

The Rule of Black Capture & The Ahmaud
Arbery Case

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TABLE OF CONTENTS

INTRODUCTION . . . . . 33

I. DEFINING BLACKNESS . . . . . 39

II. THE RULE OF BLACK CAPTURE . . . . . 41

III. POLICING BLACKNESS. . . . . 43

    A. Slave Laws, Slave Patrol Codes, and Black Codes . . . . . 43

        1. Slave Laws . . . . . 46

            a. South Carolina Negro Act of 1740: An Act For the  
                Better Ordering and Governing Negroes and Other  
                Slaves in This Province . . . . . 46

            b. Maryland Laws, Act of 1751, ch. xiv, § 9. . . . . 46

        2. Slave Patrol Codes. . . . . 46

            a. North Carolina Patrol Regulations for The Town of  
                Tarborough . . . . . 46

            b. Alabama Slave Code of 1852 . . . . . 46

        3. Pre–Abolition Black Codes. . . . . 47

            a. Maryland Session Laws, ch. 85 (1823). . . . . 47

            b. Mississippi Revised Code of 1857, § XIII, art. 84 . . . . . 47

    B. Post-Abolition Black Codes, Vagrancy Laws, Labor Laws, &  
    Citizens’ Arrest Laws. . . . . 48

        1. Black Codes: Vagrancy Laws & Labor Laws . . . . . 50

            a. The Black Code of St. Landry’s Parish, Louisiana  
                1865 . . . . . 50

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*b. North Carolina Black Codes of 1866: Laws in Relation to Freedmen* . . . . . 50

2. Citizen’s Arrest Laws . . . . . 51

*a. The Black Code of St. Landry’s Parish Louisiana 1865* . . . . . 51

*b. Mississippi Black Codes of 1865, § 7* . . . . . 51

C. *The Rule & Modern Racialized Policing*. . . . . 53

1. The Supreme Court Sustains the Rule. . . . . 53

*a. Adolph Lyons* . . . . . 54

*b. Dethorne Graham*. . . . . 58

*c. George Floyd* . . . . . 64

*d. Venus Green*. . . . . 65

2. Society is Addicted to the Rule . . . . . 66

IV. A SLAVE PATROL FEVER DREAM – THE AHMAUD ARBERY CASE . . . . . 67

        A. *The Events Leading Up to February 23<sup>rd</sup>* . . . . . 69

        B. *February 23<sup>rd</sup>, 2020* . . . . . 73

                1. Ahmaud was Bold, Unafraid, & Silent. . . . . 73

                2. Ahmaud Dismantled the Asymmetrical Power-Relation Between White Supremacy & Blackness . . . . . 75

                3. Ahmaud Chose to Fight. . . . . 78

        C. *The Trials & The Verdicts* . . . . . 79

                1. Georgia v. Travis McMichael, Gregory McMichael, and William “Roddie” Bryan . . . . . 79

                2. United States v. Travis McMichael, Gregory McMichael, and William “Roddie” Bryan . . . . . 81

CONCLUSION . . . . . 82

My name is Jasmine Arbery. Ahmaud is my brother, and I would like to tell you a little about him. Ahmaud had dark skin that glistened in the sunlight like gold. He had thick coily hair, and he would often like to twist it. Ahmaud had a broad nose and the color of his eyes was filled with melanin. He was tall with an athletic build. He enjoyed running and had an appreciation for being outdoors. These are the qualities that made these men assume that Ahmaud was a dangerous criminal and chase him with guns drawn. To me, those qualities reflect that of a young man full of life and energy who looked like me and the people I love. Ahmaud was funny. He told jokes to lighten the mood because he was a positive thinker. Ahmaud had a big personality and never missed an opportunity to let it shine. Ahmaud had a future that was taken from him in an instance of violence. He was robbed of his life pleasures, big and small. He will never be able to fulfill his professional dreams. Nor will he be able to start a family or even be a part of my daughter's life. The loss of Ahmaud has devastated my family and me. So, I'm asking that the men that killed him be given the maximum sentence available to the court. Thank you.<sup>1</sup>

#### INTRODUCTION

An intimate and lurid form of cruelty,<sup>2</sup> the incessant policing of black people is a necropolitical<sup>3</sup> sport that evinces our country's built-in tolerance for lawless<sup>4</sup> racialized violence. It is a form of play.<sup>5</sup> Black people are treated as sub-human objects to be hunted, possessed, "toyed with and discarded."<sup>6</sup> This article argues that racialized policing and the related extrajudicial brutalization and killing of black people derive their legitimacy from the Rule of Black Capture. The Rule of Black Capture is one of society's unspoken and yet universally adhered to laws that was once overtly codified. Now, whereas America's legal system has been bifurcated into a de jure legal system comprised of race-neutral laws<sup>7</sup> that operate at the surface level of society and a de facto legal system comprised of unspoken, white supremacist-oriented laws that operate beneath society's surface, the Rule of Black Capture has been codified in America's hidden, subterranean body of law.

The Rule of Black Capture (the "Rule") is a three-part declarative rule<sup>8</sup> that white supremacists created to exercise ubiquitous disciplinary power over black people. First, mere pursuit is sufficient to give a white supremacist the right to control and possess a black body. The pursuer may effectuate his right "without bodily touch or

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1. 11Alive, *Ahmaud Arbery's Sister Gets Emotional Speaking in Courtroom as His Killers Await Sentencing*, YOUTUBE (Jan. 7, 2022), <https://perma.cc/Q2PWM9P6>.

2. See ACHILLE MBEMBE, *NECROPOLITICS* 73 (2019).

3. See *id.* at 92.

4. *Id.* at 77.

5. *Id.* at 73.

6. *Furman v. Georgia*, 408 U.S. 238, 273 (1972).

7. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 240-42 (2012); see generally Neil Gotanda, *A Critique of "Our Constitution is Color-blind,"* 44 STAN. L. REV. 1 (1991).

8. The Rule is constituted from the synthesis of principles of behavioral science, property law, and race and the law.

manucaption,”<sup>9</sup> even if the pursuer is not “within reach or doesn’t have a reasonable prospect of taking.”<sup>10</sup> Second, a pursuer may justify any use of force as a legitimate means of enforcing or reconstituting the historical, asymmetrical power-relation between white supremacy and blackness. In the pursuer’s mind, the power relation is enforced or reconstituted when the person is physically restrained, controlled, trapped, wounded, or killed.<sup>11</sup> Third, black people have no right to “self-ownership,”<sup>12</sup> and thus, no right to self-defense. Black people have an “obligation to conform” their instincts of self-preservation to their “condition of inferiority”<sup>13</sup> and demonstrate reflexive obedience under all circumstances.

White supremacists did not create the Rule to determine first possession. From an existential standpoint, first possession was achieved when the White Lion, an English privateer ship, seized enslaved Africans from the São João Bautista, a Portuguese slave ship, between 1618 and 1619.<sup>14</sup> Instead, “[t]o recognize the right of property is to recognize the right of reclaiming it, and the duty of its restoration”;<sup>15</sup> white supremacists wanted to recreate the thrill of the first capture and in each instance, to prove their ability to exercise their self-asserted right to possess and control the black body to the exclusion of the black person. Two governing principles lie at the core of the Rule: (1) perpetual control and possession of the black body is necessary to preserve peace and order in society, and (2) the status of whiteness<sup>16</sup> confers upon white people the privilege, benefit, and legal entitlement to police, hunt, capture, brutalize, and kill black people for sport, and to discover crimes – alleged, imagined, and hoped for. The definition of crime includes crimes in law and crimes against white supremacy. Crimes against white supremacy occur when a black person refuses to submit to white supremacy and engages in conscious acts of antisubordination.

The Rule is a badge and incident of slavery<sup>17</sup> because it is rooted in the ternary status of black people as wild animals,<sup>18</sup> *quasi manui assueta*,<sup>19</sup> and *homo*

9. *Pierson v. Post*, 3 Cai. R. 175, 182 (N.Y. Sup. Ct. 1805).

10. *Id.*

11. *Cf.* ANGELA FERNANDEZ, *PIERSON V. POST THE HUNT FOR THE FOX: LAW AND PROFESSIONALIZATION IN AMERICAN LEGAL CULTURE* (2018).

12. *Cf.* JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT*, Ch. V., §2, Of Property (1689).

13. THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 275 (1999); *see also* LEE B. WILSON, *BONDS OF EMPIRE: THE ENGLISH ORIGINS OF SLAVE LAW IN SOUTH CAROLINA AND THE BRITISH PLANTATION AMERICA, 1660-1783* 27 (2021) (Judge John B. O’Neill, Court of Appeals of South Carolina, “free negroes belong to a degraded caste of society; they are in no respect on an equality with a white man. According to their condition they ought by law to be compelled to demean themselves as inferiors. I have always . . . ruled that words of impertinence and insolence addressed by a free negro to a white man, would justify an assault and battery.”).

14. NIKOLE HANNAH-JONES, *THE 1619 PROJECT* 2, 9 (2021); *see* GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICA REPUBLIC* 25 (2010).

15. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 238 (1853).

16. *See* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1725 (1993).

17. U.S. CONST. amend. XIII; *see generally* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery* 14 U. PA. J. CONST. L. 561 (2012).

18. *See* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 111 (Jean Allain ed., 2014); *see also* W.D. Hart, *W.D. Slaves, fetuses, and animals: Race and ethical rhetoric*, 42 J. RELIGIOUS ETHICS 4 (December 2014); *see also* Matthew Quallen, *Making Animals, Making Slaves:*

*criminalis*.<sup>20</sup> The intended consequence of the modern application of the Rule is to force black people to occupy death worlds.<sup>21</sup> As defined by Achille Mbembe, death worlds are “new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead.”<sup>22</sup>

Furthermore, America’s system of unspoken laws is a form of racialized structural violence<sup>23</sup> because it upholds structures of oppression. The system exists because overt legalized racism is out of fashion. Racism “has had to renew itself, to adapt itself, to change its appearance. It has had to undergo the fate of the cultural whole that informed it.”<sup>24</sup> The “vulgar”<sup>25</sup> and “over-simple”<sup>26</sup> racism of slave laws, slave patrol codes, black codes, and Jim Crow laws have been coerced into refining itself to the point of plausible deniability. Hence, legalized racism has been forced underground. The laws that once existed as sadistic signposts of white supremacy have been re-codified as unspoken laws. Unspoken laws, such as the Rule, dictate how formal laws are constructed, interpreted, and applied to black people. The guise of colorblindness<sup>27</sup> provides them with refuge.

Formal laws and unspoken laws operate concurrently to concretize states of exception<sup>28</sup> where black people are stripped of their status as legal subjects due to their dehumanization and the presumption of criminality that is attached to black skin. In states of exception, black people are non-citizens. They are forced to navigate a “legal black hole”<sup>29</sup> where they are divested of full legal protections and granted precarious legal rights. Within the legal black hole, black people are fair game to be policed,

*Animalization and Slavery in the Antebellum United States*, 6 (2016) (Honors Thesis, Georgetown University).

19. WILSON, *supra* note 13, at 30 (“[f]rom antiquity, chattel slavery was modeled on the property rights traditionally claimed for domestic animals.”). Cf. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Article 4, § 2, Clause 3 (1765).

20. THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY: WITH TWO LECTURES BY AND AN INTERVIEW WITH MICHEL FOUCAULT 238 (Graham Burchell et al. eds., 1991) (I argue black people have been designated *homo criminalis*. As defined by Foucault: “*homo criminalis*. . . constitutes a veritable new species, a separate race of people whose acts are not results of a false calculation where imprisonment would be a consequence of somewhat akin to bankruptcy. . . but manifestations of an evil nature.”); see also COBB, *supra* note 13, at 88, (“the true state of the slave must be ascertained by reference to the disabilities of an alien enemy, in which light the heathen were anciently regarded.”).

21. See MBEMBE, *supra* note 2, at 92.

22. *Id.*

23. See Ciji Dodds, *In Fear of Black Revolutionary Contagion and Insurrection: Foucault, Galtung and the Genesis of Racialized Structural Violence in American Foreign Policy and Immigration Law*, 26 MICH. J. RACE & L. 371, 391-92 (2021).

24. FRANTZ FANON, TOWARD THE AFRICAN REVOLUTION 23 (1967).

25. *Id.*

26. *Id.*

27. See DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 253 (2008) (“Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites.”); see DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 41 (1996).

28. Cf. MBEMBE, *supra* note 2, at 77.

29. Cf. Leti Volpp, *Imaginings of Space in Immigration Law*, 9 LAW, CULTURE & HUMAN. 456 (2013) (Although Volpp uses “legal black hole” to describe immigration law, I argue that it applies to black people because they have been viewed as non-citizens).

hunted, and captured at any time. The Rule has been repeatedly ratified by judicial decisions,<sup>30</sup> jury verdicts,<sup>31</sup> and failed indictments,<sup>32</sup> ranging from fugitive slave cases<sup>33</sup> to use of force cases.<sup>34</sup>

Everyone knows and understands the Rule. Black people have relentlessly said the quiet part out loud. Black people have been relentlessly silenced because the quiet part exposes the fallacies of America's legal system. This article says the quiet part out loud by making three claims.

First, the Rule is one of America's most malignant unspoken laws. It is the consequence of laws and societal norms that rationalize the perpetual criminalization and propertization of black people.<sup>35</sup> It proves that society views black people as threats and black bodies as objects to be possessed and exploited for their value in slave capitalism<sup>36</sup> and carceral capitalism.<sup>37</sup>

The Rule is insidious because it "has a generative power of its own"<sup>38</sup> and has created a body of law "in its own image."<sup>39</sup> It "lies about like a loaded weapon ready for the hand"<sup>40</sup> of any white supremacist who asserts the authority and "can bring forward a plausible claim of an urgent need"<sup>41</sup> to deploy it. From its inception, the Rule was structured to encompass the varied legal classifications of black people living in a

30. *E.g.*, *L.A. v. Lyons*, 461 U.S. 95 (1983).

31. *E.g.*, George Zimmerman was acquitted of murdering Trayvon Martin. Subsequently, Zimmerman aligned himself with white supremacists by painting and selling confederate flags and autographing confederate flags and bags of skittles. *George Zimmerman sells rebel flag art to raise legal fees*, BBC NEWS (August 2015), <https://www.bbc.com/news/world-us-canada-33979927>; *see also* Isiah Carey, *Outrage over image of George Zimmerman signing bag of skittles*, FOX 26 NEWS (September 17, 2018), <https://www.fox26houston.com/news/outrage-over-image-of-george-zimmerman-signing-bag-of-skittles>.

32. *E.g.*, A grand jury chose not to indict NYPD Officer Daniel Pantaleo for strangling Eric Garner to death on July 17, 2014, and the U.S. Department of Justice chose not to charge him. Erik Ortiz, *Decision not to charge NYPD officer in Eric Garner case exposes DOJ divide*, NBC NEWS (July 17, 2019), <https://www.nbcnews.com/news/us-news/decision-not-charge-nypd-officer-eric-garner-case-exposes-doj-n1030821>.

33. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847); *e.g.*, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

34. *E.g.*, *Graham v. Connor*, 490 U.S. 386 (1989).

35. THE LEGAL UNDERSTANDING OF SLAVERY, *supra* note 18, at 133-34; *see* SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 71, 84, 29 (2001).

36. *See generally* JOHN ASHWORTH, *SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC, 1820-1850* (1995).

