South Carolina Law Review

Volume 72
Issue 4 *Survey of South Carolina Law*

Article 8

Summer 2021

A Legacy of Slavery: The Citizen's Arrest Laws of Georgia and South Carolina

Roger M. Stevens

A LEGACY OF SLAVERY: THE CITIZEN'S ARREST LAWS OF GEORGIA AND SOUTH CAROLINA

Roger M. Stevens*

* J.D. Candidate, May 2022, University of South Carolina School of Law. I would like to extend special thanks to Assistant Public Defender Kathleen Warthen, Richland County Public Defender's Office, for providing the impetus of this Note and for guidance and advice along the way. Associate Dean Susan Kuo, my faculty advisor, and Robert Hurst, my Student Works Editor, provided substantial editorial and creative guidance. I owe a great deal to my family and friends for their patience and advice during the writing process, and especially to my mother, Ilse Stevens, for without her, I would not be here. Finally, thank you to the Editorial Board members of the *South Carolina Law Review* for their countless hours of service, fellowship, and support.

I. INTRODUCTION

The killings of Ahmaud Arbery,[1] Kenneth Herring,[2] and Derrick Grant[3] during citizen's arrests in Georgia and South Carolina illustrate the clear and present danger of citizen's arrest laws. All three of these men were shot and killed by private persons acting under color of state law: the statutory right of private persons to make citizen's arrests.[4]

On February 23, 2020, Ahmaud Arbery was shot and killed while jogging in a Georgia neighborhood after an altercation with two men, Travis McMichael and Greg McMichael. The incident was captured on video by a third individual, William Bryan. The initial district attorney on the case, George Barnhill, believed Bryan and the McMichaels "were following, in 'hot pursuit,' a burglary suspect[, Arbery], with solid first hand probable cause, in their neighborhood, and asking/telling him to stop."[5] Barnhill also believed the arrest was "perfectly legal" because "their intent was to stop and hold this criminal suspect until law enforcement arrived."[6] Barnhill refused to prosecute Arbery's killers, concluding "there [was] insufficient probable

---

1. *See* Letter from George E. Barnhill, Dist. Att'y, Off. of the Dist. Att'y Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep't (Feb. 23, 2020) (on file with Waycross Judicial Circuit) [hereinafter Barnhill Letter].

2. Kenneth Herring was shot and killed on May 7, 2019, by Hannah Payne in Clayton County, Georgia after an incident that Payne's attorney characterized as "an act of self-defense in the course of a citizen's arrest." 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/F2XJ-EFFY]. Payne followed "Herring after he left scene of a traffic collision . . . and blocked his car at an intersection roughly a mile down the road, where she confronted him and told him to return to the crash scene . . . ." *Id.* Payne then "pulled a handgun on [Herring] . . . [and] moments later, her attorney says, an altercation between Payne and Herring ended in her handgun discharging, fatally wounding Herring." *Id.*

3. Fifteen-year old Derrick Grant was shot and killed on January 17, 2018, in North Charleston, South Carolina, during an attempted citizen's arrest. Andrew Knapp, *North Charleston Police Will Not Pursue Charge Against Man Who Killed Unarmed Boy, 15, in Car Theft*, POST & COURIER (Sept. 14, 2020), 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/59UG-HULW]. On January 16, Quadarrel Morton "reported to police . . . that his girlfriend's Hyundai had been stolen outside a Rivers Avenue convenience store." *Id.* The next day, the car was spotted "near the home where the girlfriend and Morton live." *Id.* Morton said he saw the car, he headed for it armed with a gun, "[h]e saw someone go inside the car with a key, and he told the person to stop . . . ." *Id.* Morton said "[Grant] reached for something . . . [and] "I fired once . . . I saw him reach again. I fired one more time." *Id.* The police department believed "Morton was within his legal right to make a citizen's arrest over the stolen car . . . ." *Id.*

4. *See* Barnhill Letter, *supra* note 1; *supra* notes 2–3 and accompanying text.

5. Barnhill Letter, *supra* note 1, at 2.

6. *Id.*

cause . . . ."[7] After a public outcry, the Georgia Bureau of Investigation assumed control over the investigation, and Bryan and the McMichaels were indicted on multiple charges, including felony murder.[8]

The killing of Ahmaud Arbery and the societal outrage that followed pushed the Georgia and South Carolina legislatures to closely examine their citizen's arrest statutes.[9] Citizen's arrest—the ability of private persons to arrest each other under certain conditions—has a long and well-documented history as a component of English common law, but state citizen's arrest laws are not nearly as old.[10] Georgia codified citizen's arrest in 1863, and South Carolina followed in late 1865 by including citizen's arrest as part of its Black Code—a series of laws meant to allow whites to control newly freed slaves.[11]

Why look at Georgia and South Carolina together when examining citizen's arrest statutes? The answer revolves around the dark history of slavery in America. By the early 1700s, American colonists in South Carolina were looking for a cash crop that "would grow well in the moist, semitropical country bordering their coastline[,]" and they settled on rice.[12] South Carolina planters had limited to no experience with the cultivation of rice but found this expertise among African slaves.[13] Plantation owners procured slaves from all over Africa, "but they greatly preferred slaves from what they called the

---

7. *Id.* at 3. Bryan, although not speaking on behalf of all defendants, asserted in a pre-hearing memorandum of law that "[t]he fatal shooting appear[ed] to have taken place as part of an attempt by the McMichael defendants to effectuate a citizens [sic] arrest of Ahmaud Arbery for the offense of criminal attempt to commit burglary." Pre-Hearing Memorandum of Law - Citizens Arrest at 1, Georgia v. Bryan, No. 20-CR-00433 (Ga. Sup. Ct. filed July 17, 2020).

8. General Bill of Indictment at 1, *Bryan*, No. 20-CR-00433.

9. *See, e.g.*, Emma Hurt, *Georgia Lawmakers Begin Review of Controversial Citizen's Arrest Law*, WABE (July 13, 2020), https://www.wabe.org/lawmakers-begin-review-of-controversial-citizens-arrest-law/ [https://perma.cc/3NTW-YKTW]; Adam Benson, *SC's Citizen's Arrest Law Is 154 Years Old with No Record of Success. So Why Drop It Now?*, POST & COURIER (Nov. 30, 2020), https://www.postandcourier.com/politics/scs-citizens-arrest-law-is-154-years-old-with-no-record-of-success-so-why/article_9358322c-9f6b-11ea-9e1c-8f3442d7b5c.html [https://perma.cc/CC2Q-WHSP].

10. *See* Seth Stoughton, *Ahmaud Arbery's Killing Puts a Spotlight on the Blurred Blue Line of Citizen's Arrest Laws*, SALON (May 30, 2020, 12:36 AM), https://www.salon.com/2020/05/29/ahmaud-arberys-killing-puts-a-spotlight-on-the-blurred-blue-line-of-citizens-arrest-laws_partner/ [https://perma.cc/PW8E-XCRP]; *see also* Talib Visram, *The Troubling History of Citizen's Arrests—from Slave Patrols to Ahmaud Arbery to ICE*, FAST CO. (July 20, 2020), https://www.fastcompany.com/90528764/the-troubling-history-of-citizens-arrests-from-slave-patrols-to-ahmaud-arbery-to-ice (last visited May 4, 2021).

11. *See* THE CODE OF GEORGIA § 4604 Sec. III (1861); Act No. 4731, para. XIII, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 253–54 (1873). For an explanation of why the Code of Georgia, first passed in 1860, actually became law in 1863, see *infra* text accompanying note 140.

12. Joseph A. Opala, *The Gullah: Rice, Slavery, and the Sierra Leone-American Connection*, YALE UNIV., https://glc.yale.edu/gullah-rice-slavery-and-sierra-leone-american-connection [https://perma.cc/ZR49-ZTNX].

13. *See id.*

'Rice Coast' or 'Windward Coast'—the traditional rice-growing region of West Africa . . . ."[14]

Rice cultivation is extremely tough, labor-intensive work, and without slavery, the crop probably would not have taken hold in South Carolina.[15] Over time, South Carolina planters grew wealthy and began to look for expansion opportunities, eventually settling on the Georgia Lowcountry.[16] There was a problem with this plan, though: in the early 1700s, Georgia prohibited slavery.[17]

Despite this prohibition, South Carolina planters decided to "recreate the slave-based plantation economy of South Carolina in the Georgia Lowcountry[,]" move to Georgia, and push the Georgia legislature to allow slavery.[18] In the mid-1700s, the Georgia legislature acquiesced, passing a new slave code "that was virtually identical to South Carolina's."[19] South Carolina planters not only paved the way for slavery in Georgia but also introduced and encouraged its use. It is this dark history that forever links Georgia and South Carolina and directly led to the passage of citizen's arrest laws during the Civil War era.

Citizen's arrest laws were a key component of Georgia's and South Carolina's efforts to control their black populations—both enslaved and free—in the 1860s, and their current status as enforceable law is a continual reminder of slavery's legacy.[20] The citizen's arrest laws of these states are not what they ostensibly appear to be, and existing statutory language fails to provide their original intent. Exploring historical context and the intended meaning of statutory language is essential to understanding why Georgia and South Carolina initially codified citizen's arrest laws.

This Note explores the origin and use of citizen's arrest laws in Georgia and South Carolina. Part II discusses the current citizen's arrest laws in these

---

14. *Id.*

15. *See* John H. Tibbetts, *Carolina's Gold Coast: The Culture of Rice and Slavery*, 28 COASTAL HERITAGE, Winter 2014, at 3, 12 (2014).

16. *See* Betty Wood, *Slavery in Colonial Georgia*, NEW GA. ENCYC. (Sept. 29, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/slavery-colonial-georgia [https://perma.cc/XXS7-Y2V5].

17. In the early 1700s, Georgia attempted to prohibit slavery for a variety of reasons, including proximity to Spanish Florida, where the Spanish offered freedom to fugitive slaves as a way of destabilizing neighboring British colonies. *See id.* "Georgia was unique among Britain's American colonies, as it was the only one to attempt to prohibit black slavery as a matter of public policy." *Id.* Spanish Florida had a "policy of granting asylum to slaves fleeing British masters[,]" and this was the likely goal of the Stono Rebellion participants. Jane Landers, *Spanish Sanctuary: Fugitives in Florida, 1687-1790*, 62 FLA. HIST. Q. 296, 297 (1984); *see* The Eds. of Encyc. Britannica, *Stono Rebellion*, ENCYC. BRITANNICA (Sept. 2, 2020), https://www.britannica.com/event/Stono-rebellion [https://perma.cc/RJ2M-K3GW].

18. Wood, *supra* note 16.

19. *Id.*

20. *See* discussion *infra* Parts III–IV.

states and includes a review of relevant case law. Because Georgia and South Carolina relied on slave labor as their primary economic engine in the 1860s, Part III explores the methods developed by each state to control their slave populations. Part IV examines the codification of each state's citizen's arrest laws with a particular focus on the South Carolina Black Code. Finally, Part V explores the legacy of slavery and describes how continued use of citizen's arrest laws are an ever-present reminder of their origin.

