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Citizen's Arrest and Race

Ira P. Robbins*

INTRODUCTION

I begin with a *mea culpa*. In 2016, I published an article about citizen's arrest.¹ The idea for the article arose in 2014, when a disgruntled Virginia citizen attempted to arrest a law school professor while class was in progress.² I set out to research and write a "traditional" law review article. In it, I traced the origins of the doctrine of citizen's arrest to medieval England,³ imposing a positive duty on citizens to assist the King in seeking out suspected offenders and detaining them.⁴ I observed that the need for citizen's arrest lessened with the development of organized and widespread law-enforcement entities.⁵ I surveyed developments across the United States and highlighted numerous problems with the doctrine that led to confusion and abuse.⁶ I concluded by recommending abolition of the doctrine in most instances and proposed a model statute to address appropriate applications of citizen's arrest.⁷

But I did not discuss race. Indeed, I did not even use that word in the entire forty-three-page article.⁸ It's not that I had intentionally ignored the issue. Rather, I

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¹ See Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557 (2016).

² See *id.* at 559. The perpetrator claimed, among other things, that the professor had engaged in mind control "by computer technology at a distance." Rachel Weiner, *Tyler Cowen's Attacker Thought the Professor Was Controlling His Mind, Cowen Testifies*, WASH. POST (Apr. 29, 2014), https://www.washingtonpost.com/local/crime/tyler-cowens-attacker-thought-the-professor-was-controlling-his-mind-cowen-testifies/2014/04/29/a4c5b9f4-cfb9-11e3-b812-0c92213941f4_story.html [https://perma.cc/5QMX-AW5R].

³ See Robbins, *supra* note 1, at 562.

⁴ *Id.*

⁵ See *id.* at 565.

⁶ See *id.* at 572–80. These problems include, inter alia, the level of suspicion required, the ability to know the difference between misdemeanors and felonies, the temporal reasonableness of detention, and the appropriate use of force on the part of the arrestor.

⁷ See *id.* at 584–98. These applications include a shopkeeper's privilege, police outside of their jurisdiction, and properly trained private police forces.

⁸ In a section on neighborhood watch groups, I devoted three sentences to the 2012 killing of Trayvon Martin in Florida. See *id.* at 582.

was wearing blinders and failed to consider the bigger picture. Until three men killed Ahmaud Arbery in Brunswick, Georgia on February 23, 2020.

Standing in his front yard, Gregory McMichael spotted Arbery, a twenty-five year-old Black man, jogging through the Satilla Shores neighborhood.⁹ There had been a recent string of break-ins in the area and, according to the police report, McMichael thought that Arbery matched the suspect's description.¹⁰ McMichael quickly called to his son, Travis McMichael, proceeding to grab a shotgun and a .357 Magnum handgun as the men chased Arbery down in a pick-up truck.¹¹ Their neighbor, William Bryan, also joined in the chase.¹² The three white men quickly cornered Arbery; the encounter turned deadly in a matter of minutes.¹³

After a string of prosecutorial recusals, the three were charged with one count of malice murder, four counts of felony murder, two counts of aggravated assault, one count of false imprisonment, and one count of criminal attempt to commit false imprisonment.¹⁴ In a Pre-Hearing Memorandum, Bryan's attorney argued that "[t]he law provides no right to resist a legal arrest."¹⁵ The Memorandum, however, did not clearly identify what a legal arrest was.¹⁶ At trial, defense attorneys for the McMichaels argued that Georgia's Civil War-era citizen's arrest law gave his clients a duty to protect their neighborhood from so-called criminal activity.¹⁷ Under the now-repealed statute, a "private person" was permitted to arrest a fellow citizen if the individual had committed a felony and was trying to escape, even if the arrestor had only "probable grounds of suspicion."¹⁸ In November 2021, a jury found the

⁹ See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [https://perma.cc/QT9B-XQ2L].

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Kate Brumbach, *Explainer: What Are the Charges in Ahmaud Arbery's Killing?*, AP NEWS (Nov. 23, 2021), <https://apnews.com/article/ahmaud-arbery-travis-mcmichael-georgia-7558b86305d4c95d8e830b16bf19eef> [https://perma.cc/D2YB-JPP3].

¹⁵ Defendant's Pre-Hearing Memorandum of Law – Citizens Arrest at 4, *State v. Bryan*, No. 20-CR-00433 (Ga. Super. Ct. July 14, 2020) (citing *Cordis v. State*, 236 Ga. 629, 631 (1999)). Bryan's attorney "anticipate[d] a directed verdict in favor of all three [defendants] at trial." *Id.* at 5.

¹⁶ *See id.*

¹⁷ See Brakkton Booker, *The Uncomfortable Truths Hidden Inside the Ahmaud Arbery Verdict*, POLITICO (Nov. 24, 2021, 10:12 PM), <https://www.politico.com/news/2021/11/24/uncomfortable-truths-ahmaud-arbery-verdict-523374> [https://perma.cc/7FKW-PEVR] (noting that the defendants never witnessed a crime, nor did they have immediate knowledge of a crime). A trial court document stated that "the citizen arrest statute itself is not well worded." Defendant's Pre-Hearing Memorandum of Law – Citizens Arrest, *supra* note 15, at 2 (reinforcing that a felony must be committed in the citizen's presence).

¹⁸ The Georgia Legislature seriously weakened the citizen's arrest statute, but still provided for detainment in specific circumstances, including shopkeepers who witness shoplifting and restaurant

defendants guilty of murder, among other counts. In January 2022, the judge sentenced them to life in prison.¹⁹

In addition to the state charges, in February 2022, a jury found the three men guilty of federal hate crimes.²⁰ Evidence at that trial revealed that the defendants held strong racist beliefs that led them to make assumptions and decisions about Ahmaud Arbery that they would not have made if Arbery had been white.²¹ Witnesses testified to numerous comments made by the men, including offensive social media posts that included racial slurs.²² The jury ultimately concluded that race formed a but-for cause of the defendant's actions, meaning that the three men would not have chased down a Black man whom they assumed, without evidence, was a criminal.²³

The murder of Ahmaud Arbery may have received the most media attention, but this was not the first time that citizen's arrest had been used in an attempt to justify the killing of an innocent Black man. Derrick Grant, an unarmed fifteen-year-old, was confronted and fatally shot over an allegedly stolen vehicle in 2018, in North Charleston, South Carolina.²⁴ Talking to Grant's family after the incident, the

owners and employees who witness "dine and dash" customers. Richard Fausset, *Georgia to Weaken Citizen's Arrest Law Cited in Ahmaud Arbery's Death*, N.Y. TIMES (Mar. 13, 2021), <https://www.nytimes.com/2021/03/31/us/georgia-citizens-arrest-law.html> [https://perma.cc/8HH6-Q4HE]; Emma Hurt, *In Ahmaud Arbery's Name, Georgia Repeals Citizen's Arrest Law*, NPR (May 11, 2021, 12:00 PM), <https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law> [https://perma.cc/82P8-YGAE].