37. *See* Nia T. Evans, *Blue Lies Matter* (February 22, 2022), <https://bostonreview.net/articles/blue-lies-matter/> ("Police mendacity acts as a critical accelerant for the carceral state, greasing the wheels of the legal system by generating arrests, extracting revenue from poor communities. . ."); *see also*, SHANE BAUER, *AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 37-40, 223 (2018) ("It was nearly impossible to survive without cash in the prison, and the only legal way for rank men to make money was to sell their blood. The prison doctor, Austin Stough, paid the inmates \$5 a pint, which he then converted to plasma. . . He sold the plasma to the Berkeley-based pharmaceutical company Cutter Laboratories for \$22 a liter, making some \$130,000 annually from his Arkansas contract. . ."); *see also* ANGELA J. HATTERY AND EARL SMITH, *POLICING BLACK BODIES: HOW BLACK LIVES ARE SURVEILLED AND HOW TO WORK FOR CHANGE* 52-3, 103-118 (2018); *see generally* JACKIE WANG, *CARCERAL CAPITALISM* (2018).

38. *Korematsu v. U.S.*, 323 U.S. 214, 246 (1944).

39. *Id.*

40. *Id.*

41. *Id.*

“slavocracy.”<sup>42</sup> The Rule began as an openly racist informal rule utilized by white citizens to control the hereditary risks of slavery. Then, it was legally codified in various State laws and explicated in treatises.

After abolition, the Rule was forced “to undergo the fate of the cultural whole that informed it.”<sup>43</sup> It had to adapt to the legal reality of the Thirteenth Amendment<sup>44</sup> and the cultural reality of free black bodies. However, because society held onto the myth of the depraved black criminal, the Rule was not entirely forced underground. It renewed itself in black codes that retained the legal structures of slave laws and contained enforcement mechanisms akin to slave patrol provisions. Then, in response to the Fourteenth Amendment<sup>45</sup> and the Civil Rights Acts of 1866<sup>46</sup> and 1875,<sup>47</sup> society made it clear that race-neutral laws were inconsequential. Laws, such as vagrancy and citizen’s arrest laws, were almost exclusively enforced against black people, leading to a wave of carceral enslavement and convict leasing.<sup>48</sup> Jim Crow laws and the Supreme Court’s decision in *The Civil Rights Cases*<sup>49</sup> solidified the point. The Rule manifested itself in lynchings, arrests, and white supremacist-vigilantism. Thus, despite the form of the law, society openly enforced the Rule as a legitimate means of preserving white supremacy and ensuring carceral capitalism supplanted slave capitalism.<sup>50</sup> The right to possess, control, and exploit the black body as a de facto form of racialized property persisted.<sup>51</sup>

When the Court definitively struck down Jim Crow laws, again, the Rule was forced “to renew itself, adapt itself and change its appearance.”<sup>52</sup> It was forced into America’s subterranean body of law, thereby completing the bifurcation of our legal system. The full transparency of legalized racism was replaced by a tacit reliance on society to utilize a de facto system of unspoken, white supremacist laws.

Accordingly, this article claims that racialized policing was developed as an instrumentality of governance to enforce the Rule. The two are inextricably linked because racialized policing and the Rule are based on the relationship of enmity<sup>53</sup> between black people and society, in which society has designated black people as the “terrifying object.”<sup>54</sup> As used in this article, the term policing encompasses the actions of police officers and private citizens because both have been deputized by law and

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42. See AUGUST H. NIMTZ, JR., MARX, TOCQUEVILLE, AND RACE IN AMERICA: THE ABSOLUTE DEMOCRACY OR DEFILED REPUBLIC 12, 19, 49 (2003) (According to Karl Marx, so long as antiblack racism and chattel slavery existed, America could not be an “absolute democracy.” Instead, it was a slavocracy, a “defiled republic” whose founders had chosen to “accommodate the interests of the most retrograde feature of the American social formation—the slave owners.”).

43. FANON, *supra* note 24, at 32.

44. U.S. CONST. amend. XIII.

45. U.S. CONST. amend. XIV.

46. See Civil Rights Act, 14 Stat. 27 (1866).

47. See Civil Rights Act, 18 Stat. 335 (1875).

48. See ALEXANDER, *supra* note 7, at 32.

49. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

50. See BLACKMON, *supra* note 27, at 66-9.

51. See JOON-KIE JUNG AND JOAO H. COSTA VARGAS, ANTIBLACKNESS 194 (2021).

52. FANON, *supra* note 24, at 32.

53. See MBEMBE, *supra* note 2, at 42.

54. *Id.*; THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY, *supra* note 20, at 238.



society to eliminate the threat posed by blackness. The term racialized policing means “not only the literal use of police force to control the behavior of Black people – by arrest, incarceration, murder and so forth – [but also means] the control, regulation, and surveilling of Black bodies: how Black people are allowed to “be,” where Black people are allowed to go and when, and what choices Black people are allowed to make.”<sup>55</sup> As used in this article, a white supremacist can be of any ethnicity or race. A person who has internalized the ideologies of white supremacy, resulting in an inferiority complex that makes him or her want to police black people in order to obtain proximity to whiteness, is a white supremacist.<sup>56</sup> Moreover, a white supremacist is a person that consciously or unconsciously believes in the tenets of white supremacy.

Finally, this article claims that Travis McMichael, Gregory McMichael, and William “Roddie” Bryan lynched Ahmaud Arbery pursuant to the Rule. In body-camera videos and statements made after the killing, each rationalized their actions by implicitly stating and applying each part of the Rule.<sup>57</sup> Their dispositions proved they hunted him for sport and because they presumed that he was a criminal, despite contrary evidence. Gregory was giddy: “If he’d have gotten that shotgun, I was going to cap his ass.”<sup>58</sup> Roddie was not initially involved. But upon seeing white men in a truck hunting a black man, he yelled, “ya’ll got him,”<sup>59</sup> before he hopped into his truck to join the hunt and pulled out his cell phone to memorialize it.<sup>60</sup> Travis declared that Ahmaud left him no choice. All Ahmaud had to do was stop and talk to him.<sup>61</sup>

Ahmaud’s murderers were not instantly arrested and charged because the criminal justice system in Glynn County, Georgia, understood and applied the Rule. Only after the lynching was publicized did the Attorney General cite Georgia’s former Citizen’s Arrest Law<sup>62</sup> as a defense. As Ahmaud lay dead in the street, Gregory asked, “y’all aren’t going to put him [Travis] in cuffs?” An officer responded, “[w]hy would

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55. HATTERY, *supra* note 37, at 8.

56. See Tanya Kateri Hernandez, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 115 (1998).

57. See Nicole Duncan-Smith, ‘Didn’t Know How to Respond’: GBI Agents Describe Gregory and Travis McMichael Being ‘Shocked’ and ‘Surprised’ as they were Being Arrested for Killing Ahmaud Arbery, YAHOO! (Jan. 24, 2022), <https://www.yahoo.com/video/didn-t-know-respond-gbi-161000819.html>.

58. 11Alive, *Transcript: Greg McMichael said if Ahmaud Arbery got gun ‘I was going to cap his a\*\*\**, YOUTUBE, at 0:36 (Nov. 10, 2021), <https://www.youtube.com/watch?v=LsOsmNVS3JU>.

59. Adam Klasfeld, *Man Who Pursued Ahmaud Arbery and Recorded Shooting Told Cop He was Almost ‘Thrown Through the Windshield Trying to Chase This Damn Joker’: Testimony*, LAW & CRIME at 2:00 (Nov. 8, 2021), <https://lawandcrime.com/live-trials/live-trials-current/ahmaud-arbery/man-who-pursued-ahmaud-arbery-and-recorded-shooting-told-cop-he-was-almost-thrown-through-the-windshield-trying-to-chase-this-damn-joker-testimony/>.

60. See Rick Rojas, *Investigators Say William Bryan Was More Than a Witness*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/us/ahmaud-arbery-william-roddie-bryan.html>.

61. First Coast News, *Raw Video: Police body cam following fatal shooting of Ahmaud Arbery. Interview of Travis McMichael*, YOUTUBE, at 1:03 (Dec. 17, 2020), <https://www.youtube.com/watch?v=aXRVXstOySM> [hereinafter *Travis McMichael Interview*].

62. GA. CODE ANN., § 17-4-60 (repealed 2021).



he be in cuffs?”<sup>63</sup> An officer told Roddie to “go home and get you a lil’ glass of tea.”<sup>64</sup> The officers eagerly provided Travis and Gregory with wipes to clean off Ahmaud’s blood. One officer instructed another to make sure he did not give them the wipes that burned.<sup>65</sup>

Part I of this article contains a historical analysis of how white supremacists defined blackness. The definition is significant because it informed why and how the Rule was constructed. In Part II, the Rule is fully explicated. Part III analyzes the body of law that the Rule has generated, starting with slave laws and ending with the Supreme Court’s excessive force jurisprudence. Part IV examines the Rule through the lens of the Arbery Case.

## I. DEFINING BLACKNESS

“Every facet of black life was suspect.”<sup>66</sup>

The fusion of race and property law is the co-constitutive force that sustains American white supremacy. Beginning with slavery, the dual legal status<sup>67</sup> of black people as persons and property created ambiguities and logical inconsistencies within the law. However, reason and logic were subordinated to preserve a racial hierarchy.<sup>68</sup> The principle, “every Man has a Property in his own Person,”<sup>69</sup> was conditioned upon whiteness. The prevailing legal principles were “[e]very negro is presumed to be a slave,”<sup>70</sup> and “[c]olor and long possession are such presumptive evidence of slavery as to throw the burden of proof on the party claiming his freedom.”<sup>71</sup>

In affirming and protecting chattel slavery, the government and the law “denied to the slave the possession of any rights by denying to him the right of self-ownership, which is the foundation and parent stock of all other rights, and without which they cannot exist.”<sup>72</sup> Moreover, free status did not nullify one’s dual

63. First Coast News, *Raw police body cam from Ahmaud Arbery shooting. Greg McMichael speaks to Glenn County PD*, YouTube, at 10:25 (Dec. 17, 2020), <https://www.youtube.com/watch?v=JW39jE81qiQ> [hereinafter “Gregory McMichael Interview”].

64. First Coast News, *Raw Video: ‘Should we have been trying to chase him? I don’t know.’ Roddie Bryant tells police after Ahmaud Arbery shooting*, FIRST COAST NEWS, at 25:12 (October 12, 2021), <https://www.firstcoastnews.com/video/news/crime/raw-video-should-we-have-been-trying-to-chase-him-i-i-know-roddie-bryant-tells-police-after-ahmaud-arbery-shooting/77-54b38dca-170e-4e53-9d01-418b8531864d> [hereinafter *Bryan Interview*].

65. Travis McMichael Interview, *supra* note 61, at 0:50.

66. Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 PHYLON 42, 49 (2016).

67. See THE LEGAL UNDERSTANDING OF SLAVERY, *supra* note 18 at 111.

68. See GOODELL, *supra* note 15, at 34-5, 77-88 (Excerpt from Henry Clay’s U.S. Senate speech in 1839: “The third impediment to the immediate abolition to be found in the immense amount of capital which is invested in slave property. The total value of slave property. . . is twelve hundred million[s] of dollars. . . I know that there is a visionary dogma which holds that negro slaves cannot be the subject of property. . . Two hundred years of legislation have sanctified and sanctioned negro slaves as property.”); see generally, *Groves v. Slaughter*, 40 U.S. 449 (1841).

69. LOCKE, *supra* note 12, at § 27.

70. E.g., GOODELL, *supra* note 15, at 276-77.

71. *Id.* at 277; THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 38 (1965).

72. GOODELL, *supra* note 15, at 290.

status.<sup>73</sup> Before and after abolition, free black people were essentially categorized as unclaimed things subject to enslavement, re-enslavement,<sup>74</sup> or carceral enslavement.<sup>75</sup> They possessed quasi-rights that were contingent upon the largesse of the state and every white person they encountered. "White identity and whiteness were sources of privilege and protection; their absence meant being the object of property."<sup>76</sup>

Owing to its dual status, the black body was paradoxically valued as a commodity and devalued as a vessel for an inherently predatory person. As property, and thus, an item of commerce,<sup>77</sup> the black body's legal personality was defined by slave capitalism.<sup>78</sup> As a person, the black body's legal personality was defined by carceral capitalism. The value ascribed to both legal personalities reinforced the belief that the black body was only fit for individual and state appropriation.

Furthermore, enslavement was an existence defined by a master's ability to exercise absolute power and control over the mortality of the slave. Likewise, a free black person's existence was structured as one where a white supremacist possessed power and control over their mortality.<sup>79</sup> In many cases, the law placed the same legal restrictions on free black people and slaves.<sup>80</sup> In *Dred Scott v. Sandford*, Chief Justice Taney's description of the legal personality of black people in America applied to all black people.

[T]hey are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.<sup>81</sup>

Both were stateless. Although they were physically present within America's territorial boundaries, they were non-citizens who resided in a "legal black hole"<sup>82</sup> located outside of America's constitutional boundaries.<sup>83</sup>

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73. See *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850) (holding that the status of slaves travelling from Kentucky to other states depended on Kentucky law); see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

74. See generally GOODELL, *supra* note 15, at 355-371.

75. See BLACKMON, *supra* note 27, at 53-5.

76. Harris, *supra* note 16, at 1721.

77. See *Groves v. Slaughter*, 40 U.S. 449, 465-478 (1841).

78. *Dred Scott v. Sandford*, 60 U.S. 393, 407-10 (1857).

79. See COBB, *supra* note 13, at 314-15.

80. *E.g.*, *State vs. Jowers*, 33 North Carolina 555, at 556-57 (1850) ("It is unfortunate that this third class exists in our society. . . A free negro has no master to correct him. . . and unless a white man, to whom insolence is given, has a right to put a stop to it, in an extra judicial way, there is no remedy for it. . . this extrajudicial remedy is excusable, provided the words or acts of a free negro be in law insolent."); see also *Bryan v. Walton*, 14 GA 185, 198 (1853); see also, WILSON, *supra* note 71, at 19, 36.

81. *Dred Scott*, 60 U.S. at 404-405.

82. Volpp, *supra* note 29, at 3.

83. *Id.*

Finally, to define blackness, one must define the psychological value white supremacists derive from the propertization and criminalization of blackness. Extending Anthony Paul Farley's theory that the black body is a fetish object<sup>84</sup> to the Rule, I posit that white supremacists fetishized the black body as a source of animate capital<sup>85</sup> and animalistic power. An animalistic power that, for white supremacists, produced wealth and the pleasure associated with capture. The presumption that a black person was a piece of property and a criminal allowed white supremacists to satisfy their fetish by policing and hunting black people for sport and wealth.

## II. THE RULE OF BLACK CAPTURE

I work for the sheriff's office. . . . I hunt people — it's a great job, I love it. I worked this job 14 years, you know, I ain't never been hit clean in the face one time? It's a fact. It ain't 'cause I'm so good. You know why? I learned long ago I gotta throw the first punch. And I learned long ago why I'm justified in throwing the first punch. Don't look up here like, 'Oh, police brutality.' People I hit you wish you could hit, trust me.<sup>86</sup>

I argue that whereas the racial identity of whiteness is a form of property,<sup>87</sup> the right to perpetually control and possess black bodies is within the scope of the privileges, benefits, and legal entitlements that white supremacists believe accompanies the status of whiteness.<sup>88</sup> The right is comprised of settled, strong, and permanent expectations of being allowed to (1) use the law to subjugate black life to the power of death,<sup>89</sup> (2) derive pleasure from exposing black people to state-sanctioned, recreational terror, and (3) commoditize the black body for economic use. Black people are regarded as "objects, as 'things,' [that] have no purposes except those their oppressors prescribe for them."<sup>90</sup>

Therefore, the Rule of Black Capture is the product of the convergence of capitalism and the fetishization of blackness, and it governs the subject-object relation created therefrom. Thus, it answers the question of how do white supremacists seek to affirm a perpetual right to control and possess<sup>91</sup> black people, even in the face of de jure recognition of black people as full citizens.