II. CITIZEN'S ARREST LAWS IN GEORGIA AND SOUTH CAROLINA

Section 17-4-60 of the Georgia Code was codified in 1860 and enacted in 1863.[21] It remains a part of Georgia law to the present day, unchanged except for punctuation.[22] This statute gives private persons and sworn state law enforcement officers the same statutory arrest authority.[23] As long as the statute's elements are satisfied, Georgia courts interpret § 17-4-60 as authorizing arrests for both misdemeanor and felony offenses.[24] Although physical touch is not necessary to effectuate an arrest in Georgia, once an arrest is made by a private person, that person is required by law to take the arrestee to either a judicial officer or peace officer.[25] Much of Georgia's case law on citizen's arrest concerns the reasonable use of force—in part due to the nature of the law itself.[26]

South Carolina Code §§ 17-13-10 and 17-13-20 are the current citizen's arrest statutes in South Carolina.[27] These statutes were first codified in 1865,

---

21. *See infra* note 140 and accompanying text; GA. CODE ANN. § 17-4-60 (West, Westlaw through 2020 Legis. Sess.).

22. *See* 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.").

23. McPetrie v. State, 587 S.E.2d 233, 237 (Ga. Ct. App. 2003) ("A private [person] has quite as much power to arrest a fugitive felon, where the emergency calls for immediate action, as a public officer, and while so doing, is equally under the protection of the law." (quoting Johnson v. Jackson, 230 S.E.2d 756, 760 (Ga. Ct. App.))).

24. Young v. State, 233 S.E.2d 750, 752 (Ga. 1977) ("It is a well-settled principle of the law of this state, and, as far as we are advised, of all other jurisdictions, that a private individual cannot make an arrest for a misdemeanor, unless the offense is committed in his presence or within his immediate knowledge." (quoting Delegal v. State, 35 S.E. 105, 106 (Ga. 1899))).

25. *See* §§ 17-4-1, -61.

26. *See infra* Section II.A (providing examples of Georgia case law regarding reasonable use of force).

27. Currently, South Carolina Code § 17-13-10 reads: "Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be

and few changes have been made to them, with the exception of a substantial rewrite in 1866.[28] After this rewrite, only one significant change has been made to § 17-13-10: the ability to make a citizen's arrest for larceny.[29] This 1898 revision allowed for shopkeeper's privilege—the statutory authority to arrest shoplifters.[30] The final change to § 17-13-10 was made in 1952, improving the statute's readability but making no substantive changes.[31]

Between 1866 and 1952, no major changes were made to the other statutory provision for citizen's arrest, codified at § 17-13-20 of the South Carolina Code. In 1952, the South Carolina legislature slightly altered the statute for readability but, again, made no substantive changes.[32] The only significant change to § 17-13-20 took place in 1995 when "has entered a dwelling house with evil intent"[33] was replaced with "has entered a dwelling house without express or implied permission."[34]

Modern precedent pertaining to citizen's arrest laws in Georgia and South Carolina tends to coalesce around three areas: reasonable use of force during a citizen's arrest; out-of-jurisdiction arrests by law enforcement officers; and other uses of the laws, such as shopkeeper's privilege.

---

dealt with according to law." S.C. CODE ANN. § 17-13-10 (2003). South Carolina Code § 17-13-20 reads:

> A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person: (a) has committed a felony; (b) has entered a dwelling house without express or implied permission; (c) has broken or is breaking into an outhouse with a view to plunder; (d) has in his possession stolen property; or (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

§ 17-13-20.

28. *See infra* Part IV (discussing the initial language and subsequent revisions of these statutes).

29. *See* State v. McAteer, 340 S.C. 644, 650, 532 S.E.2d 865, 868 (2000).

30. *See* An Act to Amend Section 1 of the Criminal Statutes of South Carolina, Volume II of the Revised Statutes of 1893, Relating to the Arrest of a Felon, ACTS AND JOINT RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 809 (1898).

31. CODE OF LAWS OF SOUTH CAROLINA § 17-251 (1952).

32. *See* § 17-251.

33. § 17-252.

34. S.C. CODE ANN. § 17-13-20 (Supp. 1996). The 1995 change to § 17-13-20 was proposed because it was "difficult for homeowners to protect their property and family because of the law's [previous] requirement that evil intent must be established." Warren Bolton, *Bill Would Boost Residents' Power to Arrest Intruders*, THE STATE, May 3, 1995, at B4. The change to the law meant that "a resident would no longer have to prove that a trespasser showed 'evil intent' before attempting to arrest the intruder." *Id.* Additionally, "residents would be able to use whatever force is necessary, even to the point of killing the trespasser." *Id.*

A. Reasonable Use of Force During a Citizen's Arrest

In Georgia, Georgia Code § 17-4-20 governs the reasonable amount of force law enforcement officers can use when making an arrest. Notably, that statute does not at all refer to private persons making citizen's arrests.[35] Certified law enforcement officers in Georgia are statutorily required to receive ongoing use-of-force training.[36] Remarkably, this training is not similarly required for private persons making a citizen's arrest under Georgia law.

On numerous occasions, the Georgia Supreme Court has stepped in to determine the reasonable use of force during citizen's arrests.[37] In *Hayes v. State*, the court held: "For a citizen's arrest to be valid, the citizen must use no more force than is reasonable under the circumstances."[38] In *Carter v. State*, the court clarified that, if use of force during a citizen's arrest is unreasonable, the arrest is illegitimate.[39] Later, *Patel v. State* clearly demonstrated the dangers of authorizing private persons to arrest each other.[40]

In *Patel*, Viral Patel owned and operated a convenience store and "used an unattached building near the store for storage . . . ."[41] Thieves targeted the

35. *See* GA. CODE ANN. § 17-4-20 (West, Westlaw through 2020 Legis. Sess.) (making no reference to private persons performing a citizen's arrest and referring only to law enforcement officers and peace officers). Courts, however, have used this statute to extend the same restrictions to private persons. *See* Prayor v. State, 447 S.E.2d 155, 156 (Ga. Ct. App. 1994).

36. § 17-4-20(e) (requiring all law enforcement and peace officers in Georgia "be provided with a copy of this Code section . . . and the requirements of this Code section should be offered as part of at least one in-service training program each year conducted by or on behalf of each law enforcement department and agency in this state"). No mention is made of private persons making arrests. *See supra* text accompanying note 35.

37. *Cf.* Haynes v. State, 405 S.E.2d 660, 662–63, 665 (Ga. 1991) (stating that, when Joe Turner attempted to affect a citizen's arrest of a drug dealer with an AR-15 rifle but shot and killed the wrong person, the Georgia Supreme Court concluded there was "no evidence that a citizen's arrest was justified[,]. . . [n]o felony was committed by the victim in Turner's presence or in his immediate knowledge[,]" and Turner "had no grounds for suspicion that the victim was an escaping felon").

38. *Id.* at 665.

39. 506 S.E.2d 124, 127 (Ga. 1998) ("Although a private person may make a citizen's arrest under [Georgia Code] § 17-4-60, only force that is reasonable under the circumstances may be used to restrain the individual arrested . . . [and] the use of unreasonable force . . . could not have been part of a legitimate citizen's arrest." (footnote omitted)).

40. *See* 620 S.E.2d 343 (Ga. 2005).

41. *Id.* at 344. In *Patel*, defendant Viral Patel "raised a claim of ineffective assistance of trial counsel." *Id.* (citing Patel v. State, 603 S.E.2d 237, 242 (Ga. 2004)). Patel "assert[ed] that trial counsel was ineffective for failing to request a charge on citizen's right to arrest a felon under OCGA § 17-4-60." *Id.* at 346. On appeal, "[t]rial counsel testified that he did not request such a charge because there was no evidence at trial that Patel was attempting to effectuate an arrest." *Id.* The Georgia Supreme Court affirmed the trial court's finding that Patel's trial counsel rendered reasonably effective assistance of counsel." *Id.* at 344.

storage building, and one night, Patel armed himself with a pistol and decided to do something about it.[42] Hiding inside the storage building, Patel "heard voices outside the building followed by the sound of breaking plywood . . . [and] shouted, 'Halt . . . .'"[43] After a few minutes, Patel fired into the darkness, shooting one victim in the face and killing him.[44] The Georgia Supreme Court concluded Patel made no effort to arrest the victim, and for this reason, he could not use the citizen's arrest statute as a defense.[45]

Similarly, in *Prayor v. State*, Charles Prayor, "watching through a window in his house, saw a 15-year-old boy break into his truck."[46] Prayor "went outside and chased away the teenager before reentering his house to call 911."[47] He then "retrieved his .357 magnum, got into his car, and tracked down the teenager at a nearby school."[48] Prayor ordered the teenager to stop, but "[t]he teenager did not stop at defendant's command, and [Prayor] fired what he termed a warning shot which struck the teen in the back or side, paralyzing him."[49] The Court of Appeals of Georgia held that Prayor's "life was never in danger, he had already called the police, and he reinitiated the chase after retrieving a gun from his home[,]" making the use of deadly force unreasonable.[50]

In South Carolina, the South Carolina Supreme Court ruled that whether force used during a citizen's arrest was reasonable is a factual question best left to the jury.[51] *State v. Cooney*, a case representative of this stance, is informative. Thomas Cooney and his partner James Hale owned a "plumbing supply business" that had been "burglarized several times and copper tubing [had been] taken."[52] After one such robbery, Cooney and Hale discovered a

42. *See id.*

43. *Id.*

44. *See id.*

45. *Id.* at 346 ("Patel did not attempt to restrain the victim; rather, he shot and killed him minutes after commanding him to halt . . . [and] there was no evidentiary support in this case to warrant a charge on OCGA § 17-4-60.").

46. 447 S.E.2d 155, 155 (Ga. Ct. App. 1994).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Lee Ann Welch, *The Use of Deadly Force in a Citizen's Arrest*, 48 S.C. L. REV. 101, 101 (1996).

