Drive, they saw the unidentified male running down Burford drive. McMichael then stated Travis drive [sic] down Burford and attempted to cut off the male. [He] stated the unidentified male turned around and began

[24] *See* Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html. For a concise timeline of relevant events in this investigation, *see* Christina Carrega, *Timeline: Events Leading up to the Arrests of Three Men in the Murder of Ahmaud Arbery*, ABC NEWS (May 21, 2020), https://abcnews.go.com/US/events-leading-arrest-men-murder-ahmaud-arbery/story?id=70576804.

[25] GLYNN COUNTY POLICE DEPT., PUBLIC RELEASE INCIDENT REPORT FOR G20-11303 (2020) [hereinafter POLICE REPORT], https://int.nyt.com/data/documenthelper/6915-arbery-shooting/b52fa09cdc974b970b79/optimized/full.pdf#page=1 (this report was published online in PDF form by the N.Y. Times as part of its reporting on the Arbery homicide).

[26] POLICE REPORT, *supra* note 25, at 3.

[27] POLICE REPORT, *supra* note 25, at 3.

[28] POLICE REPORT, *supra* note 25, at 3.

[29] *See* Meredith Deliso & Christina Carrega, *Man Who Filmed Shooting of Ahmaud Arbery Charged With Murder*, ABC NEWS (May 22, 2020), https://abcnews.go.com/US/man-filmed-shooting-ahmaud-arbery-charged-murder/story?id=70820910.

> running back the direction from which he came and "Roddy" attempted to block him which was unsuccessful. McMichael stated he then jumped into the bed of the truck and he and Travis continued to Holmes [Street] in an attempt to intercept him.
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> McMichael stated they saw the unidentified male and shouted "stop, stop, we want to talk to you". McMichael stated they pulled up beside the male and shouted stop again at which time Travis exited the truck with the shotgun. McMichael stated the unidentified male began to violently attack Travis and the two men then started fighting over the shotgun at which point Travis fired a shot and then a second later there was a second shot. McMichael stated the male fell face down on the pavement with his hand under his body. McMichael stated he rolled the man over to see if the male had a weapon.[30]

Upon his review of the police report, George Barnhill, the first district attorney assigned to the case, found there was no legal reason to apprehend the McMichaels or Bryan for the death of Arbery. In a letter addressed to the Glynn County Police Department,[31] Barnhill cites no fewer than six Georgia state statutes to justify his view that no murder took place. To get a better sense of Barnhill's thinking, the following citations to the six laws are provided verbatim from his letter, with Barnhill's analysis explaining his application of the law to the facts of Arbery's death.

First was OCGA17-4-60, which states, "A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion."[32] Barnhill's view was that the McMichaels and Bryan pursued Arbery based on their reasonable belief that Arbery was a burglary suspect, deferring to their claim that their intent was merely to detain Arbery until the police arrived.[33] Reasonableness, of course, is in the eye of the beholder. Even with the surveillance video placing him at the construction site, there was no evidence that Arbery committed burglary or that he was doing anything other than jogging that day. Indeed, other surveillance videos from that same site showed that he was not the only one who visited the site—others included a man, a woman, and some children—but Arbery was the only one who was pursued and killed.[34]

Second was OCGA 16- 11- 126, which states:

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[30] POLICE REPORT, *supra* note 25, at 3.

[31] GEORGE E. BARNHILL, GLYNN COUNTY: THE SHOOTING DEATH OF AHMAUD ARBERY, FEB. 23, 2020 (2020) [hereinafter BARNHILL LETTER], https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf (this letter was published online in PDF form by the N.Y. Times as part of its reporting on the Arbery homicide).

[32] BARNHILL LETTER, *supra* note 31, at 2.

[33] BARNHILL LETTER, *supra* note 31, at 2 ("It appears Travis McMichael, Greg McMichael, and Bryan William [sic] were following, in 'hot pursuit', a burglary suspect, with solid firsthand probable cause, in their neighborhood, and asking/ telling him to stop. It appears their intent was to stop and hold this criminal suspect until law enforcement arrived. Under Georgia Law this is perfectly legal[.]").

[34] *See* Hollie Silverman, *Surveillance Videos Show Multiple People Had Trespassed at the Home Ahmaud Arbery Visited. He Was the Only One Killed*, CNN (May 18, 2020), https://www.cnn.com/2020/05/18/us/ahmaud-arbery-surveillance-timeline/index.html ("Homeowner Larry English has confirmed through the release of surveillance videos that multiple people had trespassed at his home which was under construction.").

> (a) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a weapon or long gun on his or her property or inside his or her home, motor vehicle, or place of business without a valid weapons carry license. (b) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a long gun without a valid weapons carry license, provided that if the long gun is loaded, it shall only be carried in an open and fully exposed manner.[35]

Barnhill's view of the facts was that the McMichaels carried their shotgun (a "long gun") and .357 Magnum openly and were not otherwise prohibited from carrying these firearms.[36] Concededly, under this law, Barnhill's interpretation appears to be correct. There are no facts to suggest that the McMichaels violated this law.

One point to consider, however, is that Georgia's unlicensed firearm statute is not uniform across all fifty states. For instance, in Pennsylvania, the same conduct the McMichaels engaged in—carrying firearms outside the home in a vehicle or on one's person—requires that one obtain a permit.[37] That Pennsylvania is a northern state and Georgia a southern one mirroring the pre-emancipation division between Civil War states is, perhaps, too simplistic or tenuous a connection to be made for most. However, it is likely that Arbery would not have been killed but for the permissiveness of the Georgia law that allowed the McMichaels to be armed that day.