84. See Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

85. See EDWARD B. RUGEMER, *SLAVE LAW AND THE POLITICS OF RESISTANCE IN THE EARLY ATLANTIC WORLD* 24 (2018).

86. Lauren Sue, *I hunt people – it's a great job: Ohio deputy/pastor brags before killing Casey Goodson Jr.*, DAILY KOS (December 27, 2020) <https://www.dailykos.com/stories/2020/12/27/2004342/-> (Statement of Pastor Michael Jason Meade, who is also the Franklin County Ohio Sheriff's Swat Deputy that shot and killed Casey Goodson Jr., to attendees of the 2018 convention of the Ohio State Association of Free Will Baptists on December 4, 2020).

87. See Harris, *supra* note 16, at 1713.

88. *Id.* at 1713 (I argue that white people are aware that whiteness is property, and therefore, are aware that it confers certain legal entitlements, privileges, and benefits).

89. *Cf.* MBEMBE, *supra* note 2, at 92.

90. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED: 50TH ANNIVERSARY EDITION* 60 (2018).

91. See FERNANDEZ, *supra* note 11, at 4.

The first part of the Rule provides: mere pursuit is sufficient to give a white supremacist the right to control and possess a black body. The pursuer may effectuate his right “without bodily touch or manucaption”<sup>92</sup> even if the pursuer is not “within reach or doesn’t have a reasonable prospect of taking.”<sup>93</sup> Mere pursuit is sufficient because “it declares the intention of acquiring dominion.”<sup>94</sup> Mere pursuit can be established by simply saying, “stop” or “what are you doing here?” Any small act that a black person should recognize as a signal to subordinate himself to the pursuer’s authority is sufficient. Noncompliance with the pursuer’s explicit or implicit demands is grounds for using force or escalating force. Hence, minimal labor is sufficient to exercise maximum control.

Second, a pursuer may justify any use of force as a legitimate means of enforcing or reconstituting the historical, asymmetrical power relation between white supremacy and blackness. In the pursuer’s mind, the power relation is enforced or reconstituted when the person is physically restrained, controlled, trapped, wounded, or killed. Displays of physical brutality and psychological violence are intended to have the psychological impact of paternal corporal punishment. “Corporal punishment mark[s] its object as inferior, and in particular, as inferior to its subject.”<sup>95</sup> Whether occurring in public or private, physical and psychological violence are “degradation ceremon[ies]”<sup>96</sup> designed to “unmask”<sup>97</sup> the proper legal and societal status of the black person.

Third, a black person does not have the right of self-defense because, to white supremacists, black people occupy an existence beyond the scope of natural law and justice.<sup>98</sup> Black people have an “obligation to conform” their instincts of self-preservation to their “condition of inferiority”<sup>99</sup> and demonstrate reflexive obedience under all circumstances. Involuntary physical responses, like the body’s response to being choked, are included in the definition of self-defense, even though they are a function of the body’s automatic fight or flight response.<sup>100</sup> The provocations that entitle a white person to repel force with force or defend himself in any other manner are disregarded when a black person is involved because law and society have determined that a black person who defends himself is an insurrectionist or outlaw whose conduct threatens the peace and security of society.

In the context of the propertization of black people, the concept of possession and control is not limited to the body. It includes possessing a black person’s sovereignty and time. Therefore, the purpose of the Rule is not to provide clarity in a pure property law sense for when at least two or more people are competing for possession of

92. *Pierson*, 3 Cai. R. at 182.

93. *Id.*

94. *Id.* at 177.

95. MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 34 (2005).

96. *Id.* at 34-35.

97. *Id.* at 34-5.

98. *See generally*, LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 224-66 (1987).

99. COBB, *supra* note 13, at 275; *see also*, WILSON, *supra* note 71, at 27.

100. *See Lyons*, 461 U.S., at 119.

an object. The white supremacist intent behind the Rule is to provide clarity for black people as to their status in America's racial hierarchy and how they should conduct themselves when confronted with white supremacists who want to exercise dominion over them. Simply put, the Rule applies when there are two people. One person is competing to disprove that she is an object to be possessed and to reaffirm property in her person. The other person seeks to affirm that she is an exploitable object and divest her of property in her person. They are competing to prove whether she can and should be reduced to an object to be rightfully possessed and controlled.

Collateral capture is an additional dimension of the Rule. Collateral capture occurs when a black person, who is not the original target, is subjected to the Rule because the pursuer views them as a threat to the pursuer's power. Collateral capture is triggered when a person records the encounter, verbally protests physically intervenes, or obstructs the encounter, i.e., the person commits a crime against white supremacy. The pursuer turns his attention to the person and attempts to capture the person pursuant to the Rule.

The Rule is inherently illogical. However, it is treated as a logical bright-line rule because it has served as an effective means of upholding white supremacy. The Rule is plainly revealed in slave patrol codes, black codes, citizens' arrest laws, and use of force jurisprudence.

### III. POLICING BLACKNESS

The Rule of Black Capture "has a generative power of its own"<sup>101</sup> and has created a body of law "in its own image."<sup>102</sup> The Rule and the body of law were born out of necessity. They were a means of protecting the "great objects"<sup>103</sup> of the early American government, which were the stabilization of America's economy and the maintenance of America's national existence. Because the great objects were dependent upon slave capitalism and racial oppression, racialized policing became an essential arm of governance that was necessary to prevent insurrections. Racialized policing was never intended to be solely carried out by a professional police force because the laws governing racialized policing deputized everyone who had been conferred the status of whiteness.

#### A. *Slave Laws, Slave Patrol Codes, and Black Codes*

To be black was an inchoate offense. "[T]he law of slavery was, in fact, an 'extensive set of police measures' at both the level of the private household of the plantation and of the public household of the colony."<sup>104</sup> "[S]lave codes [slave laws] resembled

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101. *Korematsu v. U.S.*, 323 U.S. 214, 246 (1944).

102. *Id.*

103. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3 (1904) ("[T]o understand the police power with reference to its purpose, it is necessary to distinguish the great objects of government: the maintenance of national existence; the maintenance of right, or justice; and the public welfare." I argue the great objects of the early American government were the stabilization of its economy using slave capitalism and maintenance of its national identity as a white supremacist nation).

104. DUBBER, *supra* note 95, at 61.

Blackstone's treatment of police offenses in that they too lacked conceptual structure and were content to accumulate, without any claims to comprehensiveness, lists of illustrative offenses."<sup>105</sup> Additionally, slave laws were examples of boundary laws.<sup>106</sup> Boundary laws "defined and patrolled the public boundaries between free and slave and between non-white and white,"<sup>107</sup> along with the geographical boundaries of the spaces enslaved people, free black people, and white people could occupy.<sup>108</sup>

In the late 17<sup>th</sup> and early 18<sup>th</sup> centuries, when slave capitalism flourished and the population of enslaved and free black people increased, states enacted slave laws and black codes that established racialized policing as the legal obligation of every white person.<sup>109</sup> States were primarily concerned with enacting laws that eliminated conditions conducive to planning slave insurrections.<sup>110</sup> The laws could only be enforced by constantly surveilling and policing black people, which led to laws establishing slave patrols.<sup>111</sup> White men who refused to carry out their periodic patrol duties could be penalized.<sup>112</sup>

Patrollers served in a quasi-judicial capacity because they were responsible for discovering crimes and determining the punishment.<sup>113</sup> Some laws limited the severity of the punishment that patrollers could inflict because slaves were valuable property;<sup>114</sup> however, the law often authorized patrollers to whip slaves and use other types of corporal punishment.<sup>115</sup> One of their primary duties was to randomly search<sup>116</sup> slave quarters for evidence that enslaved or free black people were planning

105. *Id.*; see also BRYAN WAGNER, *DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY* 4-6 (2009).

106. DUBBER, *supra* note 95, at 64 (describing the VA Slave Code of 1705 as listing "under four dozen more or less random titles, the activities that slaves and indentured servants cannot do, must do, or cannot do with whites, the things that whites cannot do for slaves, and that blacks cannot do even free"); e.g., MISS. CODE, Art. 93 (1857).

107. Johnathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417, 434 (1993).

108. See DUBBER, *supra* note 95, at 61-1.

109. HADDEN, *supra* note 35, at 17-18.

110. Bush, *supra* note 107, at 417, 428, 433-34.; HADDEN, *supra* note 35, at 14.

111. See STEPHEN KANTROWITZ, BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY 28 (2000); HADDEN, *supra* note 35, at 64-5; The Statutes at Large of S.C., No. 233 An Act to Settle A Patrol, 254-55 (1836), <https://archive.org/details/statutesatlarge04mccogoo/page/254/mode/2up>; see also STANLEY HARROLD, BORDER WAR: FIGHTING OVER SLAVERY BEFORE THE CIVIL WAR 46 (2010); see also S.C.: An Act to Reduce all Acts and Clauses of Acts, in Relation to the Patrol of the State, into One Act, and to Alter and Amend the Same (1839) ("[A]ll free white aliens, or transient persons, above the age of eighteen, and under the age of forty-five years. . . are hereby declared to be subject and liable to do all Patrol and Militia duty. . . and be subject and liable to all pains and penalties inflicted by this Act, for the non-performance of Patrol or Militia duty.").

112. E.g., Williams, E. Russ, *Slave Patrol Ordinances of St. Tammany Parish, Louisiana, 1835-1838*, 13 LA. HIST: J. LA. HIST. ASS'N 4, 406 (1972).

113. WILSON, *supra* note 71, at 30; HADDEN, *supra* note 35, at 105.

114. WILBUR R MILLER, A HISTORY OF PRIVATE POLICING IN THE UNITED STATES: HISTORY OF CRIME, DEVIANCE AND PUNISHMENT location 1218 (Kindle Ed. 2020).

115. See HADDEN, *supra* note 35, at 103, 105, 117-19.

116. *Id.* at 36.

insurrections.<sup>117</sup> Laws instructed patrollers to “disperse and punish all unusual concourse of negroes,”<sup>118</sup> meaning unauthorized meetings of slaves and meetings that included slaves and free black people.<sup>119</sup> They apprehended and punished slaves “strolling”<sup>120</sup> without passes<sup>121</sup> and runaways.<sup>122</sup> Free black people were equally surveilled and harassed.<sup>123</sup> Laws authorized patrollers to punish all black people for insolence and disobedience.<sup>124</sup>

Due to the pervasive slave plots and an increasing number of slave insurrections, slave patrols evolved from informal forces to professionalized forces that were structured like modern police forces. States paid salaries, and in many states, patrollers were indemnified against criminal and civil lawsuits brought by slaveowners for mistreating their slaves.<sup>125</sup>

The power of patrollers and private white citizens was magnified by the fact that black people did not have the right to self-defense.<sup>126</sup> Thomas Cobb wrote in his slave law treatise,

A legal provocation for a slave, is such as, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority. . . .<sup>127</sup>

Subordination and obedience being not only the duty of the slave, but absolutely necessary to the preservation of social order, insubordination, and insurrection or rebellion, are offences recognized and punished severely in all states. The slave becomes an outlaw as soon as he places himself in a state of insurrection, and by many of the codes his homicide is justified.<sup>128</sup>

The slave codes, slave patrol codes, and black codes below are representative of the laws Southern legislatures enacted. Each law expressly states or implies that (1) mere pursuit is sufficient to give a pursuer the right to control and possess a black body, (2) a pursuer may justify any use of force as a legitimate means of reconstituting or enforcing the asymmetrical power-relation between white supremacy and blackness, and (3) a black person does not have the right of self-defense.

117. *Id.* at 106-07; *e.g.*, The Revised Code of the Statute Laws of the State of Miss., Art. 86 and 88 (1857).

118. HADDEN, *supra* note 35 at 30-31.

119. *Id.* at 108-09.

120. *Id.* at 31.

121. *Id.*

122. *Id.* at 80.

123. ALEX S. VITALE, THE END OF POLICING 47 (2018).

124. HADDEN, *supra* note 35, at 107.

125. *Id.* at 77; *e.g.*, N.C., HAYWOOD'S MANUAL, Act of 1799, Hawk's Repr., vol. i., 418 (1799).

126. COBB, *supra* note 13, at 274.

127. *Id.* at 275.

128. *Id.*



## 1. Slave Laws

### *a. South Carolina Negro Act of 1740: An Act For the Better Ordering and Governing Negroes and Other Slaves in This Province*<sup>129</sup>

If any slave who shall be out of the house or plantation where such slave shall live or shall be usually employed or without some white person in company with such slave, shall refuse to submit to examination of any white person, it shall be lawful for any such white person to pursue, apprehend, and moderately correct such slave; and if such slave shall assault and strike such white person, such slave may be lawfully killed.

### *b. Maryland Laws, Act of 1751, ch. xiv, § 9*<sup>130</sup>

Any slave killed for refusing to surrender him or herself, contrary to law, or in unlawful resisting any officer, or other person, who shall endeavor to apprehend such slave or slaves, such officer or other person so killing such slave, as aforesaid, making resistance, shall be and is by this act indemnified from any prosecution for such killing aforesaid.

## 2. Slave Patrol Codes

### *a. North Carolina Patrol Regulations for The Town of Tarborough*<sup>131</sup>

If any slave shall violate the foregoing Rules, the Patrol shall have power and it shall be their duty (any two of their number being present) to whip the said slave, either at the time of the offence being committed or at any time within three months thereafter, the number of stripes not to exceed fifteen, unless the said slave shall be guilty of insolent behavior, or make his escape from the Patrol, in either of which cases the number of stripes shall not exceed thirty-nine.

### *b. Alabama Slave Code of 1852*<sup>132</sup>

§992. The patrol has power to enter, in a peaceable manner, upon any plantation; to enter by force, if necessary, all negro cabins or quarters, kitchens and out houses, and to apprehend all slaves who may there be found, not belonging to the

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129. S.C. Slave Code of 1740, No. 670 (1740), <https://ushistoryscene.com/article/excerpts-south-carolina-slave-code-1740-no-670-1740/>.

130. CHAPMAN BROTHERS, INTERESTING MEMOIRS AND DOCUMENTS RELATING TO AMERICAN SLAVERY AND THE GLORIOUS STRUGGLE NOW MAKING FOR COMPLETE EMANCIPATION 241 (1846).

131. See EDWARD CANTWELL, 1860 JUDICIAL HORNBOOK: THE PRACTICE AT LAW IN NORTH CAROLINA, 377 (1860), <https://docsouth.unc.edu/nc/tarboro/menu.html>.

132. Ala. Slave Code of 1852, §§ 992-993, <http://constitutionreader.com/reader/chapter.engz?doc=constitution&chapter=OEBPS/Text/ch82.xhtml>.

plantation or household, without a pass from their owner or overseer; or strolling from place to place, without authority.

§993. The patrol has power to punish slaves found under the circumstances recited in the preceding section, by stripes, not exceeding thirty-nine.

### 3. Pre–Abolition Black Codes

#### *a. Maryland Session Laws, ch. 85 (1823)*<sup>133</sup>

[I]f said patrol have reason to suspect that any runaway negro slave, or person of colour, is concealed or harboured in any dwelling or out house of any coloured person, within their search, it shall be the duty of such patrol to demand of the owner or occupant of such house to be admitted into the same, for the purpose of making search as aforesaid, and if the owner or occupant shall refuse to suffer such entry and search, it shall be lawful for such patrol to use all necessary force to effect the same, and any action of trespass or other suit brought by any owner or occupant for any entry made in virtue of this act, the defendant shall, on the general issue plea, have liberty to give the special matter in evidence.

[I]t shall be the duty of the commander of every patrol, at least as often as once a fortnight, to call out the patrol under his command, and to take up all slaves who may be found without the limits of their owner's plantation, under suspicious circumstances, or at a suspicious distance therefrom, and to correct all such slaves by a moderate whipping with a switch or cow-skin, not exceeding twenty lashes, unless the said slave shall have a ticket or letter to show the reasonableness of his or her absence, or shall have some white person in company to give an account of the business of such slave or slave.