52. State v. Cooney, 320 S.C. 107, 109, 463 S.E.2d 597, 598 (1995). A South Carolina Court of Appeals case, *State v. Nall*, attempted to resolve this issue as well. *See* 304 S.C. 332, 337, 404 S.E.2d 202, 205 (Ct. App. 1991). In *Nall*, a private person attempted to make a citizen's arrest of two robbery suspects. *See id.* at 334–36, 404 S.E.2d at 204. On appeal from the criminal trial, the South Carolina Court of Appeals held that "the State's evidence failed to establish a lawful citizen's arrest for two reasons." *Id.* at 341, 404 S.E.2d at 207. First, the private person in question "ha[d] no lawful authority to arrest for a misdemeanor not committed in his

hiding place nearby where thieves had hidden copper tubing, likely planning to retrieve it at some point.[53] Armed with pistols, Cooney and Hale waited and watched the hiding place.[54] A short time later, Carlton Williams approached it and was arrested by Cooney and Hale.[55] As the three walked back toward the store, Williams, who was unarmed, ran away and was shot by Cooney and Hale.[56]

At trial, Cooney attempted to use citizen's arrest as a defense, but the trial judge ruled that "use of deadly force to apprehend a suspect is not justified where the suspect poses no immediate threat to the person making the arrest and others."[57] On appeal, the South Carolina Supreme Court reversed, holding "it was reversible error to not charge the jury on . . . the use of reasonable force . . . ."[58] *Cooney*, especially when considered with the preceding Georgia cases, illustrates the inherent danger of arrests by armed, mostly untrained private citizens.

B. Out-of-Jurisdiction Arrests by Law Enforcement Officers

Law enforcement officers in Georgia and South Carolina often utilize citizen's arrest statutes when making arrests outside of their jurisdiction.[59] This should not be construed, however, to assume that a South Carolina or Georgia law enforcement officer could cross state lines and make an arrest in another state. In Georgia, when police officers make an arrest outside of their sworn jurisdiction, they are no different than a private person making a citizen's arrest and cannot exercise powers that are granted solely to certified

---

presence." *Id.* at 341, 404 S.E.2d at 208. Second, the person initiating the citizen's arrest "failed to give notice that he was making a citizen's arrest . . . [and a]s a result, the arrest was not lawful." *Id.* The Court of Appeals further explained that "reasonable notice of his purpose to arrest" must be given "together with a demand that the suspect submit to arrest." *Id.* at 339, 404 S.E.2d at 207.

53. *See Cooney*, 320 S.C. at 109, 463 S.E.2d at 598.

54. *See id.*

55. *See id.*

56. *See id.*

57. *Id.* at 110, 463 S.E.2d at 598.

58. *Id.* at 111, 463 S.E.2d at 599; *see also supra* note 52. After this decision, "the state chose not to pursue further prosecution of Cooney." F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 634 (2014).

59. *See, e.g.*, Bacon v. State, 820 S.E.2d 503, 505–06 (Ga. Ct. App. 2018) (holding that officers reserve the right to act as private persons in effecting a citizen's arrest); Christine Fernicola, *State v. McAteer: Must Extrajurisdictional Arrest Authority Come at the Expense of Political Accountability*, 50 S.C. L. REV. 917, 917 (1999) ("[P]olice officers acting outside their jurisdictions retain their status as private citizens, so any arrests by such officers are citizens' arrests.").

law enforcement officers.[60] South Carolina handles out-of-jurisdiction arrests in a similar way. In South Carolina, as long as the arrest is authorized under the citizen's arrest statute, it is typically valid.

For example, in *State v. McAteer*, "an off-duty police officer arrested James McAteer for driving under the influence of alcohol." Although the trial court "found the arrest to be valid as a citizen's arrest for a misdemeanor involving a breach of the peace[,]" the key issue was that the officer first observed McAteer outside of his jurisdiction and, as a result, had no law enforcement authority to arrest or detain him.[61] Evaluating this scenario, the South Carolina Supreme Court ruled "there is no common law right to make warrantless citizen's arrests of any kind and that such rights as exist are created by statute in South Carolina."[62] Because South Carolina law only authorizes citizen's arrests for misdemeanor larceny, McAteer's arrest was unlawful, and his conviction was reversed.[63]

C. Shopkeeper's Privilege

The Georgia and South Carolina citizen's arrest statutes are also used to detain suspected shoplifters under a doctrine known as "shopkeeper's privilege." Shopkeeper's privilege ostensibly "allows a retail merchant to detain suspected shoplifters until their guilt can be definitively ascertained."[64] Notably, whereas Georgia Code § 17-4-60 authorizes arrest, conduct

60. *See Bacon*, 820 S.E.2d at 505 (stating that, when a Georgia law enforcement officer makes an arrest outside of their jurisdiction and is "acting as a private person effecting a citizen's arrest as opposed to acting as a law enforcement officer, he [is] without certain authority otherwise conferred only upon law enforcement officers").

61. Fernicola, *supra* note 59, at 917; *see* State v. McAteer, 340 S.C. 644, 646–47, 532 S.E.2d 865, 865–66 (2000) (finding that the arrest "occurred in the daytime and involved a misdemeanor, not a felony").

62. *McAteer*, 340 at 650, 532 S.E.2d at 868.

63. *See id.* at 651, 532 S.E.2d at 868 (concluding that, under "§ 17-13-10(c), permitting warrantless misdemeanor arrests for any 'view of a larceny committed'. . . is the only circumstance when a citizen can make a daytime misdemeanor arrest"). Another South Carolina case, *State v. Boswell*, also dealt with law enforcement officers making an arrest outside of their jurisdiction. *See* 391 S.C. 592, 599, 707 S.E.2d 265, 268–69 (2011). In *Boswell*, the South Carolina Supreme Court determined whether law enforcement officers acting as private persons (as they were operating out of their jurisdiction) executed a proper citizen's arrest. *See id.* at 599–600, 707 S.E.2d at 268–69. The court found that "Boswell's actions may have supported an arrest for . . . a misdemeanor . . . [but b]ecause the Lexington County officers did not witness Boswell commit a felony, they could not have effectuated a citizen's arrest of Boswell under *McAteer*." *Id.* at 604, 707 S.E.2d at 271 (footnote omitted).

64. Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557, 584 (2016).

protected by the shopkeeper's privilege can be considered either a detention or arrest under Georgia Code § 51-7-60.[65]

South Carolina law handles shopkeeper's privilege a bit differently because it gives shopkeepers the ability to "delay" suspected shoplifters solely for purposes of investigating the ownership of merchandise.[66] After such delay, which is effectively a detention, shopkeepers are authorized to make a citizen's arrest for larceny under § 17-13-10 of the South Carolina Code.[67]

III. CONTROL: SLAVERY AND THE BLACK POPULATION IN GEORGIA AND SOUTH CAROLINA

The case law above illustrates modern applications of citizen's arrest statutes in Georgia and South Carolina. However, case law and statutory language on their own do not tell the whole story. Cultural context and legislative history are essential elements in understanding the origin of these laws, and they deserve careful consideration.

The killing of Ahmaud Arbery is just one example of the significant, yet avoidable, societal risk of placing arrest power in the hands of private persons. A literal reading of citizen's arrest laws fails to explain the cultural context and legislative history of these laws and says nothing regarding their purpose as state policy. Who wrote them and in what context? What were citizen's arrest laws originally intended to accomplish? These questions demand answers, especially because these statutes are being used by private citizens to deprive others of their liberty and, all too often, their lives. The Georgia and South Carolina citizen's arrest laws originated during the Civil War era, and this period is the optimal starting point.

The practice of slavery was one of the critical elements contributing to the development of citizen's arrest laws in both states. Slavery was very much about race: whites in these states purchased blacks, predominantly from Africa, and imported them into the United States to serve at their command.[68] This was white supremacy by force, and it held true until the Confederacy's defeat in the Civil War abolished the practice. The end of the Civil War brought forced emancipation and an occupying military force, with the U.S. Army enforcing martial law.[69]

Rice cultivation, a key economic driver for Georgia and South Carolina, required a tremendous slave labor force.[70] The slave populations of both states

65. G.A. CODE ANN. § 51-7-60 (2014).
66. S.C. CODE ANN. § 16-13-140 (2015).
67. *See supra* text accompanying note 27.
68. *See* EQUAL JUST. INITIATIVE, SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE 9–10 (2020).
69. *See infra* note 108 and accompanying text.
70. *See* Tibbetts, *supra* note 15, at 11.

became considerably larger than their white populations.[71] This difference required a system of control, leading Georgia and South Carolina to rely on a hybrid model of law enforcement: local law enforcement, state militia, and slave patrols—often known simply as "the patrol."[72] Slave states needed this hybrid model for many reasons, but chief among them was the need to monitor slaves, prevent uprisings, and hunt down and return fugitive slaves to their owners.[73] White control of slaves—enforced with slave patrols and other state and local law enforcement—was critical to maintaining the hierarchy and social order in Georgia and South Carolina.

A. Slavery as a Key Economic Enabler

The English colony "Carolina," from which South Carolina would eventually separate, was founded in 1670.[74] Most of the initial colonists came from the Caribbean island of Barbados, an English slaveholding colony.[75] During this period, Barbados became one of the wealthiest English colonies in the New World by developing sugar into a lucrative agricultural export.[76] Slavery was an essential component that made the labor intensive sugar economy of Barbados a profitable enterprise, and by its very definition,[77]

---

71. *See* Jeffrey Robert Young, *Slavery in Antebellum Georgia*, GA. ENCYC. (Sept. 30, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/slavery-antebellum-georgia [https://perma.cc/ZAC6-J7YP]; Brian Hicks, *Slavery in Charleston: A Chronicle of Human Bondage in the Holy City*, POST & COURIER (Aug. 20, 2020), https://www.postandcourier.com/news/special_reports/slavery-in-charleston-a-chronicle-of-human-bondage-in-the-holy-city/article_54334e04-4834-50b7-990b-f81fa3c2804a.html [https://perma.cc/X428-RULH].

72. *See* Visram, *supra* note 10.

73. *See id.* Fugitive and runaway slaves grew to become a significant issue in the United States. *See id.* On December 24, 1860, South Carolina became the first state to secede from the Union. *The Secession of South Carolina*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/The-secession-of-South-Carolina/ [https://perma.cc/9L5X-ATX8]. South Carolina's declaration of secession stated that it seceded as a direct result of a property dispute—the refusal of northern states to enforce the Fugitive Slave Acts and return slaves to their owners. *See Confederate States of America - Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR.: THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/csa_scarsec.asp [https://perma.cc/JK9W-J2MW]. On January 29, 1861, Georgia also seceded from the Union and joined South Carolina in pointing at northern states' refusal to enforce the Fugitive Slave Act as the cause. *Confederate States of America - Georgia Secession*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR.: THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/csa_geosec.asp [https://perma.cc/XN3S-YFGV].

74. *See* Tibbetts, *supra* note 15, at 4.

75. *See id.*

76. *See* Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. LEGAL HIST. 38, 49 (1994).