¹⁹ Richard Fausset, *Three Men Sentenced to Life in Prison in Arbery Killing*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/us/mcmichael-bryan-sentencing-ahmaud-arbery-killing.html> [https://perma.cc/3C9R-87SG]. The judge sentenced Gregory and Travis McMichael to life in prison without the possibility of parole, and sentenced William Bryan to life in prison with the possibility of parole after thirty years. *Id.*

²⁰ *Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery*, DEP'T OF JUST., OFF. OF PUB. AFF (Feb. 22, 2022), <https://www.justice.gov/opa/pr/federal-jury-finds-three-men-guilty-hate-crimes-connection-pursuit-and-killing-ahmaud-arbery> [https://perma.cc/3R8D-H2R4].

²¹ *Id.*

²² *Id.* For example:

William Bryan's text messages revealed that when defendant Bryan learned, just four days before the shooting, that his daughter was dating a Black man, he referred to the boyfriend as a "ni---" and as a "monkey." There were other messages on social media in which Bryan referred to other Black people using those slurs and another racial slur: "bootlip."

Id.

²³ *Id.* In August 2022, a federal judge in Georgia sentenced Travis McMichael to life plus ten years in prison, Gregory McMichael to life plus seven years in prison, and William Bryan to thirty-five years in prison. *Federal Judge Sentences Three Men Convicted of Racially Motivated Hate Crimes in Connection with the Killing of Ahmaud Arbery in Georgia*, DEP'T OF JUST., OFF. OF PUB. AFF (Aug. 8, 2022), <https://www.justice.gov/opa/pr/federal-judge-sentences-three-men-convicted-racially-motivated-hate-crimes-connection-killing> [https://perma.cc/KQ3L-Y2PX].

²⁴ See Andrew Knapp, *North Charleston Police Will Not Pursue Charge Against Man Who Killed Unarmed Boy, 15, in Car Theft*, POST & COURIER (Jan. 29, 2018),

police stated that the shooter was within his legal right to make a citizen's arrest over a stolen car.²⁵ No charges were filed in the case.²⁶

In 2019, Kenneth Herring, a Black man, was also shot and killed during the course of a citizen's arrest in Clayton County, Georgia.²⁷ The attorney for Hannah Payne, the shooter, characterized the incident as "an act of self-defense in the course of a citizen's arrest."²⁸ Payne allegedly followed Herring after he had left the scene of a minor traffic collision and blocked his car at an intersection roughly a mile down the road.²⁹ During the confrontation, Payne, a white woman, demanded that Herring return to the crash scene.³⁰ Payne allegedly told him, "Get out of the f*** car, I'm going to shoot you," and then she shot and killed him.³¹

These racially motivated killings—the murder of Ahmaud Arbery, in particular—thrust citizen's arrest laws into public discourse.³² The topic was no

https://www.postandcourier.com/news/north-charleston-police-will-not-pursue-charge-against-man-who-killed-unarmed-boy-15-in/article_90141088-051f-11e8-b637-9786adf08dd3.html [<https://perma.cc/Q3AF-994H>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Jonathan Raymond, *Shot Dead After a Hit and Run: A Witness Accused of Murder; The Victim May Have Been in Diabetic Shock*, 11 ALIVE (May 28, 2019, 6:14 PM), <https://www.11alive.com/article/news/crime/shot-dead-after-a-hit-and-run-a-witness-accused-of-murder-the-victim-may-have-been-in-diabetic-shock/85-21155108-40e9-4af1-b944-d1ede36356fb> [<https://perma.cc/35H5-ZVJN>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., Booker, *supra* note 17; Fabiola Cineas, *Ahmaud Arbery and the Case for Getting Rid of Citizen's Arrests*, VOX (Nov. 10, 2021), <https://www.vox.com/22765019/ahmaud-arbery-citizens-arrest-laws> [<https://perma.cc/PYR4-V386>]; Jesse Jackson, *Jogging in Broad Daylight Shouldn't Put Your Life at Risk*, CHI. SUN-TIMES (Nov. 22, 2021), <https://chicago.suntimes.com/columnists/2021/11/22/22797456/ahmaud-arbery-murder-gregory-mcmichael-trial-georgia-jogging-jesse-jackson-column> [<https://perma.cc/CFW8-XX8N>]; Phillip Jackson, *Archaic Citizen's Arrest Laws Led to Ahmaud Arbery's Death. They're Still on the Books in Many States*, HUFFPOST (Dec. 15, 2021, 6:41 PM), https://www.huffpost.com/entry/ahmaud-arbery-citizens-arrest_n_61aa3da0e4b044a1cc22caa6 [<https://perma.cc/8JRJ-8Q49>]; Hannah Knowles, *Laws Accused of Encouraging Vigilante Justice Still in Most States Despite Scrutiny After Arbery Killing*, WASH. POST (Nov. 5, 2021, 7:28 PM), <https://www.washingtonpost.com/nation/2021/11/05/ahmaud-arbery-citizens-arrest-vigilante/> [<https://perma.cc/CBM3-X6PQ>]; Tariro Mzezewa, *The Arbery Murder Defendants Say They Were Attempting to Make a Citizen's Arrest. Is That legal?*, N.Y. TIMES (Nov. 22, 2021), <https://www.nytimes.com/2021/11/22/us/citizens-arrest-arbery-murder-trial.html> [<https://perma.cc/UAX3-TJ2C>]; Frances Robles, *The Citizen's Arrest Law Cited in Arbery's Killing Dates Back to the Civil War*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html> [<https://perma.cc/6X86-QVQ5>]; Law & Crime Network, *Brian Ross Investigates: Vigilante Justice or Injustice?*, YOUTUBE (Nov. 26, 2021), https://www.youtube.com/watch?v=_D6jJQtPUo; Rachel Sharp, *Could the Verdict in the Trial of Ahmaud Arbery's Killers Spell the End for So-Called 'Vigilante Justice'?*, THE INDEPENDENT (Nov. 22,

longer considered to be within the almost exclusive domain of lawyers, professors, and judges. People throughout the United States were actively learning about the doctrine, while quickly recognizing the obvious racial undercurrent in many of these cases.³³ These developments led media outlets,³⁴ as well as at least one member of Congress,³⁵ to connect the longevity of citizen's arrest laws³⁶ to our country's deeply engrained prejudice, bigotry, and out-and-out racism.³⁷

It is simply insufficient, however, and indeed highly misleading, to discuss the ramifications of the doctrine apart from its historical context, particularly its interconnectedness with continued and systemic racism in the United States. Indeed, one can draw a direct line from the slave patrol laws of the eighteenth and nineteenth centuries, to the Fugitive Slave Acts, to emancipation, to the discriminatory use and disparate impact of citizen's arrest laws today.