#### *b. Mississippi Revised Code of 1857, § XIII, art. 84*<sup>134</sup>

Any free negro or mulatto who shall be present at any unlawful assemblage of slaves, shall, on conviction be punished by any number of lashes on the bare back, not exceeding thirty-nine; and for committing riots, affrays, trespasses, malicious mischief, or for seditious speeches, or for insulting language to white persons, or for assaults on white persons, or for any disturbance of the peace, either with white persons or slaves, or for exercising the functions of a minister of the gospel, free negroes and mulattoes, on conviction, may be punished by any number of lashes not exceeding thirty-nine, and on the bare back, and shall pay the costs.

133. Archives of Md., Md. General Assembly Laws, 1823, <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000628/htm—am628—3.html>.

134. THE REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISS. § XIII, art. 84 (1857).

*B. Post-Abolition Black Codes, Vagrancy Laws, Labor Laws, & Citizens' Arrest Laws*

White supremacists responded to abolition and reconstruction with extreme racial hostility.<sup>135</sup> Using laws, racialized policing, and recreational terrorism, white supremacists tried to force black people into a “state of injury.”<sup>136</sup> Racialized policing took on a heightened significance because white supremacists were reminded of their defeat every time they saw a free black body.<sup>137</sup>

Slave patrols were restructured as police forces<sup>138</sup> and vigilante groups, like the Ku Klux Klan<sup>139</sup> and the N-word killers.<sup>140</sup> Slave patrol codes formed the basis of police manuals and criminal law digests.<sup>141</sup> Lawyers used them to establish “proper police behavior”<sup>142</sup> in court. The police used the same tactics and performed the same duties as slave patrollers. Thus, the Rule remained the defining feature of racialized policing. Before abolition, laws limited the punishment patrollers could inflict because slaves were property. After abolition, police assaulted black people with impunity.

Black citizens of Richmond, VA described the police officers as a “mounted patrol, with their sabers drawn, whose business is the hunting of colored people.”<sup>143</sup> “The “old Rebel police now in power have been our greatest enemies. It was Mayor Mayo [Richmond] who in the former days ordered us to be “scourged for trifling offenses against slave laws and usages; and his present police, who are now hunting us through the streets, are the men who relentlessly applied the lash to our quivering flesh.”<sup>144</sup>

The Thirteenth Amendment “refurbishe[d] the racist state by transparently re-codifying the terms of bodily capture and subjection,”<sup>145</sup> thereby reimagining the black body as animate capital in the system of carceral capitalism. Carceral capitalism’s purpose was to restore the profitability of slave capitalism<sup>146</sup> and rebuild the

135. See BLACKMON, *supra* note 27, at 7, 53 (“The desire of white farmers to recapture their former slaves through new civil laws was transparent. . .there must be stringent laws to control the negroes & require them to fulfill their contracts of labour on the farms.”); THE LEGAL UNDERSTANDING OF SLAVERY, *supra* note 18, at 182-84.

136. See generally MBEMBE, *supra* note 2, at 75.

137. See Lisa M. Olson, *Blue Lives Have Always Mattered: The Usurping of Hate Crime Laws for an Unintended And Unnecessary Purpose*, 20 SCHOLAR 13 (2017).

138. *Id.*; see also MILLER, *supra* note 114, at location 826.

139. MILLER, *supra* note 114, at location 831.

140. See HADDEN, *supra* note 35, at 218-19.

141. *Id.*, at 218.

142. *Id.*

143. *Id.* at 193.

144. *Id.*; see HADDEN, *supra* note 35, at 200 (quoting The *Lynchburg Virginian* in 1865, “the most stringent police regulations may be necessary to deem [freedmen] from overburdening the towns and depleting the agricultural regions of labor. . . Magistrates and municipal officers everywhere should be permitted to hold a rod in terrorem over these wandering, idle, creatures. Nothing short of the most efficient police system will prevent strolling, vagrancy, theft, and the utter destruction of or serious injury to our industrial system.”).

145. See JUNG, *supra* note 51, at 195.

146. See GOODELL, *supra* note 15, at 70-71, 78-79, 96.

South's infrastructure and economy.<sup>147</sup> Plantations became prisons,<sup>148</sup> and the Thirteenth Amendment's exception, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted,"<sup>149</sup> was used to fill them.

Vagrancy laws, labor laws, and citizen's arrest laws fueled racialized policing and carceral capitalism.<sup>150</sup> They forced black people into neo-enslavement or carceral enslavement;<sup>151</sup> a black person could consent to an exploitative job like sharecropping<sup>152</sup> or be enslaved in the prison system. Sharecropping was a form of peonage that "depended upon formal mechanisms of contract, as supplemented by criminal law."<sup>153</sup> Vagrancy laws and labor laws reinforced each other.<sup>154</sup> A black person could be criminally prosecuted for being unemployed, quitting a job, or breaking a labor contract with a white man.<sup>155</sup>

Mass carceral enslavement ensued.<sup>156</sup> Convict leasing and convict labor replaced slave leasing and slave labor. Carceral enslavement was lucrative:<sup>157</sup> state governments, citizens, and companies paid judgments and compelled people to work for unconscionable periods under slavery-like conditions.<sup>158</sup> Prisoners rebuilt the South's infrastructure and generated massive wealth for companies.<sup>159</sup>

147. See HATTERY, *supra* note 37, at 6.

148. JUNG, *supra* note 51, at 195; OSHINSKY, *supra* note 27, at 110; HATTERY, *supra* note 37, at 49-51.

149. U.S. CONST. amend. XIII, § 1.

150. *E.g.*, Tex. General Laws 1866: An Act Regulating Contracts for Labor, <https://www.blackpast.org/african-american-history/1866-texas-black-codes/#:~:text=Approved%20November%201st%2C%201866.,of%20service%20to%20other%20persons>; see HADDEN, *supra* note 35, at 200; see also BLACKMON, *supra* note 27, at 53-54.

151. VITALE, *supra* note 123, at 47.

152. MILLER, *supra* note 114, at location 821.

153. See PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969, 19-20 (1972); see also Pete Daniel, *The Metamorphosis of Slavery, 1865-1900*, 66 J. Am. Hist. 88 (1979).

154. See OSHINSKY, *supra* note 27, at 21.

155. BLACKMON, *supra* note 27, at 53, 285.

156. See ALEXANDER, *supra* note 7, at 30-35; see also OSHINSKY, *supra* note 27, at 40-42.

157. BLACKMON, *supra* note 27, at 65 ("[C]ontrol of those county convicts was lucrative, for. . . the sheriffs who supplied them. In addition to the fees they received from defendants, sheriffs also kept any amount left over from daily feeding fees paid for each prisoner in the state. . . Alabama's sheriffs were financially motivated to arrest and convict as many people as possible, and simultaneously to feed them as little as they could get away with."); *e.g.*, MILLER, *supra* note 114, at 1 ("At least 73 percent of Alabama's revenue came from convict leases; [some] authorized companies to lease prisoners for twenty years."); see also BLACKMON, *supra* note 27, at 286-287 ("Ben Holt, convicted of vagrancy on August 29, 1906, was ordered to pay the county a fine of \$1. The costs of his arrest and prosecution, however, totaled \$76.28. Instead of paying, he confessed judgement. . . a farmer named James Wharton paid the fine and fees and [] owned Holt for a minimum of two hundred days.").

158. MILLER, *supra* note 114, at 3497 ("In Alabama, reports revealed that 18 to 41 percent of the prisoners died between 1868 and 1870. Tennessee reports mostly give no cause of death, but some, such as "shot," "drowned," or "found dead").

159. BLACKMON *supra* note 27, at 7-8, 289; BAUER, *supra* note 37, at 124; see also JUNG, *supra* note 51, at 132-35 (2021).

## 1. Black Codes: Vagrancy Laws &amp; Labor Laws

*a. The Black Code of St. Landry's Parish, Louisiana 1865*<sup>160</sup>

AN ORDINANCE relative to the police of negroes recently emancipated within the parish of St. Landry.

Whereas it was formerly made the duty of the police jury to make suitable regulations for the police of slaves within the limits of the parish; and whereas slaves have become emancipated by the action of the ruling powers; and whereas it is necessary for public order, as well as for the comfort and correct deportment of said freedmen, that suitable regulations should be established for their government in their changed condition, the following ordinances are adopted, with the approval of the United States military authorities commanding in said parish, viz:

SECTION 1. [N]o negro shall be allowed to pass within the limits of said parish without a special permit in writing from his employer. Whoever shall violate this provision shall pay a fine of two dollars and fifty cents, or in default thereof shall be forced to work four days on the public road, or suffer corporeal punishment as provided hereinafter.

SECTION 5. [N]o public meetings or congregations of negroes shall be allowed within said parish after sunset; but such public meetings and congregations may be held between the hours of sunrise and sunset, by the special permission in writing of the captain of patrol, within whose beat such meetings shall take place. This prohibition, however, is not intended to prevent negroes from attending the usual church services, conducted by white ministers and priests. Every negro violating the provisions of this section shall pay a fine of five dollars, or in default thereof shall be compelled to work five days on the public road, or suffer corporeal punishment as hereinafter provided.

*b. North Carolina Black Codes of 1866: Laws in Relation to Freedmen*<sup>161</sup>

SECTION 1. [I]f any person who may be able to labor has no apparent means of subsistence, and neglects to apply himself to some honest occupation for the support of himself and his family, if he have [sic] one, or, if any person shall be found spending his time in dissipation, or gaming, or sauntering about without employment, or endeavoring to maintain himself or his family, by any undue or unlawful means, such person shall be deemed a vagrant, and guilty of a misdemeanor. And it shall be the duty of any justice of the peace of the county wherein such person shall be found, upon due proof of such offence, to issue a warrant for the arrest of

160. LA. BLACK CODE, ST. LANDRY'S PARISH, § 1, 5 (1865), [https://www.ruhr-uni-bochum.de/gna/Quellensammlung/05/05\\_blackcode\\_1865.htm#:~:text=Be%20it%20further%20ordained%2C%20That%20no%20negro%20who%20is%20not,most%20convenient%20chief%20of%20patrol](https://www.ruhr-uni-bochum.de/gna/Quellensammlung/05/05_blackcode_1865.htm#:~:text=Be%20it%20further%20ordained%2C%20That%20no%20negro%20who%20is%20not,most%20convenient%20chief%20of%20patrol).

161. Annie Campbell, *Excerpts from North Carolina Black Codes (1866)*: "Laws in Relation to Freedmen," 39 Cong., 2 Sess., Senate Exec. Doc. 6, Freedman's Affairs, <https://ushistoryscene.com/article/excerpts-north-carolina-black-codes-1866/>; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1422 (1992).

the offender, to be brought before him or some other justice of the peace, whose duty it shall be, if on examination, such person shall be found a vagrant, to recognize him with good security for his appearance at the first court to be held for said county . . . answer such offence. And if he fails to give such recognizance, he shall be imprisoned until the session of said court:

Provided, however, That if such offender shall, at the said court, enter into a recognizance, in such sum as the court shall prescribe, conditioned for his good behavior and industrious, peaceable deportment for one year, he may be discharged on payment of the costs and charges which shall have accrued; but if he shall fail to enter in such recognizance, and pay such costs and charges, he shall be prosecuted as a vagrant, and upon conviction, the court may fine or imprison him, or both, or sentence him to the workhouse for such time as the court may think fit.

## 2. Citizen's Arrest Laws

Citizen's arrest laws gave white citizens the right to enforce vagrancy, labor, and other laws targeting black people.<sup>162</sup> They represented the continuation of state-sanctioned racialized policing and maintained the subject-object relation created by slavery.

### *a. The Black Code of St. Landry's Parish Louisiana 1865*<sup>163</sup>

AN ORDINANCE relative to the police of negroes recently emancipated within the parish of St. Landry.

SECTION 11. [I]t shall be the duty of every citizen to act as a police officer for the detection of offences and the apprehension of offenders, who shall be immediately handed over to the proper captain or chief of patrol.

### *b. Mississippi Black Codes of 1865, § 7*<sup>164</sup>

[E]very civil officer shall, and every person may arrest and carry back to his or her legal employer any freedman, free negro or mulatto, who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause.

Due to the proliferation of Black Codes in the South, Congress passed the Civil Rights Act of 1866<sup>165</sup> and the Reconstruction Acts,<sup>166</sup> compelling states to ratify the

162. HADDEN, *supra* note 35, at 200.

163. LA. BLACK CODE, ST. LANDRY'S PARISH (1865), [https://www.ruhr-uni-bochum.de/gna/Quellen/sammlung/05/05\\_blackcode\\_1865.htm](https://www.ruhr-uni-bochum.de/gna/Quellen/sammlung/05/05_blackcode_1865.htm).

164. MISS. BLACK CODE (1865), <https://www.facinghistory.org/reconstruction-era/mississippi-black-codes-1865#:~:text=Section%207%3A%20.%20.%20.,service%20without%20good%20cause%20.%20.%20.>

165. Civil Rights Act, 14 Stat. 27 (1866).

166. See An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the State of Virginia to

Fourteenth Amendment, rewrite their constitutions, amend or repeal discriminatory laws, and remove racial designations. States complied. But, as demonstrated by the evolution of Georgia's former citizen's arrest law, race-neutral laws did not protect black people. The original law exclusively applied to people of African descent:

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.<sup>167</sup>

Black people could not conduct a citizen's arrest because they were not considered citizens or private persons under the law.<sup>168</sup> It was false imprisonment to "wrongfully arrest, confine or detain a free white person or citizen, without process, warrant, or legal authority to justify it."<sup>169</sup> But, it was not illegal to falsely imprison a black person. Code provisions recognized the right of self-defense but were narrowly circumscribed to require that (1) the black person's life was unlawfully endangered, and (2) it "must clearly appear the act was done in defense of his life and not in the spirit of revenge."<sup>170</sup> The term "unlawfully endangered" undermined the provision because culturally speaking, violence committed by a white person against a black person was presumptively lawful. A black person could be sentenced to death for maiming a white person "to prevent the occurrence of like offenses in the future."<sup>171</sup>

The revised law provided:

GA. CODE ANN., § 17-4-60 – Arrest by private person.

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.<sup>172</sup>

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Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870).

167. GA. CODE, Seventh §2 (1863), [https://books.google.com/books?id=MMtJAQAAIAAJ&pg=PA1031&lpg=PA1031&dq=The+Code+of+Ga.+§+2939+\(1867\).&source=bl&ots=fHfg6To1Fi&sig=ACfU3U1f—GgCQq—Uh0iMAEZyP8fOXazw&hl=en&sa=X&ved=2ahUKEwiJxd6kser2AhWXq3IEHSxsBGAQ6AF6BAGSEAM#v=onepage&q=The%20Code%20of%20Ga.%20§%202939%20\(1867\).&f=false](https://books.google.com/books?id=MMtJAQAAIAAJ&pg=PA1031&lpg=PA1031&dq=The+Code+of+Ga.+§+2939+(1867).&source=bl&ots=fHfg6To1Fi&sig=ACfU3U1f—GgCQq—Uh0iMAEZyP8fOXazw&hl=en&sa=X&ved=2ahUKEwiJxd6kser2AhWXq3IEHSxsBGAQ6AF6BAGSEAM#v=onepage&q=The%20Code%20of%20Ga.%20§%202939%20(1867).&f=false); GA. CODE § 1882 (1861), <https://archive.org/details/codeofstateofgeo1860clar/page/264/mode/2up>.