77. *See Slavery*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/slavery [https://perma.cc/FST8-K4RR].

slavery was a system that required significant control measures.[78] Barbados was a heavily populated island, and slaves constituted a large percentage of the population, prompting whites to create special legislation—a slave code—to control their slaves.[79]

Over time, the Barbadian slave code was exported "throughout the English colonies by aggressive planters seeking profitable new ventures based on slave labor."[80] It is no coincidence that one of the first English colonies to replicate the Barbadian slave code was the colony of Carolina, which passed its first slave code, an "Act for the Better Ordering of Slaves," on February 7, 1691.[81] Carolina's growing rice economy demanded a large labor force, and slavery became the key to success. Without the forced labor of African slaves, rice likely could not survive as a key economic driver for both Georgia and South Carolina, and after the Civil War eliminated slavery by force, rice cultivation slowly disappeared.[82]

Slaves formed significant parts of the Georgia and South Carolina populations. In Georgia, slaves comprised approximately 44% of the population, and by the end of the Civil War, "Georgia had more enslaved people and slaveholders than any state in the Lower South . . . ."[83] Nearly 400,000 slaves lived in South Carolina during this same period, and the black population, both "enslaved and free, made up 57 percent of the state's population."[84] Slave owners "took for granted that slaves would die early from extreme overwork, disease, neglect, injury, starvation, or severe punishments; and if slaves resisted, they would be responsible for bringing harsh punishment down on their own heads."[85]

The threat of runaway slaves and slave revolts were constant fears for the white populations of slaveholding states. News of a 1701 slave revolt in Barbados quickly made its way to Carolina, and in response, the colonial government implemented new control measures for slaves via legislation.[86] This legislation contained multiple provisions, but two are especially relevant. The first provision empowered the colony's militia to hunt down fugitive slaves and "take [them] either alive or dead."[87] The second authorized "any person" that found a black person stealing to use deadly force to apprehend

78. *See* Nicholson, *supra* note 76, at 49.
79. *See id.* at 49–51.
80. *Id.* at 49.
81. *See* Thomas J. Little, *The South Carolina Slave Laws Reconsidered, 1670-1700*, 94 S.C. HIST. MAG. 86, 97 (1993).
82. *See, e.g.*, Tibbetts, *supra* note 15, at 12.
83. Young, *supra* note 71.
84. Hicks, *supra* note 71.
85. Tibbetts, *supra* note 15, at 11.
86. *See* L.H. Roper, *The 1701 "Act for the Better Ordering of Slaves": Reconsidering the History of Slavery in Proprietary South Carolina*, 64 WM. & MARY Q. 395, 406–07 (2007).
87. *Id.* at 413.

the thief.[88] These provisions are noteworthy because they establish early on that, under certain circumstances, whites could kill blacks at will under color of law.[89]

Initially, Carolina used state militia units—military units composed of private persons for the common defense—to control its growing slave population.[90] In 1721, acting as an independent state legislature after the colony split into North and South Carolina, the South Carolina General Assembly authorized local militia units to patrol in and around plantations, enforcing laws related to slaves.[91] Slave patrols, as these militia units came to be known, were permitted to arrest all slaves found outside of their plantations without formal approval by their owners.[92] Slave patrols were also statutorily authorized to break up large meetings of slaves and search slave residences for weapons.[93]

Nearly twenty years later, tough control measures were introduced by the South Carolina General Assembly as a result of the state's "largest and bloodiest slave insurrection," the Stono Rebellion.[94] This violent slave revolt made it clear that South Carolina's existing methods for controlling the slave population were inadequate, "and [it] resulted in legislation designed to

88. *Id.* at 414. The statute stated:

> [I]f any person shall find any Negro or slave stealing (the said slave making resistance & refusing to submit himself) it shall & may be lawful for such person to kill the said Negro or slave, & he shall not be liable to any damage or action for the same, any late custom or usage to the contrary notwithstanding.

Id.

89. Note the language "any person" in the second provision; "any person" meant anyone that was not a "Negro or slave." *See id.* In other words, only whites could act under the authority granted by the statute. *See id.* at 402.

90. *See* Jack Allen Meyer, *Militia*, S.C. ENCYC. (Mar. 15, 2017), https://www.scencyclopedia.org/sce/entries/militia/ [https://perma.cc/ZEH2-AGVX].

91. *See* Act No. 440, para. XXVII, 9 THE STATUTES AT LARGE OF SOUTH CAROLINA 640 (1721) (authorizing militia units "to go a patrolling as is hereinbefore mentioned, are hereby fully empowered and authorized to put in execution the said last recited Act, and to use their utmost endeavour to prevent all caballings amongst negroes, by dispersing of them when drumming or playing, and to search all negro houses for arms or other offensive weapons"). The colony of Carolina split into North and South Carolina in 1712. David Walbert, *Carolina Becomes North and South Carolina*, NCPEDIA (Jan. 3, 2018), https://www.ncpedia.org/anchor/carolina-becomes-north-and/ [https://perma.cc/7MQZ-EWHH].

92. *Id.* at para. XXVII, 639–40 (authorizing slave patrols "to go from plantation to plantation. and into any plantation, within such limits and precincts as they shall see occasion, and to take up all slaves which they shall meet without their master's plantations, who have not such a permit or ticket from their masters or mistresses or overseers").

93. *See supra* note 91.

94. *See* Mark M. Smith, *Stono Rebellion*, S.C. ENCYC. (July 9, 2018), https://www.scencyclopedia.org/sce/entries/stono-rebellion/ [https://perma.cc/2D9L-W7UM]. The Stono Rebellion, which took place on September 9, 1739, near Charleston, South Carolina, "was a violent albeit failed attempt by as many as one hundred slaves to reach St. Augustine and claim freedom in Spanish-controlled Florida." *Id.*

control slaves and lessen the chances of insurrection by the colony's black majority population."[95] Fear within South Carolina's white population was palpable, so the legislature declared that all acts required to end the Stono Rebellion, including the killings of "rebellious" slaves, were "lawful . . . as if such rebellious negroes had undergone a formal trial and condemnation . . . ."[96] This language excused and sanctioned the white population's extrajudicial killing of rebellious slaves and was an indicator of things to come.

B. Slave Patrols: White Supremacy by Force

Slave patrols soon became a vital tool for maintaining white supremacy with the full authority and protection of the law. In 1740, the South Carolina General Assembly empowered slave patrols by enhancing their authority to control slaves and prevent revolt.[97] But these enhanced powers were authorized not just for slave patrols. The legislature also authorized whites to apprehend and detain slaves at any time if they were found outside of their sanctioned area.[98] It further authorized "any white person" to detain fugitive slaves on the run for more than a year and, if the slaves could not be "taken," deemed it lawful to kill them.[99]

In 1753, Georgia effectively replicated South Carolina's patrol laws.[100] Ten years later, the colonial legislature also made it "lawful for all and every per[s]on and per[s]ons in this province . . . to take, apprehend, and [s]ecure any runaway or fugitive [s]lave or [s]laves . . . ."[101] Shortly thereafter, the colonial legislature expanded the scope of this law, authorizing whites to arrest any blacks found outside of their plantations without authorization.[102]

---

95. *Id.*

96. Act No. 670, para. LVI, 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 416–17 (1840).

97. *See id.* at para. XXXVI, 410 ("[I]t shall be lawful for all masters, overseers and other persons whomsoever, to apprehend and take up any negro or other slave that shall be found out of the plantation of his or their master or owner, at any time, especially on Saturday nights, Sundays, or other holidays, not being on lawful business, and with a letter from their master, or a ticket, or not having a white person with them . . . .").

98. *See id.*

99. *See* Act No. 790, para. III, 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 421 (1840). Legislative language such as "all persons" or "any white person" made it clear these laws also conferred power like that of slave patrols to white people not acting in an official capacity. *Id.*

100. *See* An Act for Establishing and Regulating of Patrols, GA. COLONIAL LAWS (1932).

101. *Id.* at 160, 162.

102. *See id.* at 261 ("[I]t shall be lawful for all masters, overseers, and other persons whomsoever, to apprehend and take up any negroe or other slave that shall be found out of the plantation of his or their master or owner at any time, especially on *Saturday* nights, *Sundays*,

Like South Carolina, Georgia made it very clear that "negroes" and "slaves" were not "persons" and that any white person could control them, even by force if necessary.

Nearly one hundred years later, the South Carolina legislature enhanced its patrol laws.[103] By 1839, South Carolina's slave patrols were statutorily authorized law enforcement auxiliary organizations operating under the supervision of municipal police.[104] Similarly, the Georgia legislature revised its patrol laws in 1854, authorizing the designation of patrol commissioners.[105] These commissioners were appointed by county inferior court judges and given oversight of the slave patrols in their militia district.[106] On the eve of the Civil War, Georgia slave patrols operated as authorized and regulated state law enforcement auxiliary units in a fashion similar to South Carolina slave patrols.

The Confederacy's defeat in 1865 suddenly halted the slavery-based society of the south, but "[i]t [did] not end the legal and social distinctions between being black and being white" in Georgia and South Carolina.[107] When the Civil War ended, the governmental framework of Georgia and South Carolina, including their justice systems, collapsed. To fill this void in law enforcement power, the U.S. Army stepped in and implemented martial law.[108] Over a short time, both states officially recognized the end of slavery and began the painful period known as Reconstruction.

IV. THE DEVELOPMENT OF CITIZEN'S ARREST LAWS IN GEORGIA AND SOUTH CAROLINA

"*We are now free*. We are now *all* free."[109] With these words, the Colored People's Convention of the State of South Carolina—held in November 1865

---

or other holidays, not being on lawful business, and with a ticket from their master, or not having a white person with them.").

103. *See* Act No. 2784, para. XVIII, 11 THE STATUTES AT LARGE OF SOUTH CAROLINA 68 (1841) (vesting the "power and duty of regulating and superintending the patrol" in the municipal police "within the several incorporated towns and villages of this State").

104. *See id.*

105. HOWELL COBB, A COMPILATION OF THE GENERAL AND PUBLIC STATUTES OF THE STATE OF GEORGIA 590–91 (1859).

106. *See id.* at 592–93.

107. Philip N. Racine, *The Spartanburg District Magistrates and Freeholders Court, 1824-1865*, 87 S.C. HIST. MAG. 197, 212 (1986).

108. *See* Thomas D. Morris, *Military Justice in the South, 1865-1868: South Carolina as a Test Case*, 54 CLEV. ST. L. REV. 511, 520 (2006). The U.S. Army occupied the former Confederate states, including Georgia and South Carolina, forming military districts to restore order and "substitut[e] . . . military justice in place of the void left with the collapse of the Confederacy." *Id.* at 539.

109. ALONZO J. RANSIER ET AL., PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA 28 (1865).

at the Zion Church in Charleston, South Carolina—demanded equal treatment under the law.[110] This poignant demand came from newly freed slaves who had just won their freedom as a direct result of the Civil War. The Convention specifically protested the imminent passage of a "code of black laws," which focused on the newly freed slave population.[111]

This code of black laws, otherwise known as the Black Code, was a series of laws under consideration by the South Carolina legislature that was deliberately intended to maintain the pre-war status quo of white control over the black population.[112] The Black Code was especially significant because it contained the laws that directly evolved into South Carolina's current citizen's arrest laws.