2021), <https://www.independent.co.uk/news/world/americas/crime/ahmaud-arbery-trial-vigilante-justice-b1960900.html> [<https://perma.cc/3HEH-2WPU>]; Debra Cassens Weiss, *Laws Said to Encourage Vigilante Justice Still in Effect in Most States*, A.B.A. J. (Nov. 6, 2021), <https://www.abajournal.com/news/article/laws-said-to-encourage-vigilante-justice-still-in-effect-in-most-states> [<https://perma.cc/6YLA-DA95>].

³³ See *supra* note 32 (collecting sources).

³⁴ See Ashish Valentine, *What is the Citizen's Arrest Law at the Heart of the Trial Over Ahmaud Arbery's Death?*, NPR (Oct. 26, 2021, 10:39 AM), <https://www.npr.org/2021/10/26/1048398618/what-is-the-citizens-arrest-law-in-the-trial-over-ahmaud-arberys-death> [<https://perma.cc/WMH5-GVD5>] (stating that the 1863 Georgia citizen's arrest law "was basically a catching-fleeing-slave law"); see also Ari Shapiro, *A Now-Repealed Law Will Weigh on the Trial of Ahmaud Arbery's Accused Killers*, NPR (Oct. 20, 2021, 4:40 PM), <https://www.npr.org/2021/10/20/1047735156/how-citizens-arrest-laws-factor-into-the-trial-of-ahmaud-arberys-accused-killers> [<https://perma.cc/Y4UN-W7WE>] (discussing the racist legacy of citizens arrest).

³⁵ See 167 CONG. REC. H6852–57 (daily ed. Dec. 1, 2021) (statement of Rep. Jackson Lee on Criminal Justice Issues, addressing, inter alia, the history of citizen's arrest).

³⁶ The doctrine still stands in a majority of states today, whether by statute or by common law. California provides the typical codification. See CAL. PEN. CODE § 837 (West 2022); see also, e.g., ALA. CODE § 15-10-7 (2022); ALASKA STAT. § 12.25.030 (2022); ARIZ. REV. STAT. ANN. § 13-3884 (2022); IDAHO CODE § 19-604 (2022); IND. CODE ANN. § 35-33-1-4 (West 2022); IOWA CODE § 804.9 (2015); KAN. STAT. ANN. § 22-2403 (2022); MINN. STAT. § 629.37 (2022); MISS. CODE ANN. § 99-3-7 (2022); NEV. REV. STAT. ANN. § 171.126 (West 2022); N.D. CENT. CODE § 29-06-20 (2022); OKLA. STAT. ANN. tit. 22 § 202 (West 2022); S.D. CODIFIED LAWS § 23A-3-3 (2022); TENN. CODE ANN. § 40-7-109 (2022); UTAH CODE ANN. § 77-7-3 (West 2022). The common-law states include Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, Pennsylvania, Vermont, West Virginia, and Wisconsin. See Robbins, *supra* note 1, at 565–72.

³⁷ See generally Roger M. Stevens, *A Legacy of Slavery: The Citizen's Arrest Laws of Georgia and South Carolina*, 72 S.C. L. REV. 1005 (2021).

I. 700 YEARS OF CITIZEN'S ARREST

The first iteration of citizen's arrest arose in England during the Middle Ages.³⁸ Its initial application addressed the lack of an organized police force by requiring ordinary citizens to arrest and detain suspected offenders.³⁹ During this period, the law made little to no distinction between arrests performed by private individuals and those performed by officers of the law.⁴⁰ According to *Halsbury's Laws of England*, the only distinction was that a felony must have been committed for a private person to effect an arrest, while a felony was not required for an arrest by an officer.⁴¹ Yet, the rise of organized law enforcement over the centuries did not diminish the prevalence of citizen's arrest laws.⁴²

By the 1800s, many states had implemented a common-law version of citizen's arrest.⁴³ Under most common-law iterations, a private citizen could make an arrest only for the commission of a felony to protect public safety.⁴⁴ In 1863, however, the State of Georgia was the first state to codify the doctrine.⁴⁵ Other states, including

³⁸ M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 9 (1977). The precursor to citizen's arrest was the doctrine of hue and cry, which required all able-bodied men to join in the pursuit and arrest of a suspected felon. See Statute of Winchester, 1285, 13 Edw. 1, ch. 1(4), VI(14). See generally Robbins, *supra* note 1, at 562–63.

³⁹ Bassiouni, *supra* note 38.

⁴⁰ Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 566–67 (1936).

⁴¹ See *id.* (discussing the various formulations of historical citizen's arrest laws); see also Robbins, *supra* note 1, at 562–65.

⁴² See Robbins, *supra* note 1, at 562–65.

⁴³ See, e.g., *Morell v. Quarles*, 35 Ala. 544, 549 (1860) (“Any private person, without warrant, may arrest a felon, in the State within which the felony was committed. In doing so, he would act by permission, and not under command of law; but, nevertheless, the arrest would be a legal act.”); see also *supra* note 36 (collecting sources).

⁴⁴ Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 503 (1965); cf. *Carroll v. United States*, 267 U.S. 132, 157 (1925) (reversing convictions where the defendants had not committed a felony or a misdemeanor); *Draper v. United States*, 358 U.S. 307, 315–16 (1959) (Douglas, J. dissenting) (discussing the rule that permits arrest for felonies, but not misdemeanors, in the context of the Fourth Amendment, citing *Carroll*); *State v. Mobley*, 240 N.C. 476, 479 (1954) (finding the defendant's arrest illegal where the defendant did not commit a felony and his conduct did not amount to a breach of peace).

⁴⁵ THE CODE OF GEORGIA § 4604 Sec. III (1861); GA. CODE ANN. § 17-4-60 (West, Westlaw through 2020 Legis. Sess.) (“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.”). Thomas R.R. Cobb compiled the Georgia Code in 1860. The Code was not officially codified until 1863. See generally Jefferson James Davis, *The Georgia Code of 1863: America's First Comprehensive Code*, 4 J.S. LEGAL HIST. 1 (1995) (providing the history of and context for the creation of the 1863 Georgia Code).

Alabama, Louisiana, and South Carolina quickly followed suit.⁴⁶ Many of these statutes went beyond the scope of common-law citizen's arrest by extending to almost any crime, and not just those that threatened public safety.⁴⁷

Citizen's arrest laws have not significantly changed since the early nineteenth century.⁴⁸ Whether a state codified the doctrine or still follows the common law, the ambiguities in and problems with citizen's arrest are the same.⁴⁹ One of the most egregious problems concerns the use of force. Even police with thousands of hours of training have been in situations in which they misjudge the need to use force or use it improperly.⁵⁰ Without training, private citizens are at an even bigger risk of failing to understand and react to the situation appropriately.