168. GA. CODE § 4604 (1861), <https://archive.org/details/codeofstateofgeo1860clar/page/902/mode/2up>.

169. GA. CODE § 4264 Sec. XLIX (1860), <https://archive.org/details/codeofstateofgeo1860clar/page/826/mode/2up>.

170. GA. CODE § 4712 (1861), <https://archive.org/details/codeofstateofgeo1860clar/page/902/mode/2up>.

171. GA. CODE § 4708 (1861), <https://archive.org/details/codeofstateofgeo1860clar/page/902/mode/2up>.

172. GA. CODE § 4604 (1867), <https://archive.org/details/codeofstateofgeo1860clar/page/902/mode/2up>.



Private citizens used the law to execute the Rule.<sup>173</sup> On January 22<sup>nd</sup>, 1912, in Hamilton County, Georgia, a mob invoked the right to make a citizen's arrest to justify lynching Dusky Crutchfield, John Moore, Eugene Harrington, and Burrell Hardaway, who had been accused of murdering Norman Hadley, a prominent plantation owner. Hadley was accused of sexually abusing black girls and women. Despite the little to no evidence of their involvement in Hadley's murder, Crutchfield, Moore, Harrington, and Hardaway were arrested and jailed. Hadley's uncle was the sheriff and was supposed to guard them. He left the jail, allowing the mob to lynch them.<sup>174</sup> On July 25<sup>th</sup>, 1946, the Moore's Ford lynchings were carried out by a mob of twenty white men who stated that they were conducting a citizens' arrest. The mob pulled the black victims, George W. Dorsey, Mae Murray Dorsey, Roger Malcom, and Dorothy Malcom, out of their car, tied them up, and shot them sixty times.<sup>175</sup> No one was charged.<sup>176</sup>

Georgia was not an exception. Throughout the country, white supremacists used citizen's arrest laws<sup>177</sup> to execute the Rule. Their actions were premised upon settled, strong, and permanent expectations of being allowed to use the law to subjugate black life to the power of death.<sup>178</sup>

### C. *The Rule & Modern Racialized Policing*

*"The stare the [subject was doing] was a stare to harm or hurt us."*<sup>179</sup>

The Supreme Court has played an integral role in protecting the Rule and preserving racialized policing as an instrumentality of governance. The colorblind legal standards created by the Court in racial profiling and excessive force cases, along with the Court's interpretation and application of those standards, retain vestiges of white supremacy. These vestiges operate as unspoken laws and in particular, the Rule.

#### 1. The Supreme Court Sustains the Rule

The Court has evinced a willingness to tolerate lawless racialized violence, dismissing excessive force and racialized policing as the unfortunate collateral consequences of maintaining a well-ordered society. The Court has metaphorically analyzed the

173. Kayla Goggin, *Georgia Legislature Repeals Civil War-Era Citizen's Arrest Law*, COURTHOUSE NEWS SERV. (Mar. 31, 2021), <https://www.courthousenews.com/georgia-legislature-repeals-civil-war-era-citizens-arrest-law/>.

174. *This Day in History: Jan. 22, 1912: Hamilton, Georgia Lynching*, ZINN EDUCATION PROJECT <https://www.zinnproject.org/news/tdih/hamilton-georgia-lynching/> (last visited Nov. 21, 2022); *1912: Four blacks lynched in Hamilton, Georgia*, EXECUTED TODAY (Jan. 22, 2013) <http://www.executedtoday.com/2013/01/22/1912-four-blacks-lynched-in-hamilton-georgia/>.

175. Matt Stevens, *Secrets of 1946 Mass Lynching Could Be Revealed After Court Ruling*, NY TIMES (February 12, 2019), <https://www.nytimes.com/2019/02/12/us/moores-ford-lynchings.html>.

176. *Id.*

177. Alan J. Singer, *Citizen's Arrest: Racist at its Roots*, HISTORY NEWS NETWORK (May 24, 2020), <https://historynewsnetwork.org/article/175619>; see also MILLER, *supra* note 114, at 636.

178. Cf. MBEMBE, *supra* note 2, at 77.

179. SETH W. STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE 35 (2020).

Rule's constitutionality numerous times and has consistently responded with intellectual dishonesty. I argue that the Court reaffirmed the Rule in *L.A. v. Lyons*<sup>180</sup> and *Graham v. Connor*.<sup>181</sup> The cases are significant because the facts that gave rise to the causes of action show how the Rule manifests itself today. Moreover, *Lyons* and *Graham* generated a body of case law that sustains the Rule. In *Lyons*, the Court distorted its traditional standing requirements under the pretext of adhering to principles of judicial restraint,<sup>182</sup> which made it exceedingly difficult for an individual to challenge systemic racism in policing.

In *Graham*, the Court established the standard for analyzing excessive force claims.<sup>183</sup> The standard confers virtually unlimited discretion upon the police. The standard's language is so vague and abstract that it empowers the police to use racialized policing to enforce the Rule. Police departments have adopted the Court's lexicon and now, ambiguous terms like "immediate threat," "totality of the circumstances," "reasonable officer," and "active resistance" function as magic words that departments use to create ornamental use of force policies, justify police brutality in paperwork, and mount legal defenses.<sup>184</sup>

#### *a. Adolph Lyons*

In *Lyons*, the Court departed from its well-established Article III requirements for standing and stridently brushed off the existence of racialized policing and its dangers as abstract, speculative, conjectural, and hypothetical.<sup>185</sup> Two Los Angeles Police Department (LAPD) officers pulled Adolph Lyons over for a burned-out taillight on October 6<sup>th</sup>, 1976.<sup>186</sup> Lyons was an unarmed black man. The officers pointed their revolvers at him and commanded him to exit the car, face the car, spread his legs, and put his clasped hands on his head.<sup>187</sup> He complied.<sup>188</sup> Lyons dropped his hands after one officer patted him down, and in response, an officer slammed Lyons' hands onto his head.<sup>189</sup> Lyons still had his keys in his hands and complained about the pain caused by the keys.<sup>190</sup> Without provocation or legal justification, an officer began choking Lyons and maintained the chokehold while Lyons was handcuffed.<sup>191</sup> The officer choked Lyons until he went unconscious.<sup>192</sup> When Lyons regained consciousness, "he was lying face down on the ground, choking, gasping for air, and spitting

180. *L.A. v. Lyons*, 461 U.S. 95 (1983).

181. *Graham v. Connor*, 490 U.S. 386 (1989).

182. See *Lyons*, 461 U.S. at 111-12.

183. *Graham*, 490 U.S. at 397.

184. See Ingrid V. Eagly and Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 IND. L. J. 1, 5 (2022); see also Lance J. LoRusso, *Graham v. Connor: Three decades of guidance and Controversy*, POLICE 1 (May 23, 2019), (<https://www.police1.com/officer-shootings/articles/graham-v-connor-three-decades-of-guidance-and-controversy-ugqh9iY6XPGTdHrG/>).

185. See *Lyons*, 461 U.S. at 101-102.

186. *Lyons*, 461 U.S. at 114 (Marshall, J., dissenting).

187. *Id.*

188. *Id.*

189. *Id.* at 115.

190. *Id.*

191. *Id.*

192. *Id.*

up blood and dirt. He had urinated and defecated.”<sup>193</sup> The officers cited him for the taillight and released him.<sup>194</sup>

Lyons sued the City of Los Angeles and the individual police officers for violating his rights under the First, Fourth, Eighth, and Fourteenth Amendments.<sup>195</sup> He sought damages and declaratory and injunctive relief, averring that the officers applied a chokehold to him without provocation or legal justification, pursuant to the “official policies, customs and practices of the Los Angeles Police Department and the City of Los Angeles.”<sup>196</sup> Lyons sought a preliminary and permanent injunction barring chokeholds “except in situations where the proposed victim of said control hold reasonably appears to be threatening the immediate use of deadly force,”<sup>197</sup> arguing that in the absence of a threat of the immediate use of deadly force, a chokehold is a per se violation of various constitutional rights.<sup>198</sup> Lyons stated “as a consequence of his experience” and the fact that black men were choked and choked to death at disproportionate rates, “he becomes ‘extremely apprehensive and nervous’ whenever he sees an LAPD police car.”<sup>199</sup> Therefore, Lyons asserted standing on the grounds that he “and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life” and he “justifiably fear[ed] that any contact he has with the Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse.”<sup>200</sup>

The City of Los Angeles authorized officers to use chokeholds whenever the officer had a *feeling*<sup>201</sup> that he was going to be harmed. An officer could use a chokehold to control or “subdue any resistance by the suspects.”<sup>202</sup> The body’s involuntary response to a chokehold is fight or flight syndrome, where the person violently struggles to preserve his life or escape.<sup>203</sup> “From a medical point of view, there would be no way to distinguish this involuntary death struggle from a willful, voluntary resistance. Thus an instruction to cease applying the hold when ‘resistance ceases’ is meaningless.”<sup>204</sup> An LAPD officer described the response as “doing the chicken”<sup>205</sup> because the body’s response mirrors a chicken whose neck is being rung.<sup>206</sup> Officers were instructed to maintain the hold and apply an increasing amount of force until

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193. *Id.*

194. *Id.*

195. *See Lyons*, 461 U.S. at 98.

196. *Id.* at 97-8.

197. *Id.* at 98.

198. *Id.*

199. Brief for Respondent at 9, *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (No. 81-1064) [hereinafter Lyons Respondent’s Brief].

200. *Lyons*, 461 U.S. at 98.

201. *Id.* at 118 (Marshall, J., dissenting).

202. *Id.*

203. Lyons Respondent’s Brief, *supra* note 199, at 21.

204. *Id.* at 22.

205. *Lyons*, 461 U.S. at 117.

206. *Id.*

the person went limp.<sup>207</sup> The Court was presented with evidence that between 1975 and 1983, 12 out of the 16 people who had died following the use of a chokehold were black.<sup>208</sup> Black men were 9% of the population but represented 75% of the deaths.<sup>209</sup> Black men were 12 times more likely to be strangled to death than white people.<sup>210</sup> A black man had a 1 in 500 chance of being strangled compared to a 1 in 6,000 chance for everyone else in the city.<sup>211</sup>

The LAPD was notorious for its white supremacist practices. It had a verifiable record of racial profiling and using excessive force disproportionately against black people.<sup>212</sup> Officers used traffic violations as a pretext for harassing black people and conducting unconstitutional searches.<sup>213</sup> Based on the statistics provided to the Court and those that existed at the time, one could reasonably conclude that the officers racially profiled Lyons for driving while black and used his burned-out taillight as a pretext.

Lyons was subjected to the Rule. Police pursued Lyons, and he complied, although they used excessive force from the beginning. His small complaint about the pain caused by his keys was treated as noncompliance and grounds for the escalation of force. The police decided to choke him. Lyons' involuntary response to being choked, fight or flight mode, was a form of self-defense. The police pretextually deemed it resistance. They intentionally degraded him by increasing the amount of force applied and choking him until he defecated, urinated, and passed out. Their actions were designed to signal to Lyons and any observers that they possessed the power and authority to determine if Lyons lived or died. For them, the capture was not complete until Lyons faced death.

The Court raised the bar for establishing standing. It held that Lyons did not have standing to seek injunctive relief.<sup>214</sup> It deviated from its traditional standing inquiry and added the requirement that Lyons must establish standing for each form of relief and not just a personal stake in the underlying dispute.<sup>215</sup> The Court added that when a plaintiff seeks injunctive or declaratory relief, the plaintiff must establish a credible threat of future injury.<sup>216</sup> The Court acknowledged that the new standard placed a heavy burden on Lyons.

207. *Id.* at 119.

208. *Id.* at 115-16.

209. *Id.* at 116, n. 3.

210. Transcript of Oral Argument at 26, *City of Los Angeles, Petitioner v. Adolph Lyons*, 461 U.S. 95 (1983) (No. 81-1064).

211. *Id.* at 27.

212. See Erwin Chemerinsky, *Policing the Criminal Justice System: An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 545, 620 (2001).

213. Consent Decree, Introduction, *United States v. City of Los Angeles* (November 2, 2000), <https://www.justice.gov/crt/us-v-city-los-angeles-consent-decree-introduction>; LAPD Notice of Investigation Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to James K. Hahn, Esq., City Attorney for City of Los Angeles (May 8, 2000).

214. *Lyons*, 461 U.S. at 105.

215. *Id.* at 129-130.

216. *Id.* at 106-107.

“Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.”<sup>217</sup> “Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.”<sup>218</sup>

The Court rationalized its holding as in the interest of judicial restraint<sup>219</sup> and preserving the balance of power between federal and state authorities.<sup>220</sup> States can issue injunctions against law enforcement authorities, but federal courts are not the proper forum.

In the Dissenting Opinion, Justice Thurgood Marshall criticized the holding, arguing that the Court’s departure from traditional standards “removes an entire class of constitutional violations from the equitable powers of a federal court. . . immuniz[ing] from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future.”<sup>221</sup> Hence, only “those who are victimized by the practice and live to sue and. . . the survivors of those who are not so fortunate” may sue to obtain relief.<sup>222</sup>

The Court utilized a reductive definition of injury that is insufficient to capture the impact that racialized policing has on black people as a class. The Court described Lyons’ asserted injury as abstract, conjectural, hypothetical, and not real and immediate. The Court declared, “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. . . if unaccompanied by any continuing, present adverse effects.”<sup>223</sup>

Existing while black is sufficient to establish a case or controversy.<sup>224</sup> The nature of racialized policing is that black people live under a real and immediate threat of bodily harm or death, and the threat causes irreparable psychological and physical injuries.<sup>225</sup> The injuries are not abstract, conjectural, or hypothetical, as proven by the disproportionate number of documented cases of police brutality and killings.<sup>226</sup>

217. *Id.* at 105-106.

218. *Id.* at 111.

219. *See id.* at 112.

220. *Id.*

221. *Id.* at 137.

222. *Id.*

223. *Id.* at 102 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

224. Lyons Respondent’s Brief, *supra* note 199, at 30.

225. *See generally* Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014) (stress manifests itself in the body leading to chronic health conditions).

226. *More than half of police killings in USA are unreported and Black Americans are most likely to experience fatal police violence*, HEALTH METRICS AND EVALUATION (IHME) (September 30, 2021), <https://www.healthdata.org/news-release/lancet-more-half-police-killings-usa-are-unreported-and-black-americans-are-most-likely>; The Lancet, *Fatal police violence by race and state in the USA, 1980-2019: a network meta-*

The intergenerational transmission of trauma due to past exposure to racialized policing is a continuing and present adverse effect.<sup>227</sup> The psychological violence of being forced to live with the knowledge that at any moment a white supremacist can decide that you or someone you know is a threat, nuisance, or vermin and accordingly, decide that you should be hunted and captured is a continuing and present adverse effect.<sup>228</sup> America's past wrongs are more than enough to establish a real and immediate threat of repeated injury.

The generative power of the decision, as a formal and symbolic precedent, is apparent in subsequent racial profiling and excessive force decisions. By raising the bar for establishing standing, the Court stunted the ability of a black person to challenge systemic racism in policing and thus, the Rule as an unspoken mechanism of systemic racism. The Court requires that a claim be brought under the Fourteenth Amendment, which requires the claimant to prove intent. Intent is incredibly difficult to prove. However, given the inability of white supremacist police officers to refrain from making racist statements on social media and while wearing body cameras, hopefully, the intent requirement will become easier to satisfy.

*b. Dethorne Graham*

On November 12<sup>th</sup>, 1984, Dethorne Graham, a diabetic, asked his friend, William Berry, to drive him to the convenience store because he was beginning to experience an insulin reaction.<sup>229</sup> Graham rushed into a crowded convenience store to buy orange juice and quickly left without the juice because he did not think he would be able to purchase it in time.<sup>230</sup> He asked Berry to drive him to his friend's house.<sup>231</sup> An insulin reaction that is not stopped can result in "neurological dysfunction, coma, or death,"<sup>232</sup> a fact that the Court excluded from its Opinion.