Until 1863, citizen's arrest was a common law duty in Georgia and South Carolina.[113] By 1865, both states had codified it. Georgia did so a few years earlier than South Carolina as part of its first comprehensive codification of state law: the Georgia Code of 1863.[114] Interestingly, and not by coincidence, the Civil War was fought during this period.

A. Common Law Duty to Arrest Other Private Persons

As inhabitants of a former British colony, private persons in the original American colonies had a duty under common law, sometimes known as hue and cry responsibility, to make arrests for felony offenses.[115] In *Long v. State*, an 1852 case before the Supreme Court of Georgia, the court emphasized the British common law "duty of any private person present when a felony is committed, to apprehend the felon . . . ."[116] *Long* cited *Phillips v. Trull*, a New York case from 1814, where the New York Superior Court referenced British common law to conclude that "[a]ll persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend

110. *See id.* at 25 ("We simply desire that we shall be recognized as men . . . that the same laws which govern white men shall direct colored men . . . that we be dealt with as others, in equity and justice.").

111. *Id.* at 31. The Convention also asked "that those laws that have been enacted, that apply to us on account of our color, be repealed." *Id.* at 28.

112. *See* RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA 15 (1996).

113. Long v. State, 12 Ga. 293, 318 (1852), *superseded by statute*, THE CODE OF GEORGIA § 4604 Sec. III (1861); State v. Nall, 304 S.C. 332, 337–38, 404 S.E.2d 202, 206 (Ct. App. 1991).

114. *Cf.* Jefferson James Davis, *The Georgia Code of 1863: America's First Comprehensive Code*, 4 J.S. LEGAL HIST. 1, 1 (1995–1996) ("In 1860 Georgia enacted the first comprehensive code in the United States. That code went into effect January 1, 1863.").

115. *Long*, 12 Ga. at 318; *Nall*, 304 S.C. at 338 & n.4, 404 S.E.2d at 206 & n.4.

116. *Long*, 12 Ga. at 318.

the offenders."[117] English law's influence on the authority of private persons to make arrests requires a brief examination of the history of citizen's arrest in England.

First, an important observation is that separate treatment of freemen and slaves was a specific component of English law from at least the twelfth century. In his 1181 Assize of Arms, King Henry II codified the arrest duty or obligation for private persons in English law, requiring "[f]reemen . . . to have certain weapons and, in general, to be equipped for the pursuit of criminals when the hue and cry was raised."[118] During the twelfth and thirteenth centuries, slavery was an established practice in England with thriving slave markets, but "[b]y the 1200's [sic] slavery . . . had completely died out in the British Isles."[119]

In 1285, during the rule of King Edward I, the Statutes of Winchester commanded private persons in England to "keep the watch continually all night" and to arrest any stranger.[120] If a stranger did not "obey the arrest," the watch was to "levy hue and cry upon them" and follow the stranger until the stranger was "taken and delivered to the sheriff . . . ."[121] The Statutes of Winchester formalized the duty of citizen's arrest, and the Georgia and South Carolina citizen's arrest laws can be traced back to this early English statutory requirement.[122]

---

117. Phillips v. Trull, 11 Johns. 486, 487 (N.Y. Sup. Ct. 1814); *see Long*, 12 Ga. at 318. *Phillips v. Trull* referenced English case law from a number of secondary sources. *See Phillips*, 11 Johns. at 487. One of them, *A Treatise of the Pleas of the Crown: Or, A System of the Principal Matters Relating to that Subject, Digested Under Proper Heads*, states "private per[s]ons are bound to apprehend all tho[s]e who shall be guilty of any of the crimes above-mentioned in their view, [s]o al[s]o are they with the utmo[s]t diligence to pur[s]ue, and endeavor to take all tho[s]e who [s]hall be guilty thereof out of their view, upon a HUE AND CRY levied against them." WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 157 (Thomas Leach ed., 7th ed. 1795) (alteration in original).

118. JEROME HALL, THEFT, LAW AND SOCIETY 166 n.19 (The Bobbs-Merrill Co., 2d ed. 1952). Note the specific reference to "freemen."

119. *Slavery in History*, THE HIST. PRESS, https://www.thehistorypress.co.uk/articles/slavery-in-history/ [https://perma.cc/VJK3-ZYHG].

120. The Statute of Winchester (1285), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 78 (George Burton Adams & H. Morse Stephens eds., 1918).

121. *Id.*

122. *See* Nic Butler, *The Medieval Roots of the Charleston Night Watch*, CHARLESTON CNTY. PUB. LIBR. (May 18, 2008), https://www.ccpl.org/charleston-time-machine/medieval-roots-charleston-night-watch [https://perma.cc/42T5-H5DG]. "The Statutes of Winchester . . . formalized much of England's practice in matters of criminal justice and rules of apprehension . . . and are not without effect even today when common law elements of arrest are considered." M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 9 (1977).

B. The Georgia Code of 1860

The English common law duty of citizen's arrest for felony offenses remained effective in Georgia until the mid-nineteenth century when Thomas R.R. Cobb and others were selected by the governor to assist with the first codification of Georgia law: the 1860 Georgia Code of Laws.[123] Cobb was a lawyer, slave owner, and official reporter for the Georgia Supreme Court.[124] A defender of slavery, Cobb also authored the key southern defense of the institution, *An Inquiry into the Law of Negro Slavery in the United States of America*, or in short, *Law of Negro Slavery*.[125]

In *Law of Negro Slavery*, Cobb wrote that blacks were not equal to whites and were mentally inferior.[126] White control of slaves was an essential requirement, Cobb claimed that "*all* of the superior race shall exercise a controlling power over the inferior . . . [h]ence . . . the various police and patrol regulations, giving to white persons other than the master . . . the right of controlling, and . . . correcting slaves."[127] This is a critical observation, for Cobb clearly points out that slave owners were not the only ones who had controlling power over their property; all whites had power to control and correct slaves. Cobb also explained that slave patrols were organized to "exercise certain police powers, conferred by statute, for the better government of the slave, and protection of the master."[128] Additionally, he believed runaway or fugitive slaves could be arrested by anyone and slave owners could recover their slaves anywhere, even in non-slaveholding states.[129]

From the early eighteenth century until the Civil War, it was "lawful for *every person* to *take, apprehend and secure*, any run-away or fugitive slave" in Georgia.[130] Again, "every person" referred only to whites. By 1850,

123. *See* Davis, *supra* note 114, at 12–14.

124. *See id.* at 15–16. Cobb was a wealthy slave owner and "by 1860 . . . had amassed substantial wealth: twenty-three slaves, forty thousand dollars in real property, and eighty thousand dollars in personal property." *Id.* at 16. Married to the daughter of a Georgia Supreme Court Justice, Cobb also founded the law school that later became known as the University of Georgia School of Law. *See id.* at 15–16, 38 n.89.

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

126. *Id.* § 15, at 17, § 30, at 34.

127. *Id.* § 113, at 106 (footnote omitted).

128. *Id.* § 114, at 107.

129. *See id.* § 120, at 110.

130. COBB, *supra* note 105, at 599 (emphasis added). Note the requirement for "every person" to "take" or arrest runaway or fugitive slaves. *Id.*

runaway slaves in the United States were a significant problem for Georgia and other slaveholding states.[131]

The issue of runaway slaves was originally addressed in Article IV, § 2 of the U.S. Constitution, which specifically authorized owners to recover fugitive slaves in other states.[132] This provision was strengthened by the Fugitive Slave Act of 1793, which "left it mainly up to the slave owners and their hired slave catchers to capture and return runaway slaves."[133] Northern non-slaveholding states, however, were reluctant to allow slaveholding states to recover fugitive slaves within their borders, and they began to pass measures to restrict such activity.[134] Nearly fifty years later, the U.S. Supreme Court ruled in *Prigg v. Pennsylvania* that the Fugitive Slave Act of 1793 was constitutional and states could not infringe on the rights of slave owners to recover their slaves wherever they could be found.[135] In response to *Prigg*, Georgia and other southern states strengthened their efforts to arrest and recover fugitive slaves, wherever they were found.[136]

In 1858, the Georgia General Assembly authorized a committee to write the Code of the State of Georgia, which would "embrace in a condensed form[] the Laws of Georgia, whether derived from the Common Law, the Constitution of the State, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England of force in this State . . . ."[137] By 1859, Cobb and others began working on the Code. Cobb's role was to write the Criminal Code, which "required the readoption of the Penal Code of 1833 with minor revisions."[138] He was also tasked with writing the Civil Code, which "demanded the careful selection and concise restatement of substantive common law doctrines, the codification of which represented the unique feature of the Georgia Code."[139] Cobb's focus on restating common law doctrines likely found its way into his work on the Criminal Code as well. The

131. *See* Ken Drexler, *Compromise of 1850: Primary Documents in American History*, LIBR. OF CONG. RES. GUIDES (Apr. 11, 2019), https://guides.loc.gov/compromise-1850 [https://perma.cc/YQ4V-LPDB].

132. U.S. CONST. art. IV, § 2, *repealed by* U.S. CONST. amend. XIII ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

133. Const. Rts. Found., *The Fugitive Slave Law of 1850*, BILL RTS. ACTION, Winter 2019, at 5, 5.

134. *See* 41 U.S. 539, 608 (1842).

135. *Id.* at 620–22, 625 ("[S]uch regulations can never be permitted to interfere with, or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same.").

136. *See* Const. Rts. Found., *supra* note 133, at 5.

137. Davis, *supra* note 114, at 13; *see* WILLIAM B. MCCASH, THOMAS R.R. COBB (1823-1862): THE MAKING OF A SOUTHERN NATIONALIST 61 (1983).

138. MCCASH, *supra* note 137, at 61.

139. *Id.*

Georgia Assembly adopted the Code on December 19, 1860, and authorized its implementation on January 1, 1862.[140]

The Georgia Code of 1860 included the right of any private person to arrest a fugitive slave upon reasonable grounds of suspicion.[141] And for the first time in Georgia law, the common law duty of private persons to arrest other persons for felony offenses was codified. The Criminal Code included what is known today as the citizen's arrest law.[142] If one were to read this statute without knowing the historical context that led to its development and codification, the statute would appear to be applicable to all private persons. However, historical context is essential, and it is critical to understand exactly how "private person" was defined in the Georgia Code of 1860.

False imprisonment is a distinct possibility when private persons have the common law duty, and later the statutory right, to arrest others. Georgia specifically addressed false imprisonment as a criminal offense in the Penal Act of 1816, making it a crime to falsely imprison *whites*.[143] It remained a crime in the Georgia Code of 1860 to "arrest, confine, or detain a free white person or citizen, without process, warrant, or legal authority to justify it . . . ."[144] No such legal protection was made available for non-whites. The race-based false imprisonment law remained in the Code until after the Civil War, when it was adjusted and made applicable to all persons.[145]

How, then, was a "person" defined by the Georgia Code of 1860? The Code was very clear: a "'Person' includes a corporation; it does not include slaves or free persons of color, unless named."[146] Blacks, whether enslaved or free, were not considered to be "persons" under Georgia law and, therefore,

---

140. *See id.* at 64. Publishing and indexing the Code took longer than anticipated, and the Georgia Code of Laws "was finally published in 1862 to take effect on 1 January 1863, twenty days, coincidentally, after Thomas R.R. Cobb was killed at the battle of Fredericksburg." William B. McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 GA. HIST. Q. 9, 20 (1978).