The third through sixth Georgia statutes were cited in a single paragraph, which is how we will consider them here:

> OCGA 16-3-21 Use of Force in Defense, once confronted with a deadly force situation an individual is allowed to use deadly force to defend themselves or others[.] OCGA 16-3-23.1 Georgia' s No Duty to Retreat Law, an individual is not required to back away from or submit to an attack[.] OCGA 16 - 3- 24[b] The use of force which is intended or likely to cause death or great bodily harm to prevent trespass on or other tortious or criminal interference with real property other than a habitation or personal property is not justified unless the person using such force reasonably believes that it is necessary to prevent the commission of a forcible felony. OCGA 16-3-24.2 A person properly and legally defending themselves is immune from prosecution.[38]

Barnhill cites these four Georgia statutes together to paint a picture of self-defense on behalf of the McMichaels. It is worth closely examining Barnhill's description in his own words:

> The video made by William Bryan clearly shows the shooting in real time. From said video it appears Ahmaud Arbery was running along

[35] BARNHILL LETTER, *supra* note 31, at 2.

[36] BARNHILL LETTER, *supra* note 31, at 2 ("It clearly appears Travis McMichael and Greg McMichael had firearms being carried in an open fashion. The investigation shows neither of them to be convicted felons or under felony supervision, they were in a motor vehicle owned by Travis McMichael. Under Georgia Law this is legal open carry.").

[37] *See* 18 PA. CONS. STAT. § 6106 (2008).

[38] BARNHILL LETTER, *supra* note 31, at 3.

> the right side of the McMichael truck then abruptly turns 90 degrees to the left and attacks Travis McMichael who was standing at the front left corner of the truck. A brief skirmish ensues in which it appear (sic) Arbery strikes McMichael and appears to grab the shotgun and pull it from McMichael. The 1st shot is through Arbery's right hand palm which is consistent with him grabbing and pulling the shotgun at the barrel tip, the 2nd and 3rd wounds are consistent with the struggle for the shotgun as depicted in the video, the angle of the 2nd shot with the rear of the buttstock being pushed away and down from the fight are [sic] also consistent with the upward angle of blood plume shown in the video and that McMichael was attempting to push the gun away from Arbery while Arbery was pulling it toward himself. The 3rd shot too appears to be in a struggle over the gun. The angle of the shots and the video show this was from the beginning or almost immediately became-- a fight over the shotgun. Given the fact Arbery initiated the fight, at the point Arbery grabbed the shotgun, under Georgia Law, McMichael was allowed to use deadly force to protect himself. Just as importantly, while we know McMichael had his finger on the trigger, we do not know who caused the firings. Arbery would only [have] had to pull the shotgun approximately 1/16th to 1/8th of one inch to fire the weapon himself and in the height of an altercation this is entirely possible. Arbery's mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man.[39]

Perusing the police report, the lengths to which the McMichaels and Bryan went to arm themselves, get into their vehicles, and chase down the unarmed, jogging Arbery is remarkable. Even more remarkable is the extent to which Barnhill liberally read the six Georgia statutes he cited in favor of these men.

Barnhill depicts Arbery as an aggressive, mentally unstable, ex-convict who recklessly attacked an armed Travis McMichael, forcing the latter to reasonably defend himself with force. Barnhill also notes that Arbery may have pulled the trigger himself, leading to his own demise. While an interesting narrative,[40] Barnhill's story conveniently downplays the McMichaels' (along with Bryan's) aggressiveness in chasing after Arbery in the first place. Much like how the defense attorneys normalized the police officers' brutal beating of Black motorist Rodney King by splicing up the incident video into specific frames asking experts to determine which exact blows constituted excessive force,[41] Barnhill justified the initial aggression by the killers as reasonable under specific Georgia law-and-order statutes that legitimated the unlicensed weapons carry and the pursuit that ensued. Instead, these laws should have been read narrowly only to allow private

[39] BARNHILL LETTER, *supra* note 31, at 3.

[40] How Arbery's alleged prior criminal history or mental challenges are relevant to this narrative is unclear, especially since there is no evidence that the McMichaels or Bryan were privy to any such information.

[41] *See* Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DEN. U.L. REV. 283, 285 (1992-93) (describing how the defense broke down the video of King's beating into single frames in an effort to make each blow by the police appear to be a reasonable textbook technique).

citizens to protect themselves in self-defense when law enforcement assistance is not readily available. Dangerously, Barnhill read these exceptional laws as a call to arms, tantamount to excuses for overzealous men to aggressively carry unlicensed firearms and hunt down minorities out for a neighborhood jog.

Unsurprisingly, the Arbery killing casts new light upon what has now been termed "jogging while Black," prompting average citizens to share stories of their attempts to guard themselves when doing something most people take for granted: going out for some exercise.[42] One Black runner, journalist Kurt Streeter, described the questions he asks himself while he jogs through his neighborhood:

> Would it be better if I lived somewhere else? Why is the truck behind me on this street going so slowly? If I need to get away, which way would I sprint? If I need to turn and fight, would I kick, tackle or punch? Why did that officer circle back around and pass me twice?[43]

The ubiquitous cellphone—the instrument-of-choice for both the taking and posting of selfies in this social media age—may be mistaken for the tool of a burglar or worse, a gun.[44]

Other seemingly innocuous behavior becomes suspect. Consider Streeter's story about a run he went on a few years back:

> A few years ago, on a run about 10 minutes from my house, I stopped briefly in the middle of a street to tell a white homeowner how much I admired the minimalist fence that led up her stairs. She was in her yard. I was 20 feet away, sure to smile, and to not move any closer. I immediately saw worry in her eyes. She backed up a few steps. Someone bolted out from her front door, skeptical and scowling, as if I were an attacker. I turned back to pounding the pavement, imagining what the reaction would have been if I were blue-eyed and blond.[45]

Mario T. Calhoun, also Black, recounted jogging around his new suburban Ohio neighborhood when he was threatened with mace by a white woman going into her car. He ignored her threats and jogged on by, not veering from his course. Upon reflection, Calhoun noted, "For the past week or so, I can't help but think of how close I was to being assaulted on the same block where white men are freely able to walk around carrying weapons."[46]

Some commentators have claimed that this reaction to Black joggers has been driven by irrational fear,[47] but it seems that those on the other side view their actions as patently reasonable, just as Justice Alito was loath to connect racial history with current prejudice. In the Arbery killing, those who claim to be colorblind would likely focus on the following facts: (1) Arbery was

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[42] *See* Kurt Streeter, *Running While Black: Our Readers Respond*, N.Y. TIMES (May 18, 2020), https://www.nytimes.com/2020/05/18/sports/running-while-black-ahmaud-arbery.html.