M.S. Connor, a Charlotte City Police Department Officer, observed Graham and stopped Berry's car because he thought it was suspicious how fast Graham entered and exited the store.<sup>233</sup> Berry told Connor that Graham was experiencing a "sugar reaction," but Connor ignored him and ordered them to wait while he investigated.<sup>234</sup> Respondents' brief stated that officers received training about the problems

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*regression*, 398 THE LANCET 10307 (October 2, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01609-3/fulltext#articleInformation](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01609-3/fulltext#articleInformation);

e.g., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4-5 (2015), <https://perma.cc/4VEE-KV9K>.

227. See Thema Bryant-Davis et al., *The Trauma Lens of Police Violence against Racial and Ethnic Minorities*, 73 J. OF SOC. ISSUES 842 (2017).

228. See Christina Pazzanese, *How unjust police killings damage the mental health of Black Americans*, THE HARVARD GAZETTE (May 13, 2021), <https://news.harvard.edu/gazette/story/2021/05/how-unjust-police-killings-damage-the-mental-health-of-black-americans/>.

229. *Graham*, 490 U.S. at 388.

230. *Id.* at 389.

231. *Id.*

232. Brief for Petitioner at 11, *Graham v. Connor*, 490 U.S. 386 (1989) (No. 87-6571) [hereinafter *Graham Petitioner's Brief*].

233. *Graham*, 490 U.S. at 389.

234. *Id.*

associated with high and low blood sugar.<sup>235</sup> The Court excluded that fact too. Graham protested the detention. When Connor went to his car to call for backup, Graham got out of the car and ran around it twice.<sup>236</sup> Then, Berry and Connor helped him sit down on the curb, and he passed out.<sup>237</sup> Respondents argued that Graham's reaction was violent.<sup>238</sup>

Four officers arrived, rolled Graham over, and handcuffed him.<sup>239</sup> When Graham begged for food or drink, an officer responded, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up."<sup>240</sup> Graham lost consciousness throughout the encounter.<sup>241</sup> The officers picked him up and put him face-down on the hood of Berry's car.<sup>242</sup> Graham woke up and asked them to retrieve the diabetic decal from his wallet.<sup>243</sup> "Shut up," an officer responded and slammed Graham's head onto the hood.<sup>244</sup> "The next thing petitioner remembers was that he was face down on the ground. . . [t]he officers picked him up and threw him into the police car 'like a bag of potatoes.'"<sup>245</sup> A friend arrived and brought Graham orange juice. When Graham asked to drink it, the officer said, "I'm not giving you shit."<sup>246</sup>

After Connor learned that Graham had not committed a crime, they drove him home and left him collapsed in the yard.<sup>247</sup> "Graham suffered from a broken foot, abrasions over his right eye, cut wrists from the handcuffs," and a continuous high-pitched, loud ringing in his right ear that was not there before.<sup>248</sup> Respondents argued that Graham's injuries were speculative and, "assuming he was having some reaction . . . he recovered consciousness and. . . [t]here was absolutely no evidence that his diabetic condition was altered or that any delay in getting orange juice caused any problem for him."<sup>249</sup>

Graham filed suit under 42 U. S. C. § 1983, alleging that the officers used excessive force during the stop, thereby violating his Fourteenth Amendment Rights.<sup>250</sup> The U.S. District Court for the Western District of North Carolina ruled in favor of the Respondents, finding that the officers' use of force was appropriate, did not inflict any discernable injury, and "was not applied maliciously or sadistically. . . but in a good-faith effort to maintain or restore order in the face of a potentially explosive

235. Brief for Respondents at 3, *Graham v. Connor*, 490 U.S. 386 (1989) (No. 87-6571) [hereinafter *Graham Respondents' Brief*].

236. *Graham*, 490 U.S. at 389.

237. *Graham* Petitioner's Brief, *supra* note 232, at 12.

238. *Graham Respondents' Brief*, *supra* note 235, at 10-11.

239. *Graham*, 490 U.S. at 389.

240. *Graham* Petitioner's Brief, *supra* note 232, at 12.

241. *Id.* at 13.

242. *Graham*, 490 U.S. at 389.

243. *Id.*

244. *Graham* Petitioner's Brief, *supra* note 232, at \*5.

245. *Id.*

246. *Id.* at 14.

247. *Id.*

248. *Graham*, 490 U.S. at 389.

249. *Graham Respondents' Brief*, *supra* note 235, at 20.

250. *Graham*, 490 U.S. at 390.



situation.”<sup>251</sup> Graham appealed, and the United States Court of Appeals for the Fourth Circuit affirmed the District Court’s decision.<sup>252</sup>

The Fourth Circuit affirmed but ruled that the District Court used the incorrect standard.<sup>253</sup> Where the Fourth Amendment provides, “The right of the people to be secure in their persons. . . against unreasonable. . . seizures, shall not be violated,”<sup>254</sup> a free citizen’s claim that a police officer’s use of force was excessive during an investigatory stop, arrest, or other seizure is analyzed under the Fourth Amendment’s objective reasonableness standard.<sup>255</sup> In determining whether an officer’s use of force was excessive, the Court asks whether “the officer’s actions are objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer’s underlying intent or motivation.”<sup>256</sup> The fact that an officer acts “maliciously” or “sadistically” is irrelevant.<sup>257</sup> The Court balances the nature and quality of the intrusion on the individual’s Fourth Amendment interests against any countervailing governmental interests at stake.<sup>258</sup>

The Court established a non-exhaustive list of three factors (the Graham Factors) to conduct the analysis: (1) the severity of the crime, (2) the immediate threat to the officers and others posed by the subject, and (3) whether the subject is actively resisting or attempting to evade arrest by fleeing.<sup>259</sup> The Court has also added the totality of the circumstances and the proportionality of the force to the analytical framework.<sup>260</sup>

The Court defers to the perspective of a reasonable officer on the scene and grants broad discretion to the officer, stating, “the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight”<sup>261</sup> Thus, the Court’s standard is actually subjective objectivity.<sup>262</sup> The Court emphasized the inherent stressors involved, stating the analysis must take into account that “police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving.”<sup>263</sup> Additionally, it pointed out that “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat.”<sup>264</sup>

251. *Graham v. Charlotte*, 644 F Supp. 246, 248 (W.D.N.C. 1986).

252. *Graham*, 490 U.S. at 391.

253. *Id.* at 395-98.

254. U.S. CONST. amend. IV.

255. *Graham*, 490 U.S. at 396.

256. *Id.* at 397.

257. *Id.*

258. *Id.* at 396.

259. *Id.*

260. STOUGHTON ET AL., *supra* note 179, at 19.

261. *Graham*, 490 U.S. at 396.

262. STOUGHTON ET AL., *supra* note 179, at 21.

263. *Graham*, 490 U.S. at 397.

264. *Id.* at 396.

The Court has not articulated “operational definitions of the factors.”<sup>265</sup> However, the Court has established subsidiary factors for each Graham factor.<sup>266</sup> In assessing the severity of the crime, the officer must have reasonable suspicion or probable cause to believe a crime has been committed and the suspect committed the crime.<sup>267</sup> The officer must also evaluate the suspect’s relationship to the crime and the nature of the crime.<sup>268</sup>

To pose an immediate threat to the safety of law enforcement officers or others, the person must have the ability, opportunity, and intent to cause harm.<sup>269</sup> Ability exists if the person can cause physical harm.<sup>270</sup> The person’s physical condition (age, size, strength, skill), mental condition, proximity to weapons, and ability to resist when restrained are assessed. Intent concerns their perceived mental state, their apparent desire to cause physical harm, verbal statements, movement, and expression.<sup>271</sup> Opportunity refers to environmental factors, proximity to potential targets, and if the person’s physical condition enables the person to cause harm.<sup>272</sup> Whether the person is actively resisting or attempting to evade arrest by fleeing depends on the officer’s perception of the person’s “acts of resistance, intent to flee, and flight.”<sup>273</sup> The person’s conduct, verbal statements, movements, body language, physical condition, and mental condition are relevant.<sup>274</sup> If he is restrained, if he can resist or break free from restraints, the environment and prior experience with the suspect are relevant also.<sup>275</sup>

To assess proportionality,<sup>276</sup> the Court asks, “[w]ere the officer’s actions appropriate to the situation?”<sup>277</sup> The Court evaluates reasonableness by balancing the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.<sup>278</sup> The question is not whether the officer’s choices and actions were the only reasonable options and whether the officer is not required to use the least amount of force.<sup>279</sup> An officer may use deadly force when he has “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>280</sup> Additionally, deadly force may be used if necessary to prevent escape if “the suspect threatens the

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265. *STOUGHTON ET AL.*, *supra* note 179, at 24.

266. *Id.* at 20.

267. *See* *Terry v. Ohio*, 392 U.S. 1 (1968); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985).

268. *STOUGHTON ET AL.*, *supra* note 179, at 31.

269. *Id.* at 33.

270. *Id.*

271. *Id.* at 38-39.

272. *Id.* at 33.

273. *Id.* at 38.

274. *Id.* at 39.

275. *Id.*

276. *Id.* at 42.

277. *Id.*

278. *Graham*, 490 U.S. at 396.

279. *STOUGHTON ET AL.*, *supra* note 179, at 44.

280. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.”<sup>281</sup>

*Graham*’s objective reasonableness standard invites abuse because it makes racialized policing and excessive force feasible and easy to refute. The *Graham* factors provide departments with boilerplate language.<sup>282</sup> The vagueness of the language allows officers to overgeneralize and manipulate the facts in paperwork, and they do.<sup>283</sup> Due to the dehumanization and super-humanization of black people, the race-crime construct is embedded into society’s consciousness<sup>284</sup> and therefore, the police’s consciousness. Consequently, (1) racialized policing remains an unspoken governmental interest that is governed by unspoken laws, and (2) an inordinate amount of excessive force claims will continue to be analyzed through the lens of white supremacy.

The Court’s deference to the perspective of the reasonable officer and grant of broad discretion to officers is dangerous. Studies have consistently shown the prevalence of conscious and unconscious racial bias in police officers.<sup>285</sup> Therefore, the perception of a reasonable officer on the scene is likely to be tainted. Racial bias may impact the way the officer assesses the existence of criminal behavior, if the person poses an immediate threat to the officer or others, and if the person is actively resisting or attempting to evade arrest. The risk of abuse increases when the subsidiary factors are applied. There is an internal pattern within the subsidiary factors that triggers racial bias. The physical condition (age, size, strength, and skill), mental condition, body language, movement, verbal statements, expressions, intent, and level of compliance are considered, and all have a racial dimension to them.

Racial bias begets racialized cognitive illusions. Regarding the severity of the crime, racial suspicion replaces reasonable suspicion and probable cause. Black people’s behavior, physical appearance, and presence are more likely to trigger the presumption that they have committed a crime, are inclined to commit a crime, or are in the process of committing a crime.<sup>286</sup> In assessing if a person poses an immediate threat, as shown in many cases, the super-humanization and dehumanization of blackness have resulted in the belief that black people are always threatening because they

281. *Graham*, 490 U.S. at 386.

282. *E.g.*, U.S. DEP’T OF JUST., C.R. Div., *Investigation of the Balt. City Police Dept.* 104 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter *DOJ BPD Report*].

283. *E.g.*, Arizona Cop, *Introduction to Graham v. Connor*, YOUTUBE (June 23, 2019), <https://www.youtube.com/watch?v=SrQXxh-7xpA&list=PLfO99Kgg6c2xM4bV20gXbMzsRcDWsPpdi>.

284. *See* ALEXANDER, *supra* note 7, at 197-200; Michael D. White, *Identifying situational predictors of police shootings using multivariate analysis*, 25 *Policing* 726 (2002).

285. *E.g.*, Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, NATURE HUMAN BEHAV., Vol. 4 (July 2020), [https://5harad.com/papers/100M-stops.pdf?utm\\_source=The+Appeal&utm\\_campaign=3a050d7014-EMAIL\\_CAMPAIGN\\_2018\\_08\\_09\\_04\\_14\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_72df992d84-3a050d7014-58394763](https://5harad.com/papers/100M-stops.pdf?utm_source=The+Appeal&utm_campaign=3a050d7014-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-3a050d7014-58394763); *see also* Radley Balko, *There is overwhelming evidence that the criminal justice system is racist. Here’s the proof*, WASH POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>.

286. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, *J. of Personality and Soc. Psych.*, 87 J. PERSONALITY AND SOC. PSYCH. 876 (2004), [https://www.prisonpolicy.org/scans/Seeing\\_black.pdf](https://www.prisonpolicy.org/scans/Seeing_black.pdf).

possess superhuman or animalistic power.<sup>287</sup> This is proven by the amount of unarmed black people killed, shot, or beaten while complying with officers' demands.<sup>288</sup> Cell phones become guns. Imaginary guns appear.<sup>289</sup> Officers frequently describe black people as exceptionally large and strong.<sup>290</sup>

Whether the subject is actively resisting or attempting to evade arrest by fleeing is also susceptible to racial bias. Any action, even involuntary actions, can be interpreted as actively resisting arrest. When a black person verbally protests or questions the police in the slightest manner, the police often and loudly assert that the person is actively resisting arrest. The ability to resist is misjudged based on the myth that black people possess heightened physical abilities. Hence, police officers' default use of extreme pain compliance is a recurring theme in police brutality videos. Although there are rules for when deadly force is permissible, officers lie or misperceive facts.<sup>291</sup> Proportionality is likewise impacted by racial bias. Frequently, the amount of force that police officers and courts deem proportionate to subdue a black person is greater than the amount of force deemed proportionate to subdue a white person.<sup>292</sup> As a result, racialized cognitive bias may control an officer's perception of the facts and how the officer articulates the facts. In a courtroom setting, racialized cognitive bias may control how the judge and jurors interpret and analyze the facts. Thus, the judge and jurors could conceivably accept the officer's racialized perception of the facts as objectively reasonable.

Finally, police forces are filled with white supremacists.<sup>293</sup> The vague and pliable standards make it easy and tempting for racist officers to abuse their authority. First, the Court defers to the perspective of a reasonable officer on the scene and gives that officer broad discretion. Second, the Court has ruled that malicious or sadistic intent is essentially irrelevant to the analysis, which makes it easy to marginalize the significance of racism. Accordingly, when the Rule is executed by racist police officers, the formal rationalizations that they offer are cloaked in *Graham's* colorblind language.

However, many police officers do not conceal their racial animus. For example, when the Department of Justice ("DOJ") investigated the Baltimore Police Department ("BPD"), the DOJ found that supervisors explicitly ordered officers to

287. See Calvin John Smiley and David Fakunle, *From "brute" to "thug:" the demonization and criminalization of unarmed Black male victims in America*, 26 J. HUMAN BEHAV. SOC. ENV'T (2016).

288. *Id.*

289. See Eberhardt, *supra* note 286, at 878; e.g., Eric Levenson et al., *Sacramento Police shot man holding cellphone in his grandmother's yard*, CNN (March 22, 2018), <https://www.cnn.com/2018/03/22/us/sacramento-police-shooting>; see also Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of all Charges*, N.Y. TIMES (February 26, 2000), <https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>.

290. See Eberhardt, *supra* note 286.

291. See Joseph Goldstein, *Testifying by Police: A Stubborn Problem*, N.Y. TIMES (March 19, 2018) <https://www.nytimes.com/2018/03/18/nyregion/testifying-police-perjury-new-york.html?smid=tw-nytimes&smtyp=cur>.