II. CONNECTING CITIZEN'S ARREST TO SLAVERY

When commencing this research, my research assistants and I sought to locate historical documents proving that pro-slavery politicians in the Antebellum South enacted citizen's arrest laws in response to looming emancipation and the repeal of the Fugitive Slave Acts. After all, Congress repealed the Fugitive Slave Acts in 1850, President Lincoln issued the Emancipation Proclamation on January 1, 1863, and the Georgia Legislature codified citizen's arrest that same day. Coincidence?

Although we did not find any primary documents that explicitly articulate the connection between citizen's arrest and the impending abolition of slavery, we found a wealth of strongly corroborative evidence that suggests as much. From our research—which includes numerous primary sources, interviews with experts, and modern uses of citizen's arrest—it is clear that the codification of these statutes was inextricably intertwined with slavery and eventual emancipation. This Part chronologically addresses the use of slave patrol laws, the Fugitive Slave Acts, and emancipation.

⁴⁶ ALA. CODE § 15-10-7 (2022); LA. CODE CRIM. PROC. ANN. art. 214 (2022); S.C. CODE ANN. 17 § 17-13-10 (1976).

⁴⁷ See *The Law of Citizen's Arrest*, *supra* note 44, at 503 (citing various state statutes on citizen's arrest that allowed for the arrest of someone practicing law without a license or selling liquor to a minor); see also Robbins *supra* note 1, at 565–68 (discussing the development of citizen's arrest in the common-law states).

⁴⁸ See BASSIOUNI, *supra* note 38, at 9 (attributing the lack of attention to enhancing the citizen's arrest doctrine to the increase in law enforcement).

⁴⁹ See Robbins *supra* note 1, at 572–80 (identifying some of the problems with citizen's arrest).

⁵⁰ See, e.g., *George Floyd: Timeline of Black Deaths and Protests*, BBC NEWS (Apr. 22, 2021), <https://www.bbc.com/news/world-us-canada-52905408> [<https://perma.cc/6RC9-ULVB>] (including a timeline of major incidents resulting in the death of Black Americans by police).

A. *Slave Patrol Laws and the Fugitive Slave Acts*

Statutes regarding slaves existed in America as early as 1643.⁵¹ From the early eighteenth century through the end of the Civil War, the Antebellum South relied heavily on private citizens to carry out law-enforcement-type duties.⁵² A large portion of these duties arose under the then enacted Slave Patrol Laws.⁵³ Before the advent of formal police systems, states established slave patrols to implement “a system of terror and squash slave uprisings with the capacity to pursue, apprehend, and return runaway slaves to their owners.”⁵⁴

Beginning in 1704, South Carolina enacted slave patrols to police the unauthorized wandering of slaves at night.⁵⁵ While slaves were free to move about during the day, after 9:00 p.m., a slave needed a “ticket” from his master to move freely.⁵⁶ Captains, appointed by the South Carolina General, each selected ten white men to ride around the districts and pick up slaves who were wandering without a ticket.⁵⁷ By 1734, South Carolina had a regular patrol whose duty was to visit each plantation once a month and administer twenty lashes to any slave who was outside of the home without a pass.⁵⁸ In 1739, the Negro Act of 1740 established more

⁵¹ See THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND (May 19, 1643), https://avalon.law.yale.edu/17th_century/art1613.asp [<https://perma.cc/6Y87-ZD8V>] (last visited Nov. 18, 2022).

If any servant run away from his master into any of these Confederated Jurisdictions, that in such case, upon the certificate of one magistrate in the jurisdiction out of which the servant had fled or upon other due proof, the said servant shall be delivered either to his master or to any other that pursues and brings such certificate or proof.

Id. cl. 8. “No trial by jury was given; only a certificate was necessary.” C.W.A. David, *The Fugitive Slave Law of 1793 and its Antecedents*, 9 J. NEGRO HIST. 18, 19 (1924).

⁵² See NAACP, *The Origins of Modern Day Policing*, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [<https://perma.cc/M92G-B4DS>] (last visited Nov. 18, 2022).

⁵³ *Id.*

⁵⁴ *Id.* “Tactics included the use of excessive force to control and produce desired slave behavior.” *Id.*

⁵⁵ HOWELL M. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA* 28–29 (1968) (noting the reasons for preventing movement was to keep slaves from insurrecting, decrease the fights between slaves, and ensure that the slaves had enough sleep and energy to work). This Essay focuses on the South Carolina slave patrol laws because that state’s system “seems to have been the oldest, most elaborate, and best documented.” Philip Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 59 (1988). Reichel adds: “That is not surprising given the importance of the militia in South Carolina and the presence of large number of Blacks.” *Id.*

⁵⁶ HENRY, *supra* note 55, at 30–31.

⁵⁷ *Id.* at 31.

⁵⁸ *Id.* at 33 (noting that the patrolmen were compensated for their duties).

permanent patrols in South Carolina.⁵⁹ Georgia also enacted slave patrols as a response to their concerns that slaves would revolt.⁶⁰ Under this law, it was the white man's duty to "patrol over all slaves and free persons of color" and "arrest and apprehen[d] . . . any offender against the laws."⁶¹

Under the slave patrol system, the patrolmen saw it as their duty to protect their communities from the possibility of a slave revolt.⁶² In *Henry v. Armstrong*,⁶³ a slave owner sued patrolmen for trespass after the patrolmen whipped and beat his slaves to the point that they were unable to work.⁶⁴ The patrolmen argued that their actions were justified because it was their duty and right to reprimand slaves that were found wandering without a pass.⁶⁵ The patrolmen prevailed.⁶⁶

These patrols additionally often led to extremely dangerous situations. In *Duperrier v. Dautrive*,⁶⁷ two members of a patrol hailed a slave at night.⁶⁸ When the slave attempted to escape, the patrol shot and killed him.⁶⁹ The Louisiana Supreme Court found that, even though the slave was not a runaway and had the full assent of his master to be on the road, the two patrol members were authorized to infer that the slave was endeavoring to escape a lawful arrest, citing recent disorder among the slave population.⁷⁰ The court held, therefore, that "laws relative to the police of slaves[] should be strictly enforced."⁷¹

⁵⁹ John Belton O'Neill, *The Negro Law of South Carolina*, GENEALOGY TRAILS HISTORY GROUP, http://genealogytrails.com/scar/negro_law.htm [<https://perma.cc/C2NL-HQKY>] (last visited Nov. 18, 2022).

⁶⁰ An Act to Incorporate the Town of Bellville in the County of Richmond, tit. II, § X (1861). Mayor and Aldermen shall have power to establish and regulate a police or patrol over all slaves and free persons of color in said town; and that said Mayor shall have full power and authority to call to his aid any and all white male citizens of said town, capable of bearing arms, for the arrest and apprehension of any offender against the laws.