[43] *Id.*

[44] "Then there's my iPhone. To some, snapping off a few frames with a cellphone camera makes me look like a prowler. Cellphones can also be mistaken for guns. Not a chance I'm pulling it out." *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* David French, *Unreasonable Fear Is Killing Black Men in America–And There's No Justification for It*, TIME (May 21, 2020), https://time.com/5840195/ahmaud-arbery-violence-against-black-men.

captured on a surveillance video at a home under construction; (2) there had been burglaries in the neighborhood supposedly committed by Black males, and Arbery was a Black male; (3) Arbery may have been armed, and therefore the McMichaels thought it prudent to bring weapons, which they were legally entitled to possess; (4) their intent was not to kill Arbery, but simply to stop him to ascertain his identity; and (5) the fact that Arbery would not stop and converse with the McMichaels suggests that he had something to hide. Like the white woman who threatened to mace Calhoun, who was new to her suburb, the McMichaels perceived a threat and took reasonable steps to protect themselves, so the argument goes.

But it is impossible to ignore the role of race in each of these cases—Arbery's, Streeter's, Calhoun's—even if the offenders involved claimed they only focused on each gentleman's behavior, not race; that is, that these neighborhood watchdogs were colorblind, not prejudiced or racist. The sad reality is that the perception that Blacks are more aggressive than whites when engaged in the same behavior starts early in a Black American male's life. Instead of benefiting from the view that children need to be protected, Black boys are typically seen as older and less innocent, making them seemingly acceptable targets of police violence.[48] This pattern follows Black men as they mature into adulthood. Young Black men are seen as larger and more physically threatening than their white counterparts.[49]

A color conscious approach would recognize the value of the foregoing lessons from social psychology. In the United States, we live in a society in which Black people cannot participate in activities most others take for granted without taking extraordinary care or enduring microaggressive[50] behavior, serious bodily harm, or risk of death, as Arbery unfortunately discovered.

How might color consciousness lead to change? It starts first with an acknowledgement and understanding of the role law plays in sometimes exacerbating societal inequities. If we know, for instance, that young Black men are more likely to be viewed by society as more threatening than their white counterparts, we should reevaluate the likely effects of laws, like Georgia's, that permit ordinary citizens to carry guns without a license, chase down people they suspect to be criminals, and stand their ground with lethal force. Even if we assume that most people do not consider themselves racist

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[48] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 526 n.4 (2014). *See also* Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes and the Disciplining of Young Students*, 26 ASS'N FOR PSYCH. SCI. 617, 622 (2015) (finding that school teachers tend to discipline Black students disproportionately more often compared with White students).

[49] *See* John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 59 n.1 (2017). Sadly, though relatively recent, this study simply confirms many others describing the disparate treatment of Black Americans under the U.S. criminal justice system. *See, e.g.*, Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 325 (1997) (noting, for instance, that Blacks are overrepresented in arrest statistics); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th Anniversary ed., 2020) (arguing that the mass incarceration of Black Americans is equivalent to formalized apartheid).

[50] *See* Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1980) (describing microaggressions as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of Blacks by offenders.").

or to hold racist views, these law-and-order policies make it possible for those who do to escalate a routine afternoon jog into a homicide investigation, whether intentionally or not.

Earlier, Pennsylvania was mentioned as a state with more stringent gun laws; New York is similar.[51] A May 2020 encounter between two people named "Cooper"—one a white woman, the other a Black man—illustrates how more stringent gun laws might have mattered even where the race card was deliberately played.[52] Amy Cooper was walking her dog one morning in New York's Central Park. In the same area, Christian Cooper was bird watching when he noticed that Amy's dog was unleashed, a violation of park rules that disturbed nearby birds. Christian asked Amy to restrain her dog; Amy refused. When Christian began filming Amy's violation, she threatened to call the police to report that an "African American" man was threatening her and her dog.

Even if we assume that Amy subjectively felt threatened by Christian (although it appears that the only real threat was Christian reporting Amy's failure to leash her dog), why did she feel it necessary to mention his race? Why not simply report that a *man* had made her feel threatened?[53] The ensuing media firestorm led to Amy losing her job and temporary custody of her dog; Amy promptly issued a statement profusely apologizing for her actions, claiming she was not a racist.[54]

The point of this story is not to have us judge whether Amy was racist or not, but for us to note the differences in outcome between this case and Arbery's. Even though race played a role in both cases—that is, in Amy's threat and in Arbery's identification as a possible suspect—the outcomes in each differed due, in part, to the different statutory schemes at issue. Whether she wanted to have a firearm on her person for self-defense or not, Amy Cooper could not possess an unlicensed one during her encounter with Christian Cooper; this was not the case when the McMichaels confronted Arbery. Under Georgia law, the McMichaels were well within their rights to have unlicensed firearms on their persons. The presence of firearms in the McMichael-Arbery confrontation elevated the risks that come with being a minority race, whether the offending parties deployed race intentionally or

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[51] *See* N.Y. PENAL CODE § 265.01-B (McKinney 2020) ("A person is guilty of criminal possession of a firearm when he or she: (1) possesses any firearm or; (2) lawfully possesses a firearm prior to the effective date of the chapter of the laws of two thousand thirteen which added this section subject to the registration requirements of subdivision sixteen-a of section 400.00 of this chapter and knowingly fails to register such firearm pursuant to such subdivision. Criminal possession of a firearm is a class E felony."). *See also* People v. Marrero, 69 N.Y.2d 382 (1987) (describing New York's statutory scheme prohibiting a Federal corrections officer from carrying a handgun in a Manhattan social club without a license).