292. See Eberhardt et al., *supra* note 286, at 890.

293. See FED. BUREAU OF INVESTIGATIONS COUNTERTERRORISM DIVISION, *White Supremacist Infiltration of Law Enforcement* (Oct. 17, 2006), <https://www.justsecurity.org/wp-content/uploads/2021/06/Jan-6-Clearinghouse-FBI-Intelligence-Assessment-White-Supremacist-Infiltration-of-Law-Enforcement-Oct-17-2006-UNREDACTED.pdf>.

target African Americans for stops and arrests<sup>294</sup> and did not hold officers accountable for using racial slurs or statements exhibiting biases. BPD had a longstanding practice of overly aggressive street enforcement, leading to unconstitutional stops, searches, and arrests.<sup>295</sup> BPD's overly aggressive tactics unnecessarily escalated encounters resulting in excessive force.<sup>296</sup> Moreover, BPD used unreasonable force against people who were not a threat to officers or the public.<sup>297</sup>

The consequences of *Graham* are clear. Countless videos prove that there is a conspicuous pattern in the sequence and substantive characteristics of the facts that tend to give rise to excessive force claims involving black people. The pattern parallels the structure of the Rule. A police officer pursues a black person to investigate actual crimes, imagined crimes, or hoped-for crimes. The investigation is spurred by existing while black. The officer declares his intention to exercise control over the person using words or actions. A seizure occurs on sight because when black people are concerned, the actual legal requirements for effectuating a seizure do not apply. A black person immediately takes his life into his own hands when he asserts his rights during a police encounter. Any perceived act of noncompliance is grounds for escalation. The officer defaults to using excessive force calculated to cause grievous bodily injury or death. If the black person defends himself, intentionally or unintentionally, the officer treats him as an immediate threat to the life of the officer or other people and applies increasing force.

The officer intends for the encounter to be a degradation ceremony that is steeped in psychological and physical violence. The officer's eventual goal is to incarcerate the person, except in instances where the officer seeks to definitively assert the power relation between the two by killing the person. Afterward, the officer invokes the *Graham* factors via the department's use of force policy to justify the excessive force. Subsequently, the police department and union use *Graham*'s language to defend the officer if the victim sues. The sequence and substantive characteristics of the facts surrounding George Floyd's murder and Venus Green's beating align with the Rule. Moreover, the polices' responses to public outrage and the initiation of civil and criminal lawsuits illustrate *Graham*'s influence.

### *c. George Floyd*

On May 25, 2020, Officer Derrick Chauvin seized George Floyd for allegedly using a fake twenty-dollar bill.<sup>298</sup> Officer Thomas Lane pointed his gun at Floyd and commanded him to get out of the car.<sup>299</sup> Floyd repeatedly apologized and said,

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294. DOJ BPD Report, *supra* note 282, at 88.

295. *Id.* at 40.

296. *Id.* at 76.

297. *Id.* at 88.

298. Jerry Holt, *George Floyd is killed by a police officer, igniting historic protests*, HISTORY (May 25, 2020), <https://www.history.com/this-day-in-history/george-floyd-killed-by-police-officer>.

299. *Id.*

“Please don’t shoot me, man,” explaining that he had been shot before.<sup>300</sup> At gunpoint, Floyd got out of the car and, when told to get into the police car, said he was claustrophobic.<sup>301</sup> He did not comply.<sup>302</sup> The police shoved him into the car, with him screaming that he couldn’t breathe.<sup>303</sup> He tried to “brace himself against the squad car and arched his body while they tried to get him inside.”<sup>304</sup> The police escalated the amount of force. Chauvin and Lane, along with Officer Alexander Kueng, pulled Floyd out and put him in a prone position on the ground.<sup>305</sup> Chauvin put his knee into Floyd’s neck, one officer put a knee in his back, and another held his legs.<sup>306</sup> Floyd’s writhing and begging were treated as noncompliance and as grounds for escalating force. Chauvin forced his knee into Floyd’s neck until Floyd died.<sup>307</sup>

The scene was a degradation ceremony. Chauvin’s self-righteous posture, hands in his pockets, and refusal to stop despite Floyd’s crying and the crowd’s pleading signaled his desire to degrade Floyd and assert his power. Floyd attempted to defend his life by moving and begging.<sup>308</sup> Chauvin characterized it as threatening and grounds for the increased and prolonged application of force. “We gotta control this guy,” he was a “sizable guy,” “probably on something,”<sup>309</sup> Chauvin said. Chauvin appeared to enjoy causing and observing intimately the spectacle of Floyd’s death. Chauvin’s attorney argued Chauvin acted in accordance with the department’s use of force policy and training.<sup>310</sup> The policy was based on *Graham*.

*d. Venus Green*<sup>311</sup>

“Bitch, you ain’t no better than any of the other old black bitches I have locked up,”<sup>312</sup> a Baltimore Police officer said to eighty-seven-year-old Venus Green as he stood over her after he had pushed her to the ground for refusing him entry to her basement without a warrant.<sup>313</sup> Venus Green was a victim of collateral capture. In

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300. Steve Karnowski and Amy Forliti, *Ex-Cop told onlooker Floyd was big, ‘probably on something,’* ARRESTED PRESS (March 31, 2021), <https://apnews.com/article/derek-chauvin-trial-live-updates-00cfa62f9b1c12076316845c100d6b97>.

301. Holt, *supra* note 298.

302. *Id.*

303. Stephen Groves, *Use-of-Force Experts Evaluate Floyd Arrest*, ASSOCIATED PRESS (March 31, 2021), <https://apnews.com/article/arrests-minneapolis-death-of-george-floyd-racial-injustice-da5e8060b2c023558e91564b0d82c75d>.

304. *Id.*

305. Karnowski, *supra* note 300.

306. Groves, *supra* note 303.

307. 10 Tampa Bay, *Raw: George Floyd Minneapolis police body camera footage*, YOUTUBE (August 10, 2020), <https://www.youtube.com/watch?v=0gQYMBALDXc>.

308. *Id.*

309. Karnowski, *supra* note 300.

310. *Id.*

311. Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, THE ATLANTIC (April 22, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/>; see DOJ BPD Report, *supra* note 282, at 67; see also Mark Puente, *Undue Force*, THE BALTIMORE SUN (September 28, 2014), <http://data.baltimoresun.com/news/police-settlements/> (From 2011 to 2015, Baltimore paid approximately \$5.7 million to settle police brutality civil lawsuits).

312. DOJ BPD Report, *supra* note 282 at 67.

313. Friedersdorf, *supra* note 311.

July 2009, her grandson had been shot at a convenience store and ran to her home.<sup>314</sup> Green called 911.<sup>315</sup> An officer arrived and asked the grandson who shot him.<sup>316</sup> When her grandson refused to tell the officer, the officer said, “[w]e ain’t going to help you because you are lying.”<sup>317</sup> The officer accused Green of shooting her grandson and refused to allow paramedics to treat him.<sup>318</sup> Green’s grandson ran into her basement, and the officer demanded access.<sup>319</sup> She demanded a warrant, and he pushed her down. “He pulled me up, pushed me in the dining room over the couch, put his knees in my back, twisted my arms and wrist and put handcuffs on my hands and threw me face down on the couch.”<sup>320</sup> He repeatedly called her a bitch.<sup>321</sup> He viewed her warrant request as noncompliance and as a threat to his power. The grandson was the original target, but Green’s intervention made her an additional target. Crying, she told him she was in pain and asked him to remove the handcuffs.<sup>322</sup> The officer had broken her shoulder.<sup>323</sup> A black officer entered and instructed an officer to remove the handcuffs. The police did not charge her.<sup>324</sup>

## 2. Society is Addicted to the Rule

Private citizens have taken their cues from the law and use “shameless nanoracism”<sup>325</sup> when attempting to enforce the Rule. Nanoracism is “racism turned culture.”<sup>326</sup> It is,

[T]hat narcotic brand of prejudice based on skin color that gets expressed in seemingly anodyne everyday gestures, often apropos of nothing, apparently unconscious remarks, a little banter, some allusion or insinuation. . . an innuendo, but also, it must be added, consciously spiteful remarks, like malicious intention. . . a dark desire to stigmatize and, in particular, to inflict violence, to injure and humiliate, to sully those not considered to be one of us.<sup>327</sup>

Private citizens ask black people to “justify who they are, why they are here, where they have come from, where they are going, why they do not go back where they came from.”<sup>328</sup> They “deliberately seek to occasion in [black people] a large or small

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314. See Heather E. Harris, *A ‘fierce angel’ of Baltimore fights back*, BALTIMORE SUN (Apr. 10, 2012, 12:00 AM), <https://www.baltimoresun.com/opinion/bs-xpm-2012-04-10-bs-ed-venus-green-20120410-story.html>.

315. *Id.*

316. *Id.*

317. *Id.*

318. WBALTV, *Woman, 90, locked officer in basement, settles with police*, WBALTV (Apr. 4, 2012), <https://www.justsecurity.org/wp-content/uploads/2021/06/Jan-6-Clearinghouse-FBI-Intelligence-Assessment-White-Supremacist-Infiltration-of-Law-Enforcement-Oct-17-2006-UNREDACTED.pdf>.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. MBEMBE, *supra* note 2, at 58.

326. *Id.* at 59.

327. *Id.* at 58.

328. *Id.* at 58-9.



jolt, to irritate them, to upset them, to insult them, to get them to lose their cool precisely so as to have a pretext to violate them. . . strip them of all their acquired rights” and attack their dignity and self-esteem.<sup>329</sup>

Existing while black is sufficient to spark an actual investigation or a pretend investigation that is initiated for sport. The pattern is analogous to the pattern of police interactions. A pursuer targets a black person, either accusing her of having committed a crime, committing a crime at that moment, or preparing to commit a crime. The pursuer asks questions and makes accusations. If the black person does not comply, meaning objects or refuses to answer, the pursuer escalates the situation. The pursuer becomes increasingly antagonistic and picks a verbal altercation. If the interaction escalates to violence, some use citizens’ arrest laws or stand-your-ground laws to justify violence.<sup>330</sup> When the black person defends herself, the pursuer assumes the role of the victim.

Typically, the pursuer engages in “white caller crime.”<sup>331</sup> The pursuer weaponizes the police (often tauntingly), engages in racialized police communication,<sup>332</sup> cries, and lies. When the police arrive, the black person is subjected to a second round of the Rule’s application, with a heightened chance of serious bodily harm or death.

The scope of this article is limited to exploring instances of racialized policing where the pursuer intentionally manifests his desire to commit acts of violence against the victim. In such a case, the violence is directly attributable to the pursuer. When a private citizen tries to conceal their intent and instead uses the police to commit an act of violence against the victim, the private citizen is attempting to engage in a dissociative act of violence. This makes the analysis more complicated because the private citizen is functioning as a willing conduit for racialized violence. Notwithstanding nanoracism, openly racist private citizens do not conceal their intent when attempting to enforce the Rule. The pattern is analogous to instances involving the police because the private citizens view themselves as possessing the same authority and rights as the police. The analysis of the Ahmaud Arbery case illustrates this point.

#### IV. A SLAVE PATROL FEVER DREAM<sup>333</sup> – THE AHMAUD ARBERY CASE

*“And when they could not sufficiently scare him or intimidate him they killed him.”<sup>334</sup>*

329. *Id.*

330. See Chan T. McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335 (2019).

331. See Michael Harriot, *White Caller Crime: The Worst Wypipo Police Calls of All Time*, THE ROOT (May 15, 2018), <https://www.theroot.com/white-caller-crime-the-worst-wypipo-police-calls-of-1826023382>.

332. See McNamarah, *supra* note 330.

333. TONI MORRISON, *THE SOURCE OF SELF-REGARD: SELECTED ESSAYS, SPEECHES, AND MEDITATIONS* 147 (2021) (“In that construction of blackness and enslavement could be found not only the not-free but also the projection of the not-me. The result was a playground for the imagination. And what rose up out of collective needs to allay internal fears and rationalize external exploitation was an Africanism – a fabricated brew of darkness, otherness, alarm and desire – that is uniquely American.”).

334. 11Alive, *Ahmaud Arbery’s mom says his killers have ‘no remorse’, do not deserve ‘leniency’ amid sentencing*, YOUTUBE (January 7, 2022), [https://www.youtube.com/watch?v=Rb3jFW\\_H6Qw](https://www.youtube.com/watch?v=Rb3jFW_H6Qw).

Self-imposed docility would not have saved Ahmaud Arbery's life. The only thing self-imposed docility would have ensured was an undignified death. Ahmaud denied his murderers the pleasure of forcing him to spend the final moments of his life in a death world. "[D]riven by a fatal dose of racial resentment"<sup>335</sup> and Nixonian, law and order romanticism, Travis McMichael, Gregory McMichael, and William "Roddie" Bryan lynched Ahmaud to satisfy their desire to possess and control him. They were obsessed with his body, noting his muscles, hair, endurance, and running gait.<sup>336</sup> They did not view Ahmaud as a citizen. These men, who regularly used the n-word and referred to black people as monkeys, viewed Ahmaud as a fugitive and, therefore, believed they had a collective duty to hunt and capture him.<sup>337</sup>

The criminal justice system in Glynn County, Georgia, implicitly acknowledged the legitimacy of the Rule and applied it to Ahmaud's murder. The police did not immediately arrest his killers<sup>338</sup> and exhibited bias in the body camera footage. Gregory informed the officers that he had recently retired after thirty years as a police officer and investigator in the Glynn County District Attorney's Office,<sup>339</sup> and the officers responded by showing deference to him.<sup>340</sup> Gregory's former employer, District Attorney Jacquelyn Lee Johnson, allegedly ensured that the McMichaels were not prosecuted.<sup>341</sup>

It was not until Ahmaud's mother, Wanda Cooper-Jones, publicized his lynching that the case was taken seriously.<sup>342</sup> Nonetheless, in April 2020, George E. Barnhill, District Attorney for the Waycross Circuit, wrote a letter stating that it was his professional belief that the killing was legal pursuant to Georgia's former Citizens' Arrest Law (the "Law") because Travis, Gregory, and Roddie had probable cause to believe that Ahmaud was a burglar and were following him in hot pursuit.<sup>343</sup> Travis and

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335. Shaddi Abusaid and Bill Rankin, *Jury Resumes deliberations Tuesday in hate crimes trial over Arbery's killing*, NNY 360 (February 21, 2022), [https://www.nny360.com/news/jury-to-resume-deliberations-tuesday-in-hate-crimes-trial-over-ahmaud-arbery-s-killing/image\\_d54789a4-077c-596b-8599-fbf52710433d.html](https://www.nny360.com/news/jury-to-resume-deliberations-tuesday-in-hate-crimes-trial-over-ahmaud-arbery-s-killing/image_d54789a4-077c-596b-8599-fbf52710433d.html).

336. CBS News, *Travis McMichael testifies at trial for Ahmaud Arbery's killing | full video*, YOUTUBE, at 6:13:20, <https://www.youtube.com/watch?v=gLDqXyPajcg>, [hereinafter *McMichael Testimony I*].

337. Liz Baker, *Racist, violent evidence presented in federal trial against Ahmaud Arbery's killers*, NPR (February 16, 2022), <https://www.npr.org/2022/02/16/1081257533/racist-violent-evidence-presented-in-federal-trial-against-ahmaud-arberys-killer>.

338. Dakin and one, *A timeline of the killing of Ahmaud Arbery and the case against 3 men accused of his murder*, CNN (Nov. 12, 2021, 10:22 PM), <https://www.cnn.com/2021/10/18/us/ahmaud-arbery-case-timeline/index.html>.

339. *Gregory McMichael Interview*, *supra* note 63, at 7:12.

340. *Id.* at 10:16.

341. See Indictment No. CR-2100168, State v. Jacquelyn Lee Johnson, No. CR-2100168 (Ga. Sup. Ct. Sept. 2, 2021).

342. See Jelani Cobb, *Justice for Ahmaud Arbery*, NEW YORKER (Nov. 24, 2021), <https://www.newyorker.com/news/daily-comment/justice-for-ahmaud-arbery>.

343. Letter from George E. Barnhill, Dist. Att'y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep't 2-3 (Apr. 2, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf>.