Id.

⁶¹ *Id.*; see also Reichel, *supra* note 55, at 51.

⁶² HENRY, *supra* note 55, at 28–29.

⁶³ 15 Ark. 162 (1854).

⁶⁴ See *id.* at 163 (stating that "the slaves in question were so bruised and hurt by the beating, as to be unable to perform labor and service for the plaintiff, their owner and master"); see also Tate v. O'Neal, 8 N.C. 418, 419 (1821) (stating that "the Defendants . . . inflicted on the slave fifteen lashes, having first made his body naked and confined him to the whipping-post").

⁶⁵ *Henry*, 15 Ark. at 163–64.

⁶⁶ *Id.* at 169.

⁶⁷ 12 La. Ann. 664 (1856).

⁶⁸ *Id.* at 664.

⁶⁹ *Id.*

⁷⁰ *Id.* at 665.

⁷¹ *Id.* It is important to note that slaves' injuries generally were not the subject of cases for excessive brutality; rather, the actions were brought by slaveholders against the patrolmen for trespassing on their property, seeking to recover for "the value of a slave." *Id.* at 664. Courts agreed that batteries and assaults of slaves could be "indictable offence[s]," but mostly because they were "an

The similarities between slave patrol laws and citizen's arrest have been evident from the beginning. Much like the patrolmen having the ability to infer the nefarious actions of a slave out at night, citizen's arrest laws create an illusion of power that is conferred on everyday citizens to police the actions of others.

Through the course of various slave uprisings, it became clear that slave patrol laws were insufficient to create the sense of security that the slave-holding states wanted. As a result, many states—including Maryland, New York, and Virginia—enacted laws designed to prevent slaves from fleeing.⁷² In an effort to further institutionalize slave labor, Southern politicians insisted on the inclusion of a Fugitive Slave Clause in the newly drafted constitution.⁷³ The Clause states that “No Person held to Service or Labour” would be released from bondage in the event they escaped to a free state.⁷⁴

The inclusion of the Fugitive Slave Clause in the Constitution did not quell the anti-slavery sentiment in the North.⁷⁵ At the time of the Constitutional Convention in 1787, many states advocated the abolition of slavery outright, and some states took matters into their own hands by abolishing slavery within their own borders.⁷⁶ By the time of the Convention, many Northern states, including Connecticut, New Hampshire, Pennsylvania, Rhode Island, and Vermont had abolished slavery.⁷⁷ Concerned with this growing debate, Southern lawmakers argued that slavery was driving a wedge between the states.⁷⁸ In an attempt to justify the practice of slavery,

insult to the master, calculated to rouse angry passions, and provoke resentment, leading to breaches of the peace.” *Henry*, 15 Ark. at 166.

⁷² See JONATHAN A. BUSH, *SLAVERY & THE LAW* 392 (Paul Finkelman ed., 2002) (discussing Virginia's fleeing-slave laws); Leo H. Hirsch Jr., *The Slave in New York*, 16 J. NEGRO HIST. 383, 398–99 (1931) (discussing New York's fleeing-slave laws); *History of Runaways*, MARYLAND STATE ARCHIVES: LEGACY OF SLAVERY IN MARYLAND, <http://slavery.msa.maryland.gov/html/research/histlaw.html> [https://perma.cc/JDM9-CHKA] (discussing Maryland's fleeing-slave laws).

⁷³ U.S. CONST. art. IV, § 2, cl. 3; see also Ariela Gross & David R. Upham, *Article IV, Section 2: Movement of Persons Throughout the Union*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/37> [https://perma.cc/3LJH-EESS]. The Fugitive Slave Clause was abrogated by the Thirteenth Amendment, which was ratified on December 6, 1865.

⁷⁴ U.S. CONST. art. IV, § 2, cl. 3.

⁷⁵ *Fugitive Slave Acts*, HISTORY, <https://www.history.com/topics/black-history/fugitive-slave-acts> [https://perma.cc/KDU6-VVES] (Feb. 11, 2020).

⁷⁶ *Id.*

⁷⁷ *Id.* Pennsylvania became the first state to abolish slavery in 1780 by passing a law that provided for the freedom for every slave born after its enactment. See J. Gordon Hylton, *Before There Were “Red” and “Blue” States There Were “Free” States and “Slave” States*, MARQ. UNIV. L. SCH. BLOG (Dec. 20, 2012), <https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/> [https://perma.cc/Z84G-GHC4] (discussing the abolition of slavery by state). Massachusetts was the first to abolish slavery outright in 1783. *Id.*

⁷⁸ Hylton, *supra* note 77.

defenders invoked arguments based on economics,⁷⁹ history,⁸⁰ religion,⁸¹ legality,⁸² and even social good.⁸³ Acknowledging the growing divide, the Congress bowed to the pressure of the South by passing the Fugitive Slave Act of 1793.⁸⁴

Comprised of four sections, the 1793 Act represented the United States' first collective attempt at limiting the movement of enslaved people.⁸⁵ Under the Act, any slave without proper documentation was required to be returned to their owner, regardless of whether they were in a free state.⁸⁶ The Act further prevented people from aiding fugitive slaves by imposing a fine of five hundred dollars and up to one year in prison if convicted.⁸⁷

The 1793 Act may have been a political victory for the South, but it only caused the Northern states to get more creative.⁸⁸ Refusing to be complicit in the institution of slavery, many Northern states refused to enforce the law; several states passed "Personal Liberty Laws" to protect Black citizens who were being erroneously taken and sold back into slavery.⁸⁹ Personal liberty laws gave accused runaways the right to a jury trial and increased protection for free Black citizens.⁹⁰

⁷⁹ The South relied on slave labor to bolster their economy. Many argued that the abolition of slavery would cause the cotton, tobacco, and rice industries to collapse. *The Southern Argument for Slavery*, U.S. HISTORY, <https://www.ushistory.org/us/27f.asp> [<https://perma.cc/KAG2-N36C>].

⁸⁰ Slavery existed throughout history. The Greeks, Romans, and English all participated in slavery. *Id.*

⁸¹ Many pro-slavery arguments cited to the Ten Commandments, stating: "Thou shalt not covet thy neighbor's house, . . . nor his manservant, nor his maidservant." *Id.* In addition, "[i]n the New Testament, Paul returned a runaway slave, Philemon, to his master, and, although slavery was widespread throughout the Roman world, Jesus never spoke out against it." *Id.*

⁸² *See, e.g., Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 568 (1857) (finding that slaves were the property of their owners, and that all Black citizens—not just slaves—had no legal standing), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

⁸³ *See infra* text accompanying notes 118–120.

⁸⁴ Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864) (providing for the seizure or arrest of "fugitive[s] from labour").

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133, 1137–40 (2012).