[52] *See* Zeba Blay, *Amy Cooper Knew Exactly What She Was Doing*, HUFFINGTON POST (May 26, 2020), https://www.huffpost.com/entry/amy-cooper-knew-exactly-what-she-was-doing_n_5ecd1d89c5b6c1f281e0fbc5 ("Amy Cooper lost her dog and possibly her job. Christian Cooper, the Black man she called the cops on, could have lost his life.").

[53] One commentator has noted the irony in the well-educated offender using the "politically correct" term "African American" to engage in an act of racial profiling. *See* Ginia Bellafonte, *Why Amy Cooper's Use of 'African-American' Stung*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/nyregion/Amy-Cooper-Central-Park-racism.html ("A resident of the Upper West Side with a graduate degree from the University of Chicago, a rescue dog and a face mask, Ms. Cooper engaged in a calculated act of profiling even as she accommodated the dictates of progressive speech.").

[54] *See* Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020), https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html.

not. Put differently, if we know that guns can be carried without a license and Black males are more likely to be viewed as threatening to people than white males, it is more likely that Black males will bear a disproportionate burden of injury and death in encounters where race played a factor. Color conscious awareness of the unintended consequences of gun laws and the social psychology research about the negative public perception of Black males helps us better evaluate the true costs that might ensue in social conflicts.

A colorblind proponent might argue, as Justice Alito did in *Ramos*, that there is nothing racial about Georgia's law-and-order statutes as none explicitly mentioned race. All six of the laws that District Attorney Barnhill thought relevant apply to all persons without regard to race. Indeed, Arbery could have armed himself during his jog for self-protection just as the McMichaels did, and the social psychology research explains generalities, not specific cases. As mentioned above, defenders of the McMichaels would likely contend that the objective evidence available to them—video footage of a man visiting a home site, a neighborhood that had been burglarized, and a similar-looking man running down the street—add up to justify the McMichaels' attempt to question Arbery until the police arrived. In sum, the only relevant factors in the McMichael-Arbery encounter were whether the behaviors of each party were consistent with what the law required.

Though seemingly rational at first blush, the argument that the race-neutral Georgia law would also permit Arbery to arm himself fails to grapple with the realities of being a Black man in society, something that the social psychology research tells us makes a clear difference. If Arbery were to have carried a gun, even for self-defense on his jog, the simple fact that he was Black would have made that act suspicious. As Penn State defensive tackle Aeneas Hawkins posted on social media regarding his decision not to respond to a racial slur hurled at him when he stopped for gas on his drive home, "Although my inclination was to jump through [the offender's] face when he stood close to me, I know that I'll always be guilty before proven innocent."[55]

Similarly, if Arbery had decided to carry a weapon to protect himself on his jog, many might have interpreted that act as unusual, an exaggerated response to a nonexistent threat. Instead, the carrying of that weapon, even if legal in Georgia, might well have been deemed suspicious because of Arbery's race—in Hawkins' words, "I'll always be guilty before proven innocent."[56] Further, just as the social psychology studies may appear for some to be inapplicable to specific situations like Arbery's, for Black males like Arbery and Hawkins, the studies simply confirm their daily reality: that living while Black and male is fraught because color's role often figures prominently, the McMichaels' and Amy Cooper's claims of color blindness notwithstanding.

[55] *See* Alex Seats, *Report: Penn State Defensive Tackle the Target of Racial Slur*, 247 SPORTS (May 26, 2020), https://247sports.com/Article/Penn-State-defensive-tackle-the-target-of-racial-slur-Aeneas-Hawkins--147532763/.

[56] *Id.*

For those still skeptical of race's role in the lives of young Black males, non-Blacks need only ask if they ever run through the same questions Kurt Streeter asks himself when they go out for a routine run:

> Would it be better if I lived somewhere else? Why is the truck behind me on this street going so slowly? If I need to get away, which way would I sprint? If I need to turn and fight, would I kick, tackle or punch? Why did that officer circle back around and pass me twice?[57]

Indeed, as a Black male jogger, to not ask oneself these questions could be a matter of life or death, as Arbery sadly discovered.[58]

Given the social psychology research and this nation's history, perhaps covert, institutional, implicit racism—especially daily microaggressions—may never be truly eliminated. However, society does have choices when it comes to the laws it implements. Apropos of Justice Alito's approach in *Ramos*, proponents of color blindness have no quibble with unlicensed gun carry laws, stand-your-ground laws, and citizen's arrest laws that they think benefit a society plagued by crime. Tragedies, like Arbery's death, are horrible, they might argue, but are a result of unfortunate circumstances and choices, not the product of a vast racial conspiracy perpetuated by laws aimed at promoting law and order. But as other *Ramos* Justices on both ends of the ideological spectrum—from Gorsuch and Kavanaugh on one end, to Sotomayor on the other—recognized, an alternative approach exists. A color conscious approach to reviewing tragic racial incidents like Arbery's death—and even less tragic, but no less racial, encounters like that between the Coopers[59]—means acknowledging the consequences of choosing a race-neutral law that might have far-reaching racially disparate impacts. Just as the race-neutral nonunanimous verdict law in *Ramos* could not be easily stripped of its racist history, law-and-order laws that allow citizens to

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[57] *See* Streeter, *supra* note 42.

[58] I am a Filipino immigrant, and I have never been stopped for the same conduct Arbery was accused of here. I have stopped at home construction sites out of curiosity, and I have jogged around neighborhoods I lived in throughout my life, both in the U.S. and in the Philippines. Interestingly, the one time I was harassed was because of my perceived ethnicity—that is, for "walking while Asian (Japanese)"—was because I was with my white wife. *See* VICTOR C. ROMERO, ALIENATED 2-3 (2005) ("On a balmy May evening in 1996, Corie and I decided to take a walk around the neighborhood, something which we have enjoyed on many an afternoon. As we crossed Willow heading south on West Street, we noticed a pick-up truck whose occupants began to whistle wolf-calls and shout lewd remarks. Naively, my first thought was that these words were being directed at others around us or at occupants of another vehicle. It soon became clear that we were the target of these obscenities: 'Hey, you Japanese sonofabitch! Why don't you fuck her? I have!' That said, the truck slowly approached the next intersection, more obscenities coming from within. At the time, I remember trying to decide where we should run should these people come after us. . . . After several tense moments, we were relieved to see the truck pull away as it rounded the corner. As a last show of power, one of the occupants extended his white arm and thrust his fist into the night air while simultaneously letting out a taunting laugh.").