141. *See* THE CODE OF GEORGIA § 1882 (1861) ("Every citizen of this State has the right of interrogating every negro or mulatto found in the highway or away from his master's premises and business without a permit, or under any other suspicious circumstances, with a view of ascertaining whether he is a fugitive or not, and, upon reasonable grounds of suspicion, to arrest such negro or mulatto and carry him before the nearest Justice of the Peace for further examination into the fact.").

142. *See* 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.").

143. *See* An Act to Reform the Penal Code of This State and to Adapt the Same in the Penitentiary System, A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 572 (1821).

144. THE CODE OF GEORGIA § 4604 Sec. XLIX (1861).

145. CODE OF THE STATE OF GEORGIA § 2939 (1867).

146. THE CODE OF GEORGIA § 6 (1861).

could never effectuate a citizen's arrest. Words matter; Georgia's citizen's arrest law was originally intended to allow whites to maintain absolute control over the black population.

C. Reconstruction and the Thirteenth Amendment in South Carolina

The end of the Civil War began one of the most consequential periods in U.S. history. Reconstruction was an effort to bring about social, legal, and economic change in former Confederate States.[147] In the immediate aftermath of the Civil War, Reconstruction was primarily a federal effort.[148] President Andrew Johnson's initial focus was to appoint loyal provisional governors and establish a policy for presidential pardon of former Confederate military officers and leaders.[149] To regain control of state government, former Confederate States were also required to pass new state constitutions that recognized the Thirteenth Amendment, which abolished slavery and involuntary servitude except as punishment for a crime.[150]

In mid-1865, President Johnson appointed Benjamin F. Perry as the provisional governor of South Carolina and authorized him to begin the formal process of re-admitting South Carolina into the United States.[151] President Johnson's authorization was the catalyst for South Carolina's immediate effort to restore control and minimize federal involvement in its affairs as much as possible.[152] The South Carolina legislature initially focused on lawlessness that was created by the post-Civil War vacuum of authority and the substantial fears of insurrection by newly freed slaves.[153]

The Civil War had a significant impact on South Carolina: over 60% of white men in the state had been killed or wounded while serving the

147. *See* ZUCZEK, *supra* note 112, at 1–2.

148. Reconstruction of the south occurred in distinct flavors: presidential Reconstruction, congressional Reconstruction, and white South Carolinian Reconstruction. *Id.* Presidential reconstruction is named for the period where the actions of President Andrew Johnson were dominant in restructuring the south. *Id.*

149. *Id.* at 11.

150. DAN T. CARTER, WHEN THE WAR WAS OVER: THE FAILURE OF SELF-RECONSTRUCTION IN THE SOUTH, 1865–1867, at 72 (1985). Before they could officially rejoin the United States, former Confederate states were required to ratify the Thirteenth Amendment. *Id.*

151. JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877, at 71 (1965). South Carolina, specifically "[w]hite [South] Carolinians, again in legitimate control of the state, could now begin their reconstruction in earnest." ZUCZEK, *supra* note 112, at 15.

152. South Carolina may have been on the losing side of the Civil War as it "had failed to preserve slavery, but whites were determined to use every means at their disposal to limit the damage and recreate as near as possible their old order." *Id.*

153. *See infra* text accompanying note 169.

Confederacy.[154] Economic damage was significant; the capital city of Columbia was burned and state-organized slave patrols and militia units ceased to exist as the Union Army occupied South Carolina.[155] In this vacuum, lawlessness and the fear of revolt resulted in a local effort to organize volunteer patrol and militia units.[156] These units operated much like slave patrols and provided limited local law enforcement.[157]

During this time, federal representatives in South Carolina observed that "common whites openly 'announce[d] their determination to take the law into their own hands . . . .'"[158] An example of white South Carolinians' determination to take the law into their own hands involved the murder of

154. At least 18,666 South Carolina soldiers were killed in the Civil War. RANDOLPH W. KIRKLAND JR., BROKEN FORTUNES: SOUTH CAROLINA SOLDIERS, SAILORS, AND CITIZENS WHO DIED IN THE SERVICE OF THEIR COUNTRY AND STATE IN THE WAR FOR SOUTHERN INDEPENDENCE, 1861–1865, at 411–12 (1995). In the 1860 U.S. Census, the South Carolina white male population (ages eighteen to forty-five) was 55,046. U.S. CENSUS BUREAU, 1860 CENSUS: POPULATION OF THE UNITED STATES, at xvii (1864).

155. Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231, 234–35 (2007); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 168 (2001).

156. HADDEN, *supra* note 155, at 166.

157. *Id.* Provisional Governor Perry directly addressed this issue in a proclamation on July 20, 1865. PROCLAMATIONS OF HIS EXCELLENCY B.F. PERRY, PROVISIONAL GOVERNOR OF SOUTH CAROLINA, AND OF HIS EXCELLENCY ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES (1865), *reprinted in* REPORTS AND RESOLUTIONS OF SOUTH CAROLINA TO THE GENERAL ASSEMBLY. He "command[ed] and enjoin[ed] all good and lawful citizens of the State to unite in enforcing the laws and bringing to justice all disorderly persons, all plunderers, robbers and marauders, all vagrants and idle persons who are wandering about without employment or any visible means of supporting themselves." *Id.* at 6. The reference to "disorderly persons, all plunderers, robbers and marauders, all vagrants and idle persons" applied to both whites and blacks alike, but foremost on the minds of the South Carolina white population at the time was the large population of newly freed slaves. *See, e.g.*, ZUCZEK, *supra* note 112, at 16.

158. ZUCZEK, *supra* note 112, at 19.

Cromwell Bright, a newly freed slave.[159] In July 1865, the U.S. Army arrested Edward W. Andrews for Bright's murder.[160]

For allegedly stealing his horse, Andrews executed Bright with a gunshot to the back of the head.[161] Bright's young son, Israel, witnessed his father's murder and served as a trial witness.[162] Andrews' murder trial was unique: it was handled by a U.S. Army military commission.[163] Andrews was a civilian, and what would normally be handled as a criminal matter by local authorities was pursued by the U.S. Army in a remarkable intervention. Military commissions had several goals, chief among them to restore some semblance of law and order but also to enforce equality between blacks and whites.[164] At the time of the murder, Andrews was part of a provost guard "organized to keep the county straight, both blacks and whites, and prevent horse-stealing."[165] During Andrews's trial, witness testimony made it clear that the

159. In the antebellum years, South Carolina used Magistrates and Freeholders Courts to hear cases regarding slaves and freedmen, and some of them continued to operate as late as October 1865. *See generally* Racine, *supra* note 107. One of the final cases heard by the Magistrates and Freeholders Court in Spartanburg, South Carolina in October 1865, was a coroner's inquiry into the murder of "Bob." *See id.* at 212; Coroner's Inquisition, Bob, a Free Man of Color, Hanged by Unknown Persons, Series L42211, Item No. 00302 (Spartanburg Dist. Oct. 10, 1865), *in* TRIAL PAPERS OF THE MAGISTRATES AND FREEHOLDERS COURT [hereinafter Coroner's Inquisition]. The coroner's inquiry revealed that "Bob" had been arrested at home by a group of white men for getting "in a scrape," possibly an allegation of an offense of some sort, when the "moon was one hour high," or at night, when slave patrols often operated. Coroner's Inquisition, *supra*. The inquiry revealed that the group of white men wanted Bob to come with them "so that he could clear himself." *Id.* David Holcombe, a white man, testified that he had previously owned Bob and that Bob "lived with him at the time of his death." *Id.* Holcombe also testified that, when Bob's body was discovered, his "hands were tied behind him and his feet tied together[,]" and it appeared that Bob had been "violently hung by some persons to him unknown." *Id.*

160. S. EXEC. DOC. NO. 39-11, at 1, 3 (1866).

161. *Id.* at 3.

162. *Id.* at 8.

163. The U.S. Army occupied the south after the Civil War, forming military districts to restore order and "substitut[ing] . . . military justice in place of the void left with the collapse of the Confederacy." Morris, *supra* note 108, at 523. The Army established two types of military courts: provost courts and military commissions. *Id.* These courts existed "to establish order, and they were not always staffed by people who knew law, . . . [but] some members of these courts were knowledgeable of the law." *Id.*

164. The Army was "quick to proclaim whites and [Blacks] equal before the law and also quick to enforce that equality." JAMES E. SEFTON, THE UNITED STATES ARMY AND RECONSTRUCTION, 1865-1877, at 44 (1967). The military courts were a key instrument in enforcing the civil rights of black people but "caused the Army serious difficulties." *Id.*

165. S. EXEC. DOC. NO. 39-11, at 12–13. During cross-examination, Frederick testified that the provost guard was disbanded in April 1865. *Id.* However, the unit continued operating as "patrols until the United States forces took possession" of the Orangeburg area. *Id.* at 14. Continued cross-examination brought additional testimony from Frederick regarding the duties of this extrajudicial slave patrol. *Id.* These duties included guarding plantations to keep newly freed slaves from leaving them. *Id.*

provost guard acted as a slave patrol in an extrajudicial capacity.[166] Bright's execution at the hands of an extrajudicial group of white men demonstrated that slave patrols and other vigilante groups continued to operate in the power vacuum that existed in South Carolina after the Civil War ended.[167]

D. Restoration of Power in South Carolina: The 1865 Patrol Law

In mid-1865, the federal government's return of legislative sovereignty allowed South Carolina to begin re-establishing its law enforcement power. In September of that year, "[a]lthough technically outlawing slavery, South Carolina's legislature reenacted its militia and patrol laws . . . as part of its new code . . . ."[168] This reenactment of slavery-era militia and patrol laws was the legislature's attempt to address the power vacuum. But there was an additional purpose as well. Because the legislature believed newly freed slaves were a threat to the white population, it focused on restoring tough control measures on the state's black population.[169]

---

166. *See id.* After additional witness testimony, the military commission found Andrews guilty of manslaughter, sentencing him to ten years' imprisonment. *Id.* at 33. The Commanding General of the Military District of Charleston, Brevet Major General John P. Hatch, directed the military commission to reconsider its verdict, noting that "'manslaughter' [was] not in accordance with the ample and decisive testimony upon record[,]" and directed the commission to reconvene to determine if it could "find the accused guilty of 'murder.'" *Id.* The military commission reconvened as ordered but "adhere[d] to its former finding of 'manslaughter.'" *Id.* at 34.