⁸⁹ *See generally id.* The enactment of the Fugitive Slave Act resulted in many free Black citizens being illegally captured and sold into slavery. For example, Solomon Northup, a freeborn Black musician, was kidnapped in Washington, D.C. in 1841. Northup spent twelve years enslaved in Louisiana before winning back his freedom in 1853. *See generally* SOLOMON NORTHUP & DAVID WILSON, *TWELVE YEARS A SLAVE* (1853).

⁹⁰ *See* Baker, *supra* note 88, at 1149–51.

The Supreme Court took up the question of personal liberty laws in 1842.⁹¹ In *Prigg v. Pennsylvania*,⁹² a Black woman named Margaret Morgan, who was not formally emancipated at the time, escaped from Maryland to Pennsylvania.⁹³ In an effort to bring Morgan back to Maryland, Edward Prigg, an attorney, was duly appointed to capture her.⁹⁴ After returning to Maryland with Morgan, however, Prigg was convicted by a Pennsylvania court for violating Pennsylvania's 1788 and 1826 non-extradition laws.⁹⁵ In an opinion by Justice Story, the Supreme Court held that the two Pennsylvania laws violated both Article IV, Section 2 of the Constitution and the Fugitive Slave Act of 1793.⁹⁶ The Court's reasoning rested in large part on the Supremacy Clause, asserting that the Pennsylvania laws could not prevail when Congress had already spoken on the issue.⁹⁷ Despite the Supreme Court's ruling, the 1793 Act remained largely unenforced in the Northern states.⁹⁸ Because of this, thousands of fugitive slaves continued to pour into free states via networks like the Underground Railroad.⁹⁹

Southern states became increasingly frustrated by the North's refusal to enforce the Act.¹⁰⁰ In an attempt to quiet early calls for secession, Senator Henry Clay, representing the South, and Senator Daniel Webster, representing the North, introduced a group of bills, including the Fugitive Slave Act of 1850¹⁰¹ (which abolitionists often referred to as the "Bloodhound Bill"¹⁰²). Among other things, the new Act forcibly compelled "all good citizens" to assist in the capture of runaway slaves and increased the penalties for aiding anyone considered a fugitive.¹⁰³ The

⁹¹ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540–41 (1842) (asking two questions: (1) whether Pennsylvania's extradition law violates the U.S. Constitution; and (2) whether Pennsylvania's law violates the Fugitive Slave Act of 1793 as applied by the Supremacy Clause).

⁹² *Id.*

⁹³ *Id.* at 539–40.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 540–41.

⁹⁷ *Id.* at 542 ("Where Congress [has] exclusive power over a subject, it is not competent for state legislation to add to the provisions of Congress on that subject.").

⁹⁸ *The Fugitive Slave Act of 1850*, 34 BILL OF RTS. IN ACTION (Constitutional Rights Foundation, Los Angeles, Cal.), 2019, at 5–6, <https://www.crf-usa.org/images/pdf/Fugitive-Slave-Law-1850.pdf> [<https://perma.cc/Y23K-S54D>] (discussing the circumstances surrounding the 1793 Fugitive Slave Act and the subsequent enactment of the 1850 Fugitive Slave Act).

⁹⁹ See *id.* at 5 (noting the importance of the Underground Railroad in guiding escaped slaves to refuge in the North).

¹⁰⁰ *Id.*

¹⁰¹ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (expanding the power to return allegedly fugitive slaves); see also *The Fugitive Slave Act of 1850*, *supra* note 98.

¹⁰² See MARGARET WASHINGTON, *SOJOURNER TRUTH'S AMERICA* 191–205 (2009) ("The Bloodhound Bill and Intensified Activism").

¹⁰³ See *The Fugitive Slave Act of 1850*, *supra* note 98, at 6.

1850 Act also attempted to circumvent the North's legal strategy by denying enslaved people the right to a jury and placing individual cases in the hands of the federal government.¹⁰⁴ Despite the stronger provisions, the 1850 Fugitive Slave Act was met with even more impassioned criticism and resistance.¹⁰⁵

B. *Secession and the Rise of Citizen's Arrest*

In the wake of Abraham Lincoln's election and the ongoing controversy surrounding slavery, delegates from Georgia met in November of 1860 to debate the possibility of secession.¹⁰⁶ Emancipation and the Fugitive Slave Acts were recurring and prominent themes in the speeches made in support of secession.¹⁰⁷ Many of those speeches espoused fatalistic claims that emancipation would ruin their economy, way of life, and harm working class white people.¹⁰⁸ On February 4, 1861, representatives from Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina met in Montgomery, Alabama with representatives from Texas arriving later, to form the Confederate States of America.¹⁰⁹ Former Secretary of War, then Mississippi Senator, Jefferson Davis, was elected Confederate President.¹¹⁰ The former Georgia Governor and Congressman, Alexander H. Stevens, became Vice President.¹¹¹

Many politicians commanded influence over the newly created Confederacy. None, however, was more influential in Georgia politics than Thomas R.R. Cobb.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 6–8.

¹⁰⁶ See generally WILLIAM W. FREEHLING & CRAIG M. SIMPSON, *SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860* (1992). President Lincoln first proposed emancipation in July of 1862. He issued the preliminary Emancipation Proclamation on September 22, 1862. The preliminary Proclamation stipulated that, if the Southern states did not cease their rebellion by January 1, 1863, then the Proclamation would go into full effect. When the Confederacy did not yield, Lincoln issued the final Emancipation Proclamation on January 1, 1863. See Patricia Murphy, *Opinion: The Ugly Past of Georgia's Citizen's Arrest Law*, ATLANTA J.-CONST. (Feb. 17, 2021), <https://www.ajc.com/politics/opinion-the-ugly-past-of-georgias-citizens-arrest-law/FTMNUJSNPREYBBLNZC56SZIY7U/> [<https://perma.cc/QX86-CBEB>].

¹⁰⁷ FREEHLING & SIMPSON, *supra* note 106, at xiii–xix. Seven formal speeches were made during the convention, both for and against secession. Thomas R.R. Cobb, Robert Toombs, Henry L. Benning, and Joseph E. Brown all made speeches in favor of secession. Alexander H. Stephens, Benjamin H. Hill, and Herschel V. Johnson all made speeches in favor of remaining in the Union. All of the participants were keenly aware of the fact that Northern emancipation and lack of enforcement of the Fugitive Slave Act would have a detrimental effect on their property and their livelihood. *Id.*; see also William L. Barney, *Resisting the Republicans: Georgia's Secession Debate*, 77 GA. HIST. Q. 71, 72–73 (1993).

¹⁰⁸ Barney, *supra* note 107, at 72–74.

¹⁰⁹ JEFFERSON DAVIS, *A SHORT HISTORY OF THE CONFEDERATE STATES OF AMERICA* 59 (1890).

¹¹⁰ *Id.* at 60.