[59] Paraphrasing Christian Cooper, I don't mean to "excuse the racism" that he endured, but only to acknowledge that the difference in consequences is in part because of the presence of firearms during Arbery's incident. *See* Sarah Maslin Nir, *The Bird Watcher, That Incident and His Feelings on the Woman's Fate*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/2020/05/27/nyregion/amy-cooper-christian-central-park-video.html. Nor do I intend to ignore the long history of state violence against Blacks, as evident by the recent—and expected—furor over the death of George Floyd. *See, e.g.*, Matt Furber, Audra D.S. Burch & Frances Robles, *What Happened in the Chaotic Moments Before George Floyd Died*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html. For the relationship between Floyd's death and the history of racism in Minneapolis, Minnesota, see Olivia B. Waxman, *George Floyd's Death and the Long History of Racism in Minneapolis*, TIME (May 28, 2020), https://time.com/5844030/george-floyd-minneapolis-history/.

militarize against others perpetuates racist burdens, sometimes leading to tragic results.[60]

IV. A WAY FORWARD: LESSONS FROM MORAL PSYCHOLOGY

Notwithstanding the arguments for color consciousness against colorblindness, it is clear that colorblindness continues to be a powerful force in both law and culture. Critical race theorists like Charles Lawrence[61] and Robin Lenhardt[62] have long questioned the Supreme Court's equal protection jurisprudence for its failure to effectively account for the insidious nature of institutional racism—that is, that our legal and cultural majoritarian commitment to color blindness has failed to alleviate the vestiges of racism left over from slavery and Jim Crow.

Unfortunately, the Court and the culture have been resistant to reform. In response to an increasingly diverse United States, Kenji Yoshino has noted the Court's reluctance to expand equal protection doctrine to more groups and their claims, succumbing to what he terms "pluralism anxiety."[63] Similarly, while Samuel Bagenstos has acknowledged that social psychology terms like "implicit bias" have found their way into popular discourse, he concludes that the culture has resisted the depoliticization and

[60] Perhaps unsurprisingly, the deaths of Black victims at the hands of whites have been the subject of debate as to their larger meaning about race in America and possible solutions. *Compare* Gerard Baker, *The Often Distorted Reality of Hate Crime in America*, WALL ST. J. (May 15, 2020), https://www.wsj.com/articles/the-often-distorted-reality-of-hate-crime-in-america-11589562033 (arguing that the American media underplays the criminality of Black Americans) *with* Eddie S. Glaude, Jr., *George Floyd's Murder Shows Once More That We Cannot Wait for White America to End Racism,* TIME (May 29, 2020), https://time.com/5844645/george-floyds-shows-we-cannot-wait-end-racism/ (arguing that "those of us who will dare to actually learn from our history, must figure out how to be together differently in a New America") (emphasis omitted).

[61] *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."); Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 942 (2007) ("The Court's use of legal formalism to repress our consciousness of racism has converged with psychologists' efforts to explain the origins of unconscious bias, and this convergence has served to undermine my article's chief purpose: to advance the understanding of racism as a societal disease and to argue that the Constitution commands our collective responsibility for its cure.").

[62] *See* Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) ("My argument is that racial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States. This theory accounts for the persistence of racial disparities that mark the color line, as well as the incidence of intentionally discriminatory or racialized behavior."); Robin A. Lehnardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1534 (2011) (arguing for race audits by localities in which "the search for the proverbial wrongdoer that currently characterizes most inquiries about race would be replaced with a focus on local systems and procedures, and the extent to which municipal policies or entanglements with certain private entities have contributed to ongoing racial disparities and spatial segregation.").

[63] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751–52 (2011) ("Because of 'new' and 'newly visible' groups, the nation has developed an increasing sense of its own pluralism. That sense has engendered significant anxiety across the political spectrum. For some time now, conservative commentators have expressed impatience with the seemingly endless proliferation of identities and identity politics. But the concern transcends political creed. Even liberal lion Professor Arthur Schlesinger Jr. cautioned as early as 1991 against the 'disuniting of America,' calling for a recommitment to the ideals of assimilation and integration.").

depersonalization of institutional racism, reacting with the same defensiveness to charges of implicit bias as it did to explicit ones.[64]

How do we get past this impasse? If social science studies are currently resisted as political and personal, as Bagenstos suggests, and if, notwithstanding *Ramos*, legal and political institutions suffer from pluralism anxiety, as Yoshino contends, then how do we move forward, knowing that race burdens our citizens unequally? How do we get color consciousness to stick?

This Part returns to the field of psychology but now focusing on research into moral thinking. While the social psychology research discussed earlier showed how our culture perceives young Black and white men differently as threats, moral psychology seeks to explain what values might underlie such thinking. It turns out that while liberals care primarily about harm and fairness above all else, conservative values extend to loyalty, respect for authority, and purity, all values that make the marginalization of outsiders more likely.