167. On August 25, 1865, Joseph Holt, Judge Advocate General of the United States Army, recommended in a blistering memorandum that the Secretary of War, Edwin Stanton, issue a reprimand to the Andrews commission and the prosecuting judge advocate. *Id.* at 35–36. Holt asserted that "the murder [of Bright] was undoubtedly committed under the influence of that brutal contempt for the lives and rights of the negro race so commonly prevailing with certain classes of the south, and in fanatical defiance of the government which has taken that race under its protection." *Id.* at 36. Holt's feelings were underscored by a clemency petition sent by a large number of South Carolinians, including Speaker of the South Carolina House of Representatives, A.P. Aldrich, to President Johnson on Andrews's behalf. *Id.* at 36–40. For Holt, the high number of South Carolina citizens who signed the clemency petition showed how "deeply seated and so widely spread the feeling of deadly hatred to the black race [was] among those who so lately held that race in abject bondage." *Id.* at 40.

168. HADDEN, *supra* note 155, at 199.

169. A key example of this focus came from the November 4, 1865 meeting of the South Carolina House of Representatives Committee on the Military. The Committee believed that "volunteer companies" (patrols) augmented by militia would "be a sufficient protection" in part of South Carolina but asked for United States "white forces" to maintain order "in the sea-board Districts of the State, where the negro population so largely predominate[d], and ha[d] become so thoroughly contaminated with false notions as to their rights, and with feelings of hostility towards the whites." H.R. 47th Reg. Sess. (S.C. 1865), *reprinted in* REPORTS OF THE VARIOUS STANDING COMMITTEES OF THE SOUTH CAROLINA CONVENTION 139 (1866). The legislature left no doubt that, in late 1865, maintaining white control over South Carolina's black population was of critical importance. *See id.*

On December 5, 1865, the South Carolina Senate attempted to reinstate the pre-Civil War patrol laws with a "Bill to Amend the Patrol Laws."[170] The Bill proposed to repeal certain sections of the 1839 Patrol Act and replace them "in order to provide an adequate force for the general police of the State . . . ."[171] There was no doubt the Bill was intended to address newly freed slaves, empowering "every owner or lessee of a plantation upon which fifteen or more colored laborers shall be employed or reside . . . [to] employ and keep on such plantation some person capable of performing patrol duty . . . ."[172] The Bill required patrols to "enforc[e] the laws . . . in reference to person of color, by arresting all offenders and taking them before a magistrate to be dealt with according to law."[173] Understanding the true reason for the legislature's attempt to reinstate the patrol laws, Governor James Orr immediately vetoed the Bill.[174]

Ignoring the veto, the legislature separately authorized Governor Orr to continue using the 1839 Patrol Laws as control measures for South Carolina's black population. The same day Governor Orr vetoed the Bill to Amend the Patrol Laws, the legislature authorized him "to employ . . . the militia and volunteer police forces of this State for the purpose of enforcing the Patrol Laws of the State, so far as they are applicable to the changed condition of society under the new Constitution, and of preserving law and order in the State."[175] Notably, the legislature removed references to race and substituted the phrase "changed condition of society." Regardless of cosmetic language adjustments, the legislature intended to allow whites—in a lawfully authorized militia and volunteer law enforcement capacity—to control the black population with law enforcement power under the newly passed Black Code.

170. An Act to Amend the Patrol Laws (Dec. 20, 1865) (on file with the State of South Carolina Department of Archives and History as Series S165001, Item 00201).

171. *Id.*

172. *Id.*

173. *Id.*

174. S. 47th Reg. Sess. (S.C. 1865), *reprinted in* JOURNAL OF THE SENATE OF THE STATE OF SOUTH CAROLINA 130–31 (1866) ("In every slaveholding country the owners have endeavored, by stringent legislation and a rigorous police, to guard against the dangers of revolt and insurrection—insurrection to secure freedom; this was the reason why the legislation in the South required the presence of a white man on every farm or plantation where there were ten or more slaves, that a vigilant watch might be kept over them and their movements.").

175. H.R. Res., 1865 Leg., 47th Reg. Sess. (S.C. 1865), *reprinted in* REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 195–96 (1866).

E. The South Carolina Black Code

In September 1865, the South Carolina Constitutional Convention authorized a two-person committee to write a code specifically designed for the newly freed slave population and, upon completion, to submit that code to the state legislature.[176] Governor Orr appointed Armistead Burt and Judge David L. Wardlaw as the two commissioners.[177] Burt, a well-known constitutional lawyer, was responsible for the "social and economic provisions" of the Black Code.[178] Judge Wardlaw, a prominent politician and judge, was responsible for the "machinery of enforcement."[179]

In October 1865, the committee presented its report to the South Carolina General Assembly.[180] The committee's primary objective was to construct a legal framework that would allow for a split society "and especially to prepare and submit a code for the regulation of labor[] and the protection and government of the colored population of the State."[181] Blacks would receive protection under the law for "their persons and property," but such protection would not be equal to that of whites.[182] Citizen's arrest, codified in the report for the first time in South Carolina, was a clear example of this objective.

The first versions of what would later become South Carolina's citizen's arrest laws were included in the "Arrest of Offenders" section of the report.[183] The first proposed provision allowed a magistrate to arrest anyone upon view

---

176. D.L. WARDLAW & ARMISTEAD BURT, REPORT OF THE COMMITTEE ON THE CODE 1 (1865).

177. ZUCZEK, *supra* note 112, at 15; NORRECE T. JONES JR., BORN A CHILD OF FREEDOM, YET A SLAVE: MECHANISMS OF CONTROL AND STRATEGIES OF RESISTANCE IN ANTEBELLUM SOUTH CAROLINA 187 (1990).

178. WILLIAMSON, *supra* note 151, at 72.

179. *Id.* Judge David L. Wardlaw was a prominent resident of, and slaveowner in, Abbeville, South Carolina, serving as a public servant in several prominent capacities. JOSEPH G. WARDLAW, GENEALOGY OF THE WARDLAW FAMILY 64 (1929) ("[He] was elected a member of the Legislature in October, 1826; Speaker of the House of Representatives in 1836; Law Judge in December, 1841; Associate Justice of the Court of Appeals in 1865[;] . . . member of Secession Convention of 1860, signing the famous Ordinance; Trustee of South Carolina College [now known as the University of South Carolina] for thirty years.").

180. WARDLAW & BURT, *supra* note 176, at 1. The South Carolina General Assembly was in session on the grounds of the South Carolina College (now known as the University of South Carolina) in Columbia, South Carolina. JOHN S. REYNOLDS, RECONSTRUCTION IN SOUTH CAROLINA, 1865-1877, at 21–22 (1905).

181. WARDLAW & BURT, *supra* note 176, at 1.

182. Persons of color would have the "right to acquire, own and dispose of property; to make contracts; to enjoy the fruits of their labor; to sue and be sued; and to receive protection under the law in their persons and property." *Id.* at 3. Additionally, persons of color could "constitute no part of the Militia of the State, and no one of them shall, without permission in writing from the District Judge or a Magistrate, be allowed to keep a fire-arm, sword or other military weapon . . . . appropriate for purposes of war." *Id.* at 32.

183. *Id.* at 36.

of a misdemeanor offense.[184] The second proposed provision dispensed with equality and allowed for anyone present to arrest blacks for a misdemeanor offense.[185] However, if a white person committed the same offense against a black person, one could only "complain to a Magistrate" who could then authorize an arrest.[186] The differences for each race were clear: blacks and whites would not be treated equally under the law.

The report also authorized citizen's arrests for felony offenses. Drafted in September and October 1865, § 28 of the report is the first version of what is known today as South Carolina Code § 17-13-10.[187] The language of this recommended statute—"any person may arrest the felon"—appears, at least initially, race neutral. However, the next part, "and take him directly to the District Judge or a Magistrate," makes clear that race is a component. District judges handled matters involving blacks, while magistrates handled matters involving whites.[188] The use of separate courts indicates race is an intentionally critical factor.[189] This recommended statute and those that followed were "clearly designed as race control laws with discriminatory features . . . ."[190]

Section 29 of the report contained the first version of South Carolina Code § 17-13-20. This provision allowed for the arrest of blacks "by such efficient means as the darkness and the probability of his escape render necessary, even if his life should be thereby be taken . . . ."[191] Specifically authorizing deadly

184. *Id.*

185. *Id.* ("Upon view of a misdemeanor committed by a person of color, any person present may arrest the offender, and take him before a magistrate to be dealt with as the case may require.")

186. *Id.* ("In case of a misdemeanor committed by a white person toward a person of color, any person may complain to a Magistrate, who shall cause the offender to be arrested, and according to the nature of the case, to be brought before himself, or taken for trial in the District Court.").

187. *Id.* ("Upon view of a felony committed, or upon certain information that a felony has been committed, any person may arrest the felon, and take him directly to the District Judge or a Magistrate, to be dealt with accordingly to law. A person against whom strong grounds of suspicion exist, even though he may be innocent, may be arrested as a known felon might be."); *see* S.C. CODE ANN. § 17-13-10 (2018).

188. *See* WARDLAW & BURT, *supra* note 176, at 18. District courts were specifically designated by the committee to handle cases involving blacks. *Id.* ("The District Court shall have exclusive jurisdiction . . . of all civil cases where one or both of the parties are persons of color and of all criminal cases wherein the accused is a person of color and also of all cases of misdemeanor affecting the person or property of a person of color . . . .").

189. *See id.* at 36.

190. HADDEN, *supra* note 155, at 199.

191. WARDLAW & BURT, *supra* note 176, at 36 ("In the night time, a person of color may be arrested by such efficient means as the darkness and the probability of his escape render necessary, even if his life should thereby be taken, in cases where he has committed a felony, or has entered a dwelling house with evil intent, or has broken, or is breaking into an out-house,

force against blacks at night, § 29 would have shielded Edward W. Andrews for the "arrest" and violent, extrajudicial murder of Cromwell Bright. That appears to be exactly what the committee intended. The proposed statute also allowed for the killing of blacks at night simply for fleeing when "hailed" upon mere suspicion of a desire to commit a felony—a particularly egregious addition.[192] Notably, the proposal did not address felony crimes at night by whites and, as such, did not authorize deadly force against whites.

On December 19, 1865, the South Carolina General Assembly directly responded to the ratification requirement of the Thirteenth Amendment by passing the Black Code.[193] The report's misdemeanor and felony sections were integrated into the Black Code.[194] Compared to what the committee presented to the legislature in October, the only significant changes were to the sections that dealt with citizen's arrest for felony offenses. The last sentence of § 28, "A person against whom strong grounds of suspicion exist, even though he may be innocent, may be arrested as a known felon might be[,]" was removed from the Black Code.[195] For § 29 of the report, the Black Code replaced the term "a person of color" with "any person."[196] This modification made the statute appear to apply equally to all races, but the intent behind it likely remained exactly what the committee initially articulated in its report.[197]

---

with a view to plunder, or has in his possession stolen property, or being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.").