¹¹¹ *Id.*

Cobb played a key role in shaping the legal and political landscape of pre-secession and Civil War-era Georgia.¹¹² Thoroughly established in the public discourse, Cobb served as an attorney, law professor, Georgia Supreme Court Reporter, and staunch proponent of slavery.¹¹³ Noted as the most significant proslavery scholar, Cobb wrote a treatise entitled, *An Inquiry into the Law of Negro Slavery in the United States of America*.¹¹⁴ This lengthy writing articulates the various ways in which Antebellum Southern lawyers and judges could use their influence to support slavery.¹¹⁵ The tome detailed documentation on the emancipation of slaves across the world.¹¹⁶ One of Georgia's foremost legal authorities, Cobb continued to make speeches addressing the "horrible" consequences that would follow emancipation, just as he drafted and compiled Georgia's 1861 statute.¹¹⁷

Cobb and other pro-slavery advocates emphatically insisted on the justice and morality of slavery.¹¹⁸ Cobb wrote:

[T]his inquiry into the physical, mental, and moral development of the negro race, seems to point them clearly, as peculiarly fitted for a laborious class. Their physical frame is capable of great and long-continued exertion. Their mental capacity renders them incapable of successful self-development, and yet adapts them for the direction of the wiser race. Their moral character renders them happy, peaceful, contented, and cheerful in

¹¹² See generally WILLIAM B. McCASH, THOMAS R.R. COBB: THE MAKING OF A SOUTHERN NATIONALIST (1983).

¹¹³ Thomas R.R. Cobb was also part of a dominant political family in Georgia. His uncle, Howell Cobb "the elder," served as a U.S. Congressman. See WILLIAM J. NORTON, MEN OF MARK IN GEORGIA 443-44 (1912). His brother, Howell Cobb, served as Speaker of the House, Governor of Georgia, Treasury Secretary under President Buchanan, and was one of the founders of the Confederacy. See *Historical Highlights: Speaker of the House Howell Cobb of Georgia*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1851-1900/1868_10_09_Howell_Cobb/ [https://perma.cc/X4RP-29XJ]. Thomas R.R. Cobb's father-in-law, Joseph H. Lumpkin, served as a justice on the Georgia Supreme Court. See David Connolly, *Joseph Henry Lumpkin*, NEW GA. ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/history-archaeology/joseph-henry-lumpkin-1799-1867/> [https://perma.cc/FZ2D-KWRQ]. And his cousin, Thomas W. Cobb, was a U.S. Senator and the namesake of present-day Cobb County in Georgia. See Larry Felton Johnson, *Who Is the "Cobb" in Cobb County?*, COBB CNTY. COURIER (Sept. 12, 2021), <https://cobbcountycourier.com/2021/09/who-is-the-cobb-in-cobb-county/> [https://perma.cc/3LXD-Q7VH].

¹¹⁴ THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *id.* at clxxvi (discussing the Haitian insurrection and revolution following the abolition of slavery).

¹¹⁷ See *supra* note 107 and accompanying text.

¹¹⁸ See *infra* note 121-125 and accompanying text (describing various pro-slavery arguments).

a status that would break the spirit and destroy the energies of the Caucasian or the native American.¹¹⁹

Not only did he believe that slaves were happier in a state of slavery, but he also believed that Black people were “less addicted to crime, and are more healthy and longlived, in a state of slavery than of freedom.”¹²⁰

Although President Lincoln did not preliminarily introduce emancipation until September 1862, southern politicians, including Cobb, knew that it was imminent. Cobb examined the effects of emancipation in other countries and argued that the federal government did not have the power to abolish slavery in the states against their will.¹²¹ In fact, Cobb believed that the countries that already abolished slavery failed due to “their utter ignorance of the [Black] character.”¹²² Under Cobb’s world view, racially-based slavery was the only way to achieve a truly “republican equality.”¹²³ Slavery was not an evil to him, but a positive good that preserved American liberty, without which white freedom in America would be threatened.¹²⁴ Notably, Cobb stated that “so long as two races of men live together . . . all of the superior race shall exercise a controlling power over the inferior . . . Hence have arisen . . . the various police and patrol regulations, giving to white persons other than the master . . . the right of controlling, and . . . correcting slaves.”¹²⁵

Although pro-slavery advocates spoke outwardly of the benefits of slavery and how Black people were content being enslaved, politicians, including Cobb, knew of the slaves’ resistance and continued to enact laws to control their behavior.¹²⁶ Southern states, including Georgia, saw slaves as a “dangerous class” that resisted by running away, committing crimes, and conspiring or revolting against their status as slaves.¹²⁷ Throughout Georgia, senators were introducing bills addressing crime

¹¹⁹ See COBB, *supra* note 114, at 46–47.

¹²⁰ *Id.* at cciv–ccv.

¹²¹ *Id.* at ccix (arguing that countries that abolished slavery saw an increase in crime and illness after emancipation).

¹²² *Id.* at cxcviii.

¹²³ *Id.* at ccxiii.

¹²⁴ Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 75–76 (1999) (“Cobb did not merely collaborate with a system of evil, he worked hard to recast the very notion of evil to remove slavery from within its definition.”).

¹²⁵ COBB, *supra* note 114, at 106. Many of Cobb’s arguments in favor of slavery focused on increased crime. See *id.* Cobb additionally asserted that the proportion of crime committed by Black people in the slaveholding states was less than in non-slaveholding states. *Id.* at cciv.

¹²⁶ Reichel, *supra* note 55, at 54–55 (discussing slave patrol laws).

¹²⁷ *Id.* at 55–56 (noting that conspiracies and revolts began occurring in 1657, making states believe that it was “absolutely necessary” to establish slave patrols).

among the slave population.¹²⁸ In Talbot County, M.J. Mulkey reported a bill entitled, “an act to suppress crime amongst our slaves.”¹²⁹ The idea behind slave patrol laws continued, and mayors were given the power to establish patrols of white male citizens to regulate slaves and free persons of color.¹³⁰

By 1860, it was clear that the Fugitive Slave Acts had become largely unenforceable, and Congress repealed both Acts on June 28, 1864.¹³¹ Their repeal, however, did not allay the continuing fear of abolition held by Southern slave states. Slave patrol laws thus continued in existence beyond the Emancipation Proclamation and until the end of the Civil War. It is no coincidence that, upon the termination of these laws, states began to codify new laws that effectively acted as a replacement to control the lives and actions of Black citizens.