A. THE RIGHTEOUS MORAL MIND

Also in May 2020, Tom Austin, a white venture capitalist in Minneapolis, called a building manager to complain about several young Black men whom he believed were using the building's gym without authorization.[65] Three of the men—Abdi Hassan, 24, Salman Elmi, 24, and Zak Ahmed, 22—were young entrepreneurs whose offices were in the same building that housed the gym; in fact, they exercised at the gym regularly.[66] The CEO took to social media to explain, "Yes, I f[]cked up. Not my job to say anything or question potential trespassers. I was in a bad mood before I even got to the gym and handled the situation poorly. Was oblivious to the perception that my actions could be perceived as racist."[67]

Setting aside advocates on the far-right,[68] most readers likely have one of two reactions to the venture capitalist's remarks: (1) "I would never racially profile another person that way;" or (2) "What he did had nothing to do with race, but with his reasonable belief that some of these men were trespassers." Both of these sentiments have a basis in moral intuition, and both reactions may be less about ignorance or indifference but instead the product of our evolution and environment. According to moral foundations theory, our minds at infancy provide a first draft, rather than a blank slate, of our moral intuitions: a prewired, rather than hardwired, brain with certain

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[64] *See* Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMP. & LAB. L. 37, 43–51 (2018) (discussing the failure of implicit bias's proponents to depoliticize and depersonalize the reality of covert racism).

[65] *See* Ikran Dahir, *A White Man Threatened to Call Police on a Group of Young Black Men Because They Didn't "Appear to Be" Tenants*, BUZZFEED NEWS (May 28, 2020), www.buzzfeednews.com /article/ikrd/venture-capitalist-threats-black-men-gym.

[66] *Id.*

[67] *Id.* (reproducing CEO's social media post).

[68] *See, e.g.*, Souad Mekhennet*, Far-Right Groups Are Spreading Racist, False Claims About Shooting Victim Ahmaud Arbery, Analysts Say*, WASH. POST (May 17, 2020), https://www.washingtonpost.com /national-security/far-right-groups-are-spreading-racist-false-claims-about-shooting-victim-ahmaud-arbery-analysts-say/2020/05/17/31cde428-962b-11ea-82b4-c8db161ff6e5_story.html (reporting that white extremist groups have published false claims that Arbery was carrying a hammer and was wearing work boots in order to place in doubt the truth that he was out jogging when he was killed).

genetic predispositions open to modification based on experience.[69] Social psychologist Jonathan Haidt and his team administered psychological surveys across country and culture, identifying five moral foundations that he asserts are part of the first draft of our righteous mind, each a product of evolution: (1) care/harm; (2) fairness/cheating; (3) loyalty/betrayal; (4) authority/subversion; and (5) sanctity/degradation.[70]

The care/harm foundation evolved to alert our ancestors to the dangers inherent in raising infants in the wild, prompting us to empathize with those who suffer and to despise those who inflict suffering on others. The fairness/cheating foundation developed out of a need to identify reliable partners and shun exploitative ones, leading us to favor collaborators and reciprocal altruists, on the one hand, and punish cheaters, on the other. The loyalty/betrayal foundation operates similarly, though at the level of groups, so that we trust teammates and shun outsiders. The authority/subversion foundation evolved to help us navigate relationships within social hierarchies, alerting us to status and rank, to respect those who outrank us while disrespecting others ranked below us. Finally, the sanctity/degradation foundation developed to clue in our ancestors to the downsides of omnivorous consumption (for example, plants that kill) and environmental pathogens, which, culturally, have given rise to (sometimes irrational) attachments to symbols of purity or impurity.[71]

Haidt's findings suggest that political conservatives—those most likely to discount claims of racial bias and extol the virtues of colorblindness—value all five of these moral foundations, while liberals typically prescribe to only the first two, care/harm and fairness/cheating.[72] Haidt contends that conservatives therefore have an advantage in marketing their policies to the public because they understand that they must appeal to all five sensibilities rather than just two. Put differently, Haidt believes that if there are people in the general public whose value judgments rest on a higher number of moral factors, conservatives trump liberals by addressing all five factors.[73]

Let us examine how this analysis might help us understand appeals to color consciousness. Liberals most concerned about care/harm and fairness/cheating tend to worry about racial minorities, focusing on the relative inequality of their position and how law facilitates their continued subordination. Law-and-order policies trigger liberals' anxiety over making outsiders' situations worse, evincing not only a lack of care but also a form of cheating. Not only do lax gun laws and strong stand-your-ground statutes facilitate white vigilantism against unarmed Blacks, but they also perpetuate racial stereotypes, robbing all minorities of their equal dignity. Jogging while Black should not be a reason to die.

In contrast, because all five moral foundations appeal to them, conservatives may have a different view of the care/harm and fairness/cheating balance when it comes to law-and-order policies. Viewing

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[69] JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 130–31 (2012).

[70] *Id.* at 153–54 (summarizing the five moral foundations).

[71] *Id.*

[72] *Id.* at 155–86 (Chapter 8, "The Conservative Advantage").

[73] *Id.*

the care/harm balance through the prism of tribal loyalty, obedience to authority, and a preference for purity, the conservative position may characterize harms to outsiders as the unintended consequences of protecting those who are already part of the ingroup. "Tribal loyalty" and a "preference for purity" translate into a form of parochialism—a circumscribed empathy for family first, and beyond that, for one's perceived social group. As psychologist Jonathan Baron puts it, parochialism is the "tendency of people to favor a group that includes them while underweighing or ignoring harm to outsiders."[74] Combining this parochialism with "obedience to authority," conservatives are likely to view law-and-order rules as part of America's social contract for the common good. Laws that promote self-arming and self-defense to protect one's family and neighborhood against outside threats appeal to all five values that conservatives hold.

Thus, moral foundations theory helps us understand that those who favor conservative policies and colorblind analyses may not be indifferent or unsympathetic, but rather they may simply view the world in a very different way from those who would prefer a more liberal, color conscious approach to minority rights. Put another way, it is not that the great majority of those who favor law-and-order policies lack empathy; it is that they empathize with those within their tribe first and foremost.