192. *Id.*

193. In a further indication of intent, the South Carolina General Assembly called the introductory Act of the Black Code "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves." 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 245 (1875). The Black Code contained three distinct Acts. An Act to Establish and Regulate the Domestic Relations of Persons of Color, and to Amend the Law in Relation to Paupers, Vagrancy, and Bastardy, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 269 (1875); An Act to Establish District Courts, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 254 (1875); An Act to Amend the Criminal Law, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 246 (1875). The original South Carolina citizen's arrest laws were a part of "An Act to [A]mend the Criminal Law." 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 246 (1875).

194. An Act to Amend the Criminal Law, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 253–54 (1875).

195. *Id.* at 253.

196. *Id.* at 254.

197. *See* CARTER, *supra* note 150, at 231 ("White southerners . . . were willing to accept the end of legal slavery [and] the supremacy of the federal government, . . . [b]ut they were unwilling to accept the legal equality of the freedmen or even . . . to feign such acceptance.").

F. "All Laws Shall Be Applicable Alike to All the Inhabitants"

Governor Orr immediately understood that the Black Code would agitate the federal government.[198] He had a direct line to Washington D.C. with William Truscott, "who represented South Carolina's interests . . . throughout late 1865 and much of 1866."[199] Quickly realizing the northern states were highly agitated by the Black Code, Truscott advised Governor Orr to push for its repeal.[200] Governor Orr immediately reached out to an old friend, Major General Daniel Sickles, who had recently become commander of the U.S. Army Department of South Carolina.[201] Governor Orr understood that the Black Code could not stand as written but was unwilling to directly intervene, so he used his friendship with General Sickles to mitigate the Black Code's potential effects.[202]

In a remarkable public pronouncement, General Sickles obliged Governor Orr and set aside the Black Code. On January 1, 1866, from his military headquarters in Charleston, South Carolina, General Sickles directed that "[a]ll laws [in South Carolina] shall be applicable alike to all the inhabitants" and that "[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ."[203] The U.S. Army ordered by military fiat what the South Carolina General Assembly refused to provide: equal rights under the law for all people, regardless of race.[204]

Meanwhile, the Black Code pushed Congress to act. Congress intervened and, on April 9, 1866, passed the Civil Rights Act of 1866, the first civil rights law passed in the United States.[205] South Carolina was deeply concerned

198. *Id.* at 231 n.110.

199. *Id.* at 230.

200. *Id.* at 230–31. Truscott "urged James L. Orr to convene the legislature 'for the express purpose of repealing that unfortunate code which Perry left as a fitting legacy of the Provisional Government.'" *Id.*

201. General Sickles had a "close personal friendship" with Governor Orr, "dating from the high times of the National Democracy in the 1850's [sic] when both had been congressmen." WILLIAMSON, *supra* note 151, at 77.

202. CARTER, *supra* note 150, at 231 n.110. Governor Orr was "[u]nwilling to antagonize South Carolinians [and] quietly persuaded . . . Sickles to set aside the [Black] [C]ode." *Id.*

203. FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, at 82–83 (René Hayden et al. eds., 2013).

204. *See id.* at 84 ("To secure the same equal justice and personal liberty to the freedmen as to other inhabitants, no penalties or punishments different from those, to which all persons are amenable, shall be imposed on freed people; and all crimes and offences which are prohibited under existing laws, shall be understood as prohibited in the case of Freedmen; and if committed by a freedman, shall, upon conviction, be punished in the same manner as if committed by a white man.").

205. *Civil Rights Act of 1866*, BALLOTPEDIA, https://ballotpedia.org/Civil_Rights_Act_of

about the Act, but "[t]o the relief of many white Carolinians, congressional activity did not have as great an impact on the South."[206]

The Act forced the South Carolina legislature to make significant changes to its citizen's arrest laws.[207] On December 21, 1866, the South Carolina General Assembly passed "An Act to Alter the Act entitled 'An Act to Amend the Criminal Law.'"[208] Both statutes pertaining to citizen's arrest for misdemeanors were deleted and replaced with a new statute that permitted punishment for misdemeanors "at the discretion of the Court."[209] The statute regarding felonies was relocated and revised by removing all references to district courts.[210]

The language of the revised statute made its provisions applicable to all private persons and is known today as South Carolina Code § 17-13-10. The statute regarding criminal conduct at night, now known as § 17-13-20, was also relocated and revised, replacing "person" with "citizen."[211] On the surface, the statute appeared to comply with the Civil Rights Act of 1866. However, South Carolina's white population had never considered blacks to be persons and certainly did not consider them to be citizens, either by statute or by custom.[212] Although specific references to race were removed from the

---

of_1866 [https://perma.cc/GXB3-L8UH]. The Civil Rights Act of 1866 was originally passed by Congress on March 13, 1866, but was vetoed by President Johnson on March 27, 1866. *Id.* President Johnson's veto was subsequently overturned by Congress on April 9, 1866. *Id.*

206. ZUCZEK, *supra* note 112, at 33. The Civil Rights Act of 1866 "provided blacks equal access to the judicial system but was more carrot than stick, for if states removed discriminatory measures from their books, legal proceedings would not be transferred from state to federal courts." *Id.*

207. *See id.* at 32.

208. An Act to Amend the Criminal Law, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 376 (1875).

209. *Id.* at 377.

210. As amended, § XI read: "Upon view of a felony committed, or upon certain information that a felony has been committed, any person may arrest the felon and take him to a Judge or Magistrate, to be dealt with according to law." *Id.*

211. *Id.* ("It shall be lawful for any citizen to arrest any person in the night time, by such efficient means as the darkness and the probability of his escape render necessary, even if his life should be thereby taken, in cases where he has committed a felony, or has entered a dwelling house with evil intent, or has broken, or is breaking into an out-house, with a view to plunder, or has in his possession stolen property, or being under circumstances which raise just suspicion of his design to steal or commit some felony, flees when he is hailed."); *see* S.C. CODE ANN. § 17-13-20 (2018).

212. See, for example, an excerpt from an 1864 statute regarding the use of slave labor for the construction of fortifications in South Carolina:

> And the said Sheriffs shall, in their respective Districts, with the assistance of a respectable loyal citizen, to be chosen by the owner of each slave, if he will, and if not, by the Sheriff, appraise said slaves on their delivery at said depots—and in case of their disagreement, they shall select a third citizen of like qualification, whose decision shall be final—and give receipts to the owners for them, specifying in said

citizen's arrest laws, their original intent could never be eliminated by merely altering statutory language.

V. CONCLUSION: THE UNDENIABLE LEGACY OF SLAVERY

Citizen's arrest laws were a key component of Georgia and South Carolina efforts to control the black population, both enslaved and free, in the 1860s. Their status as enforceable law today is a continual reminder of slavery's legacy. Rooted in slavery laws that were first passed in South Carolina in 1691 and in Georgia in 1755, the modern citizen's arrest laws of both states are irretrievably linked to a legacy of slavery.

The original intent and meaning behind statutory language matters. The evolution of that language and, in this case, the ways in which the citizen's arrest laws evolved from the Civil War era to the present day demonstrate that seemingly simple words matter. Examples include the meaning of the word "person" and the application and subsequent removal of race as a statutory element. These words were written by the preeminent lawyers and legislators of their day who knew exactly what they were doing.

The slavery laws in Georgia and South Carolina were specifically designed to allow whites to control their slave populations through law enforcement power.[213] This power was exercised not only by statutorily designated law enforcement officers but also by private persons acting in a quasi-law enforcement capacity. Quasi-law enforcement units, primarily slave patrols manned by whites, grew to become critical factors in maintaining white control over the black population.

The Civil War forced an end to slavery and, with it, the existing official and quasi-official methods of maintaining white control. The statutory codification of citizen's arrest laws during the Civil War era were intended to fill the void left by emancipation, and their purpose was clear: to continue white control over the black population. When first introduced, the clear racial components of Georgia and South Carolina citizen's arrest laws left no doubt of this intent. After substantial pressure from the U.S. Army and Congress, South Carolina eliminated the racial component of its citizen's arrest laws.

> receipts the names of the slaves, the valuation put upon them, and the term of service for which they are impressed—a duplicate of which receipts shall also be furnished by the several Sheriffs to the State Agent.

An Act to Repeal All Acts and Parts of Acts Heretofore Passed by the Legislature of this State on the Subject of Furnishing Slave Labor on the Coast and Fortifications Within this State, and Otherwise to Provide for Furnishing Such Labor, 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 212 (1875).

213. The Georgia and South Carolina slave laws were "all about race . . . [and] entirely about the new liberty of white men in the Americas to detain black people." Visram, *supra* note 10.

But the replacement of words alone could never remove their original purpose.

Today, Georgia and South Carolina citizen's arrest laws are problematic not just for their racist roots but because they allow private persons to decide "who has the authority to commit violence—and who that violence should be directed against."[214] When private persons have such power, they literally have "the power of the state" to mete out violence against other private persons.[215] In her powerful dissent in *State v. McAteer*, South Carolina Court of Appeals Judge Carol Connor emphasized: "[A]llowing untrained citizens to confront and arrest each other for violations of the . . . law[] invites anarchy and potential tragedy."[216] The unvarnished truth is that the violent killings of Ahmaud Arbery, Kenneth Herring, and Derrick Grant show the danger of allowing an armed, largely untrained civilian population to arrest other private persons.

This is not to say that law enforcement officers are infallible: they make mistakes, sometimes egregious, and have the capacity to commit crimes just like any other member of society. However, law enforcement officers are specifically trained in making arrests, using force, and employing a multitude of other specialized skills. Despite this stark difference, Georgia and South Carolina citizen's arrest laws currently give private persons and trained law enforcement officers the exact same ability to make warrantless arrests. Because private persons are—for the most part—untrained, arrests should be "left to experienced law enforcement officers."[217]

Regardless, the statutory right of private persons to arrest other private persons is about more than a lack of training: it is about a legacy of slavery. There is no place in our society for citizen's arrest laws as they exist today. Georgia and South Carolina citizen's arrest laws have "all the benefits of the British liberal tradition along with the violent privileges of American slavery" and must be revisited.[218] Without a deep understanding of historical context and legislative intent, the insidious, dark history of these laws remains hidden beneath the surface.

---

214. *Id.*

215. *Id.* These laws "deputiz[e] people to be violent, or to have the power of the state, which means that it is saying that other people do not have the power." *Id.*

216. State v. McAteer, 333 S.C. 615, 640, 511 S.E.2d 79, 93 (Ct. App. 1998), *rev'd*, 340 S.C. 644, 532 S.E.2d 865 (2000).

217. Fernicola, *supra* note 59, at 923.

218. Visram, *supra* note 10.