Throughout the secession debates and ultimate creation of the Confederacy, Cobb was also working on a comprehensive statute containing all of Georgia’s state laws.¹³² As of the late 1800s Georgia’s laws had been an amalgamation of Oliver Prince’s *1837 Digest*,¹³³ William Hotchkiss’s *1845 Digest*,¹³⁴ Thomas R.R. Cobb’s *1851 Digest*,¹³⁵ and the common law. Consequently, there was no single source for lawyers and judges to review when attempting to argue or enforce the laws.¹³⁶ This disarray impelled Thomas R.R. Cobb to take it upon himself to redraft the entirety of Georgia law. He formulated the 1861 Code (often called “Cobb’s Code”¹³⁷) by collecting already existing laws and practices and compiling them into one source. Significantly, however, the citizen’s arrest law that appears in the 1861 Code, later to be formally enacted in 1863, appears nowhere in the previous Georgia digests or common law. This lapse likely signifies that Georgia’s citizen’s arrest law—which

¹²⁸ See STATE OF GA., JOURNAL OF THE HOUSE OF REPRESENTATIVES, Annual Sess., at 75 (1861); STATE OF GA., JOURNAL OF THE HOUSE OF REPRESENTATIVES, Annual Sess., at 97, 119 (1862).

¹²⁹ STATE OF GA., JOURNAL OF THE HOUSE OF REPRESENTATIVES, Annual Sess., at 70 (1863).

¹³⁰ *Id.* This belief was not unique to Georgia. A congressman from Delaware wrote a few years later: “For the Negro is not actuated by the same motives as the white man, nor is he deterred from crime except by punishments adapted to the brutal, sensual nature which characterizes him.” CONG. GLOBE, 39th Cong., 1st Sess. 2080–81 (1866) (statement of Rep. John Anthony Nicholson).

¹³¹ *The Fugitive Slave Act of 1850*, *supra* note 98, at 8.

¹³² MCCASH, *supra* note 112, at 56–60.

¹³³ OLIVER H. PRINCE, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA: CONTAINING ALL STATUTES AND THE SUBSTANCE OF ALL RESOLUTIONS OF A GENERAL AND PUBLIC NATURE, AND NOW IN FORCE, WHICH HAVE BEEN PASSED IN THIS STATE, PREVIOUS TO THE SESSION OF THE GENERAL ASSEMBLY OF DEC. 1837 (1837).

¹³⁴ WILLIAM A. HOTCHKISS, A CODIFICATION OF THE STATUTE LAW OF GEORGIA INCLUDING THE ENGLISH STATUTES IN FORCE (1845).

¹³⁵ THOMAS R.R. COBB, A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA, IN FORCE PRIOR TO THE SESSION OF THE GENERAL ASSEMBLY OF 1851 (1851).

¹³⁶ *Id.*

¹³⁷ See Murphy, *supra* note 106.

remained substantially intact until 2021, and which the killers of Ahmaud Arbery invoked in their defense—originated with Thomas R.R. Cobb in 1861.¹³⁸

Cobb's attitude toward Blacks and his ideas about slavery permeated his writing of the Georgia Code. The end of the Civil War left the South with limited options to maintain their way of life, with their greatest fear realized: the rise of a "dangerous class" of Black citizens.¹³⁹ By this time, slave patrols laws had been nullified, the Fugitive Slave Acts had been repealed, and it was now illegal for anyone to own slaves.¹⁴⁰ While Cobb did not explicitly indicate that he included a citizen's arrest provision in the Georgia Code to protect the status quo, he did not have to. His intentions were already eminently clear. Georgia legal expert Timothy Floyd writes: "Protecting slavery was the issue of the day. All who voted for this statute would have been well aware of the 'problem' of runaway slaves and would have had that in mind as they voted on a citizen's arrest law."¹⁴¹ It defies credulity to believe anything other than that Cobb's codification of citizen's arrest acted as a covert effort to control Black citizens without explicitly saying so, effectively perpetuating the slave patrol laws and Fugitive Slave Acts that the Antebellum South had held so dearly.

III. THE RACIALLY MOTIVATED USE OF CITIZEN'S ARREST FOLLOWING EMANCIPATION

Following the Civil War, citizen's arrest statutes were prominently used to support the violence perpetrated on Black people by the Ku Klux Klan.¹⁴² More than 454 documented lynchings of Black men and women occurred in the State of Georgia from 1880 to 1930.¹⁴³ In 1868, just a few years after the codification of the Georgia citizen's arrest law, there were more than 300 cases of Klan violence culminating in the murder or attempted murder of Black citizens.¹⁴⁴ More than 589 lynchings were documented in Georgia between 1877 and 1950.¹⁴⁵

¹³⁸ See E-mail from Meaghan Gray, Reference Assistant at Ga. Hist. Society (Feb. 17, 2022, 2:36 EST) (on file with author).

¹³⁹ See *supra* note 127 and accompanying text.

¹⁴⁰ See Murphy, *supra* note 106.

¹⁴¹ E-mail from Timothy Floyd, Tommy Malone Distinguished Chair in Trial Advocacy and Dir. of Experiential Educ., Mercer Univ. School of Law (Feb. 23, 2022, 11:58 EST) (on file with author).

¹⁴² Alan J. Singer, *Citizen's Arrest: Racist at its Roots*, HIST. NEWS NETWORK (May 24, 2020), <https://historynewsnetwork.org/article/175619> [<https://perma.cc/M27P-4NLA>] (citing the Mary Turner Project database).

¹⁴³ See *id.*; see generally JULIE B. ARMSTRONG, *MARY TURNER AND THE MEMORY OF LYNCHING* (2011).

¹⁴⁴ Singer, *supra* note 142.

¹⁴⁵ *Id.*

Many of these violent attacks were perpetrated in the name of citizen's arrest. On January 22, 1912, three Black men and one Black woman were lynched for allegedly killing a white planter who was sexually abusing Black women and girls.¹⁴⁶ Similarly, on July 25, 1946, two Black couples were dragged from their car and shot on the side of the road by a group of white men making a citizen's arrest.¹⁴⁷ No action was ever taken against the perpetrators in either case.¹⁴⁸

CONCLUSION

The dehumanization and over-criminalization of Black people did not disappear with the abrogation of slave patrol laws, the repeal of the Fugitive Slave Acts, and the Emancipation Proclamation. The deeply rooted racism that permeated Thomas R.R. Cobb's first codification of citizen's arrest in the United States almost 160 years ago must contextualize the use of any law giving private individuals the right to arrest others. The McMichaels seeing a Black man running on a Georgia street and assuming that he was fleeing from the commission of a crime evokes the image of a slave patrol chasing down a fleeing slave. While in my earlier article I did not discuss the racial aspects of the citizen's arrest doctrine, it is clear that citizen's arrest in this country has been *mostly* about race. Coupled with the reality of systemic racism, the perpetuation of citizen's arrest laws provides unwarranted justification for the vigilante justice—or, better said, the vigilante *injustice*—that killed Ahmuad Arbery, Derrick Grant, Kenneth Herring, and so many others. What happened to each of these individuals, under the pretext of citizen's arrest, is nothing short of a modern-day lynching. This point is too obvious to ignore. *Mea culpa, mea culpa, mea maxima culpa.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*