The challenge, then, is to incorporate and embrace these different moral perspectives with humility and patience, recognizing that our Constitution's highest ideals demand that we move, even if in fits and starts, toward a more inclusive, perfect union. Specifically, while the original Constitution enshrined slavery as a protected economic interest,[75] the reconstructed and amended post-Civil War version guarantees due process and equal protection for all.[76]

B. AN APPLICATION: INTEGRATIVE EGALITARIANISM AND RACIAL REPARATIONS

My own contribution to this discussion has been to advocate for policies that embody what I call "integrative egalitarianism," which is the idea that "governmental programs . . . designed to overcome arbitrary inequalities stemming from accidents of birth are a worthwhile investment in society's future."[77] But given the different moral worldviews described above, how does one convince conservatives loyal to the law-and-order status quo to change course toward "integrative egalitarianism"? Steven Pinker posits that

[74] Jonathan Baron, *Parochialism as a Result of Cognitive Biases*, *in* UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 203, 203 (Ryan Goodman, Derek Jinks & Andrew K. Woods, eds., 2012).

[75] *See* U.S. CONST., art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

[76] *See* U.S. CONST., amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[77] Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 276–77 (2011) (coining the term "integrative egalitarianism").

evidence from cognitive neuroscience suggests that "[s]ympathy should be particularly likely to spring into action when an opportunity presents itself to confer a large benefit to another person at a relatively small cost to oneself, that is, when we come across a person in need."[78]

Here's one example: The predominantly white city council[79] of Evanston, Illinois recently embraced the concept of "integrative egalitarianism" by passing a resolution designed to right historical injustices and extend sympathy to Black community members. In November 2019, the city council passed a resolution earmarking funds from taxes on the sale of recreational marijuana toward initiatives that would benefit the city's Black residents.[80] Because data revealed that seventy percent of those arrested for marijuana offenses over a three-year period were Black, city alderman Ruth Rue Simmons contended that Black residents should disproportionately benefit from tax revenues from legitimate marijuana use, which are expected to generate between $500,000 to $750,000 annually.[81] Only one of the nine councilmembers voted against the resolution.[82]

By extolling Evanston, I do not mean to suggest that reparations are scalable or that the city's resolution might easily be replicated elsewhere. Indeed, the possibility of a reparations program in Evanston had apparently been introduced as early as 2002, almost twenty years prior.[83] Instead, the purpose of citing the Evanston experience is to demonstrate how "integrative egalitarianism" can appeal to someone who embraces Haidt's conservative five-factor moral code. As Rue Simmons's advocacy above suggests, concerns over community care and fairness are surely at the forefront of this reparations program, but the other three moral vectors—loyalty/betrayal, authority/subversion, and sanctity/degradation—are similarly at play. The reparations program evinces loyalty to all Evanston residents by affirming that Blacks are indeed members of the ingroup. The program accepts as a reality that law-and-order policies and discriminatory policing may never be eliminated, and yet, it also stands as a testament to the power of following established political processes to effect change. This program was the product of democratic deliberation and not the assertion of special rights in court. And finally, sanctity is addressed in the restorative nature of the reparations program, one designed to reinvigorate a part of the Evanston community that had been degraded by biased policies.[84]

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[78] STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 581–82 (2011).

[79] The members of the council and their biographies are accessible at *City Council*, CITY OF EVANSTON, https://www.cityofevanston.org/government/city-council (last visited Nov. 30, 2020).

[80] *See* Liane Jackson, *Talk of Reparations Is Being Revived Around the Country*, A.B.A.J. (Apr. 1, 2020), https://www.abajournal.com/magazine/article/talk-of-reparations-is-being-revived-around-the-country.

[81] *Id.*

[82] *See* Bill Smith, *Rue Simmons: People Were in Awe of Us*, EVANSTON NOW (Nov. 26, 2019), https://evanstonnow.com/rue-simmons-people-were-in-awe-of-us/ ("Alderman Tom Suffredin, 6th Ward, cast the only vote against the measure.").

[83] *Id.*

[84] Admittedly, this argument from sanctity frames the issue outside of the debate around safe marijuana use, which has vexed courts trying to balance the right to use marijuana against foreseeable traffic safety concerns. *See, e.g.*, Neil E. Axel, *The Legalization of Marijuana and Its Impact on Traffic Safety and Impaired Driving*, A.B.A. CRIM. JUST., Spring 2020, at 8, 14 ("More research is needed into a host of issues: the health *risks* of marijuana use, the health *benefits* of various forms of medical marijuana,

CONCLUSION

In his column on the Ahmaud Arbery killing, commentator Gerard Baker expressed concern that the media's allegedly singular focus on white-on-Black "hate crimes" obscures the truth:

> Certainly, given the nation's history and continuing social inequalities, a heightened sensitivity should be accorded evidence of racist violence by white people. But we have gone way beyond heightened sensitivity, to the point of complete distortion of reality. Almost every instance of white violence against minorities is held up now as a bleak model of the state of the nation, while almost every instance of [B]lack violence against whites is ignored.[85]

A closer examination of the statistics Baker cited suggests an alternate explanation. Baker claimed "that [B]lacks are 50% overrepresented among perpetrators of hate crimes, while whites are about 25% underrepresented,"[86] which may be the product of a criminal justice system that gives the benefit of the doubt to white perpetrators, viewing Blacks as generally more threatening and dangerous, as we learned social psychology suggests.[87] Indeed, it is this benefit of the doubt that seemed to animate District Attorney Barnhill, who justified his decision not to prosecute the McMichaels for Arbery's death based on his law-and-order reading of Georgia's gun and self-defense laws. In fact, other commentators have considered Barnhill himself to exhibit racial bias in the past, citing his prior decision to prosecute a Black woman for helping another person with an electronic voting machine.[88]

This difference in perspective between Baker and his detractors becomes easier to understand when one considers Haidt's moral matrix. A conservative might be more inclined to accept Baker's analysis because it assumes a prosecutorial criminal justice system that is legitimate, preserving order and the status quo, which just happens to privilege majorities, whether racial or otherwise. Racism, whether covert or overt, is primarily a thing of the past. The only way forward is to proceed in a colorblind fashion. In contrast, a liberal might choose the alternative interpretation, concerned primarily with the societal harm inflicted upon racial minorities whose disabilities are often ensconced in law-and-order policies. Racism is incorporated into the United States legal system. It is baked into our law and culture. The solution, therefore, is not to ignore race, but to understand how it functions to ensure that law and policy alleviates harm and promotes fairness. Color consciousness commits to that project.[89]

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the impact of marijuana on crash risks, and the development of tools to determine the presence of drugs in motorists who may be endangering others by operating motor vehicles while impaired.").

[85] Baker, *supra* note 60.

[86] *Id.*

[87] *See supra* text accompanying notes 48–49.

[88] As Adam Serwer has argued, "A crime does not occur when white men stalk and kill a black stranger. A crime does occur when black people vote." Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, ATLANTIC (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389 ("But Barnhill's leniency is selective—as *The Appeal's* Josie Duffy Rice notes, Barnhill attempted to prosecute Olivia Pearson, a black woman, for helping another black voter use an electronic voting machine.").

[89] On the current Court, even Justices Thomas and Alito—one justice who prefers not to discuss race, while another is loath to find discriminatory purpose in a law—have themselves been willing to see the pernicious effects of racial discrimination in other contexts. Justice Thomas famously wrote a stinging

It may be that moral foundations theory will suffer the same fate as implicit bias theory, failing to persuade and leading to accusations that the underlying theory is a political and personal attack upon an imperfect but serviceable status quo.[90] However, to the extent that it helps explain the ways in which thoughtful citizens view the culture war through different moral lenses, moral foundations theory may offer opportunities for each side to understand the other better, even if ultimately both sides may sometimes agree to disagree.[91]

To be clear, I am not arguing that there needs to be compromise or the seeking of common ground for its own sake, especially if that common ground continues to perpetuate racial inequality.[92] At the end of the day, the

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opinion in *Virginia v. Black*, 538 U.S. 343 (2003), the cross-burning case, highlighting the singular terror inflicted on Black Americans by the intentional burning of crosses to intimidate. *See id.* at 388 (Thomas, J., dissenting) ("In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality."). Similarly, Justice Alito in *Ricci v. DeStefano*, 557 U.S. 557 (2009), noted the injustice associated with governments that use race in ways that disadvantage groups, even those in the majority. *See id.* at 604 (Alito, J., concurring) ("Taking into account all the evidence in the summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation."). Interestingly, Justice Sotomayor's insightful *Ramos* concurrence linking the racist origins of nonunanimous verdicts to the unconstitutionality of even race-neutrally adopted laws today would surely resonate with Dr. Sabrina Strings. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring). In an editorial for the *New York Times*, Dr. Strings reminds us that the reason Black Americans have been disproportionately killed by COVID-19 is not group propensity toward sloth or obesity, but the slavery that directly shortened their forbears' lifespans, initiating a cycle of poor health outcomes that persists today. *See* Sabrina Strings, *It's Not Obesity. It's Slavery.*, N.Y. TIMES (May 25, 2020), https://www.nytimes.com/2020/05/25/opinion/coronavirus-race-obesity.html. Similarly, the killing of George Floyd is a symptom of the long history of institutional racism and inequity in Minnesota. *See* Randy Furst & MaryJo Webster, *How Did Minn. Become One of the Most Racially Inequitable States?*, STAR TRIB. (Sept. 6, 2019), https://www.startribune.com/how-did-minnesota-become-one-of-the-most-racially-inequitable-states/547537761/ (quoting public affairs professor Samuel Myers, "You have a legacy of asset accumulation in Minnesota [by] white people [that] can't be explained by education, by training, by family structure, by native ability or intelligence."). It is this history that led to the protests in Minneapolis, with other cities' residents joining in solidarity. *See* Charlotte Alter, *'America Has Its Knee on People of Color.' Why George Floyd's Death Was a Breaking Point*, TIME (May 31, 2020), https://time.com/5845752/america-has-its-knee-on-us-george-floyds-death-was-a-breaking-point-protests/ ("'It's either COVID is killing us, cops are killing us, the economy is killing us,' says Priscilla Borker, a 31-year old social worker who joined the demonstrations in Brooklyn on Friday. 'Every corner that people of color turn, they're being pushed.' After months of social distancing to avoid spreading COVID-19, the protests represented a breaking point not just in the fight against racist police violence, but also in the fight against the disease. By gathering in crowds with little chance of social distance, the masked demonstrators risked not just police violence but their own health, all to lend their voices to the chorus demanding an end to racist violence.").

[90] *See supra* text accompanying note 64.

[91] I appreciate that this view may be dismissed as overly optimistic, given the United States' recent experience navigating the polarized and politicized responses to the COVID-19 pandemic. *See* John Authers, *The Golden Rule is Dying of COVID-19*, BLOOMBERG NEWS (May 31, 2019), https://www.bloomberg.com/opinion/articles/2020-05-31/coronavirus-the-golden-rule-is-dying-of-covid-19 ("[I]n the U.S., . . . people seem to be taking refuge in tribes, and joining those with whom they already share grievances.").

[92] *See, e.g.*, Tayari Jones, *There's Nothing Virtuous About Finding Common Ground*, TIME (Oct. 25, 2018), https://time.com/5434381/tayari-jones-moral-middle-myth/ ("The middle is a point equidistant from two poles. That's it. There is nothing inherently virtuous about being neither here nor there. Buried in this is a false equivalency of ideas, what you might call the 'good people on both sides' phenomenon. When we revisit our shameful past, ask yourself, Where was the middle? Rather than chattel slavery, perhaps we could agree on a nice program of indentured servitude? Instead of subjecting Japanese-American citizens to indefinite detention during WW II, what if we had agreed to give them actual

animating idea behind *Ramos*'s non-unanimous verdicts is that they help maintain a system that exerts legal and social power over Black Americans. It is this legal and social power differential that is reflected in the tragic killing of Ahmaud Arbery, and it should be overcome.

sentences and perhaps provided a receipt for them to reclaim their things when they were released? What is halfway between moral and immoral?").