Gregory were not arrested until May 7<sup>th</sup>, 2020.<sup>344</sup> Roddie shared the video of Ahmaud's murder because he thought it would vindicate him.<sup>345</sup> Subsequently, he was arrested on May 21<sup>st</sup>, 2020.<sup>346</sup> The arrests were not the result of an awakening in Georgia's criminal justice system. The arrests were the result of activists' forceful demands and not *I beseech thee*- requests.

The Defendants' attorneys cited the Law<sup>347</sup> as their legal defense, asserting that their clients intentionally acted pursuant to the Law. But, based on the evidence presented at the Georgia state trial<sup>348</sup> and the Federal trial,<sup>349</sup> it is unlikely that the Defendants had the letter of the Law in their minds when they hunted Ahmaud. They did not say that they were acting pursuant to the Law during police interviews right after the murder or in their written police statements. The intersection of the Rule and Ahmaud's lynching is analyzed below. The analysis is primarily based on the testimony of Travis McMichael. Even when considering the source, the Rule proof is sound.

#### A. *The Events Leading Up to February 23<sup>rd</sup>*

The slave era and Jim Crow era boundary laws<sup>350</sup> that reside in America's body of unspoken laws were essential to the murderers' legal defenses. Travis's attorney, Jason Sheffield, began his direct examination of Travis by trying to lay the foundation that Ahmaud did not belong in Satilla Shores. "What type of people live in the Satilla shores community?"<sup>351</sup> Travis described it as a "typical small-town neighborhood."<sup>352</sup> "You have a lot of retirees, and you're starting to see young families."<sup>353</sup> Sheffield's phrasing, "type of people," implied that Ahmaud did not possess the

344. See Dakin Andon, *A timeline of the killing of Ahmaud Arbery and the case against 3 men accused of his murder*, CNN (Nov. 12, 2021), <https://www.cnn.com/2021/10/18/us/ahmaud-arbery-case-timeline/index.html>.

345. See Sarah Midkiff, *The Man Who Capture Video of Ahmaud Arbery's Killing Speaks Out*, REFINERY 29 (May 12, 2020, 4:16 PM), <https://www.refinery29.com/en-us/2020/05/9806392/william-bryan-ahmaud-arbery-shooting-videographer-statement>; see also Sarah Mervosh, *Ahmaud Arbery Video Was Leaked by a Lawyer Who Consulted With Suspects*, NY TIMES (Oct. 18, 2021), <https://www.nytimes.com/2020/05/08/us/ahmaud-arbery-video-lawyer.html>.

346. Rick Rojas, *Man Who Filmed Ahmaud Arbery Death Is Charged With Murder*, NY TIMES (May 21, 2020, updated October 18, 2021), <https://www.nytimes.com/2020/05/21/us/william-bryan-arrest-ahmaud-arbery.html>.

347. GA. CODE ANN., § 17-4-60 (repealed 2021) (Arrest by private person. 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) [hereinafter *the Law*].

348. State v. Travis McMichael, Gregory McMichael, and William "Roddie" Bryan, No. #CR2000433 (Super. Ct. of Glynn Cnty., Ga. Filed May 7, 2020).

349. United States v. McMichael, Case, 2:21-CR-22 (S.D.Ga. 2022).

350. Jim Crow laws enforced the same types of boundaries between black people and white people as slave laws and black codes. Jim Crow laws established when, where, and how black people and white people could interact, the spaces that black people were allowed to occupy, the conditions under which black people could exercise their liberty of movement.

351. *McMichael Testimony I*, *supra* note 336, at 4:12:00.

352. *Id.*

353. *Id.* at 4:10:00.

characteristics of members of the community and appeared suspicious because he was in a space where he should not have been.<sup>354</sup>

According to Travis, his first encounter with Ahmaud occurred at about 7:30 p.m. on February 11<sup>th</sup>, 2020, at 220 Satilla Drive.<sup>355</sup> He invoked the imagery of the predatory black male and described Ahmaud as “creeping”<sup>356</sup> around and “staying in the shadows.”<sup>357</sup> Travis was in his vehicle when he saw Ahmaud. He shined his headlights directly on Ahmaud to show Ahmaud that he was watching<sup>358</sup> and as a show of self-designated authority.<sup>359</sup> He left his vehicle to confront Ahmaud.<sup>360</sup> Ahmaud did not say anything and allegedly pulled up his shirt and acted like he was reaching for something in his waistband.<sup>361</sup> Travis assumed it was a gun. It “freaked him out,”<sup>362</sup> and he went to the home he shared with his parents.<sup>363</sup> Travis said he expected Ahmaud to be scared of him and was surprised when he was not.<sup>364</sup>

Travis told Gregory what happened, grabbed his gun, and drove his truck back to 220 Satilla Drive.<sup>365</sup> Travis called 911 and told the operator that there had been thefts in the neighborhood, and he had seen a guy who may be responsible for them entering a house that was under construction.<sup>366</sup> Officer Robert Rash arrived and showed Travis videos of what had occurred from the 220 Satilla Drive surveillance system.<sup>367</sup> When questioned about his perception of how Ahmaud acted in the video, Travis said Ahmaud was acting “bold” and not “normal.”<sup>368</sup> Ahmaud’s behavior was suspicious and alarming because anyone else who had been caught would’ve left and not continued to “creep” around.<sup>369</sup> Travis was shown videos of other people walking around the house, including a white couple, and videos of Ahmaud walking around the house on other occasions.<sup>370</sup> As Prosecutor Linda Dunikoski observed, Ahmaud did not bring anything to conceal stolen items and did not steal anything in the videos.<sup>371</sup>

Before his encounter with Ahmaud, there had been thefts in the neighborhood. In October 2019, the owner of 220 Satilla Drive, Larry English, reported that items

354. *Id.* at 4:10:00-4:13:00.

355. *Id.* at 5:10:00.

356. *Id.* at 7:29:35.

357. *Id.* at 5:21:56.

358. *Id.*

359. *Id.* at 5:28:00.

360. *Id.*

361. *Id.*

362. *Id.* at 5:24:00.

363. *Id.* at 5:18:00-5:24:00.

364. NBC News, Live: Travis McMichael Testifies in Ahmaud Arbery Murder Trial, YOUTUBE, at 2:05:00, <https://www.youtube.com/watch?v=MTh4YLWBkIY> [hereinafter *McMichael Testimony II*].

365. *McMichael Testimony I*, *supra* note 336, at 5:26:00.

366. *Id.*

367. *Id.* at 5:36.

368. *Id.* at 5:38:00.

369. *Id.* at 7:29:00.

370. *Id.* at 7:30:10.

371. *McMichael Testimony II*, *supra* note 364, at 17:40.

had been stolen from the boat he stored at the house.<sup>372</sup> He put up a video surveillance system afterward.<sup>373</sup> One neighbor said someone stole her purse, but she later found it under her car seat.<sup>374</sup> On January 1<sup>st</sup>, 2020, someone stole Travis's pistol from his truck, but before February 23<sup>rd</sup>, 2020, he found out that a person who lived in the neighborhood had stolen it.<sup>375</sup> He said he heard about additional criminal activity from his mother, neighbors, and Facebook posts.<sup>376</sup>

Community members used Facebook to discuss neighborhood crime. In Facebook posts, amongst other social media posts and messages his attorneys moved to have suppressed,<sup>377</sup> Travis promoted vigilantism<sup>378</sup> and racism.<sup>379</sup> He proudly displayed the confederate flag vanity plate on his car in one photo. On July 1<sup>st</sup>, 2019, Travis wrote, "arm up"<sup>380</sup> in a conversation about neighborhood crime. Another time, "[t]hat's right hope y'all catch the vermin."<sup>381</sup> In describing his father, "[y]our old man is just like my old man. Slap crazy, old as dirt, doesn't care about going to jail."<sup>382</sup>

He knew Ahmaud did not steal his pistol. He knew that there were multiple videos of Ahmaud walking through the house while it was vacant and under construction, and Ahmaud had not stolen anything. He knew that there were multiple videos of other people walking through the house. Nevertheless, Travis asserted that he suspected that Ahmaud was responsible for crime in the neighborhood.<sup>383</sup> During a preliminary hearing, Richard Dial, Lead Investigator for the Georgia Bureau of Investigation, testified Travis said, "he had a gut feeling Mr. Arbery may be responsible for the thefts in the neighborhood."<sup>384</sup>

The gut feeling was racism, as evidenced by the text messages and social media posts that were revealed during the federal trial.<sup>385</sup>

372. *McMichael Testimony I*, *supra* note 336, at 5:16:00.

373. *Id.* at 5:17:00.

374. *Id.* at 5:02:00.

375. *Id.* at 5:13:00.

376. *Id.* at 5:15:00-5:19:00.

377. Travis and Gregory McMichael's Response to State's Mot. 4.5: Notice of State's Intent to Introduce Evidence of Other Acts, CR-2000433 (Super. Ct., Glynn Cnty. Ga.) (Jan. 29, 2021), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

378. *McMichael Testimony II*, *supra* note 364, at 1:58:00.

379. Ga. 4.5 Notice of State's Intent to Introduce Evidence of Other Acts Pursuant to O.C.G.A. §§ 24-4-404(b) & 24-4-403, CR2000433, (Super. Ct., Glynn Cnty. Ga.) (September 29, 2020), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

380. *McMichael Testimony II*, *supra* note 364, at 1:58:47

381. *Id.* at 2:00:00.

382. *Id.* at 2:00-2:01:50; 4.5 Notice of State's Intent to Introduce Evidence of Other Acts Pursuant to O.C.G.A. §§ 24-4-404(b) & 24-4-403, No. CR2000433 (Super. Ct. of Glynn Cnty. GA Sept. 29, 2020), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

383. *McMichael Testimony I*, *supra* note 336, at 7:25:00

384. News4JAX, *GBI Investigator: Witness heard man who killed Ahmaud Arbery use racial slur following shooting*, YOUTUBE, [https://www.youtube.com/watch?v=GA66\\_yraEog](https://www.youtube.com/watch?v=GA66_yraEog) [hereinafter *Dial Testimony*].

385. United States v. McMichael, Indictment No. Cr-00022-LGW-BWC (S.D. Ga. Brunswick Div. Apr. 28, 2021), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>; 18 U.S.C. Section 245(b)(2)(B); 18 U.S.C. § 1201(a)(1), (d) (Attempted Kidnapping); 18 U.S.C. § 924(c) (Use of a firearm during a crime of violence);

Travis:

Text Message: "Need to change the name from Cracker Barrel to [N-Word] Bucket."<sup>386</sup>

Facebook Comment: "Under a video of a Black Lives Matter protest, McMichael wished for a semiautomatic rifle in order to shoot the people he described as 'god\*\*\*\*monkeys and [wrote] another post advocating driving into a group of Black people with a vehicle.'"<sup>387</sup>

Text Message: "Love it, zero n-words work with me."<sup>388</sup>

Social Media Comment: "[In] his response to a video of a Black man playing a prank on a white man: 'I'd kill that fu\*\*\*\*\* n-word.'"<sup>389</sup>

Social Media Comment: "A video of a Black man lighting a firecracker inside his nostril prompted him to comment, 'Been cooler if it blew that fu\*\*\*\*\* n-word's head off.'"<sup>390</sup>

Text Message: "I'd rather say zoodle every day for the rest of my life than ever be a n-word."<sup>391</sup>

Facebook Comment: "In response to a June 2017 Facebook post he shared about a white mother and daughter who were assaulted by Black customers," Travis wrote, "I would have the same remorse putting them down as I would a rabid coon. . . I would beat those monkeys to death if they did that to (name redacted by the FBI) or my mother and sister."<sup>392</sup>

Gregory: Investigators could not fully access Gregory's phone because they had difficulty breaking the encryption. Yet, they found language promoting vigilantism.

Facebook Post: "a gun in hand is worth more than an entire police force on the phone."<sup>393</sup>

Roddie:

Regarding the 2019 Martin Luther King, Jr. Holiday, "I'm working so all the n-words can take off."<sup>394</sup>

He described the MLK Day parade as "monkey day parade."<sup>395</sup>

In discussing his daughter's black boyfriend, he messaged a friend, "He'd fit right in with the monkeys."<sup>396</sup>

386. Baker, *supra* note 337.

387. *Id.*

388. Kayla Goggin, *Racist social media posts, text messages revealed during hate crimes trial against Arbery's killers*, COURTHOUSE NEWS SERV. (Feb. 16, 2022), <https://www.courthousenews.com/racist-social-media-posts-text-messages-revealed-during-hate-crimes-trial-against-arberys-killers/>.

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. Baker, *supra* note 337.

394. Goggin, *supra* note 388.

395. *Id.*

396. *Id.*

*B. February 23<sup>rd</sup>, 2020*

On February 23<sup>rd</sup>, 2020, Gregory was outside, as was Matt Albenze, a neighbor that lived down the street. Gregory saw Ahmaud jogging<sup>397</sup> and ran into his house, and yelled at Travis to get his gun so they could hunt down Ahmaud.<sup>398</sup> Travis got his shotgun, and Gregory got his 357 Magnum.<sup>399</sup> When Travis walked outside, he saw Matt pointing down the street.<sup>400</sup> Travis and Gregory climbed into Travis's Ford F-150 truck and went to find Ahmaud.<sup>401</sup>

Travis lied during his testimony. He testified that he did not know what was happening when his father ran into the house and screamed at him to go hunt Ahmaud.<sup>402</sup> Travis said he wanted to investigate.<sup>403</sup> Then, he testified that he wanted to arrest Ahmaud: detain, question, and hold him until the police arrived because he had probable cause to believe Ahmaud committed a crime on February 23<sup>rd</sup><sup>404</sup> and likely committed a crime on February 11<sup>th</sup>.<sup>405</sup> Additionally, he said he proceeded based on rumors that his mother told him, Facebook posts, and assumptions he made about Ahmaud due to their encounter on February 11<sup>th</sup>.<sup>406</sup> He emphasized that Ahmaud acted brazen.<sup>407</sup>

1. Ahmaud was Bold, Unafraid, & Silent

Mere pursuit is sufficient to give a white supremacist the right to control and possess a black body. The pursuer may effectuate his right “without bodily touch or manucaption”<sup>408</sup> even if the pursuer is not “within reach or doesn’t have a reasonable prospect of taking.”<sup>409</sup> Mere pursuit is sufficient because “it declares the intention of acquiring dominion.”<sup>410</sup> Mere pursuit can be established by simply saying, “stop” or “what are you doing here?” Any small act that a black person should recognize as a signal to subordinate himself to the pursuer’s authority is sufficient. Noncompliance with the pursuer’s explicit or implicit demands is grounds for using force or escalating force. Hence, minimal labor is sufficient to exercise maximum control.

According to Travis, Ahmaud should have recognized Travis’s and Gregory’s presence as a show of authority.<sup>411</sup> Ahmaud should have perceived their pursuit and

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397. *McMichael Testimony I*, *supra* note 336, at 6:03:00.

398. *Id.* at 6:03:00.

399. *Id.* at 7:43:00, 7:53:00.

400. *Id.* at 7:57:00.

401. *Id.* at 7:42:00.

402. *Id.*

403. *Id.* at 7:56:00.

404. *Id.* at 7:07:00.

405. *McMichael Testimony II*, *supra* note 364, at 5:06.

406. *Id.* at 7:27:00.

407. *Id.* at 7:29:00.

408. *Pierson*, 3 Cai. R., at 182.

409. *Id.*

410. *Id.* at 176.

411. See *Travis McMichael Interview*, *supra* note 61, at 1:03. <https://www.youtube.com/watch?v=aXRVXstOySM>.



questions as a signal to subordinate himself through compliance. Ahmaud did not comply. Travis, his attorney, and the attorneys for Roddie and Gregory characterized his noncompliance as proof of his dangerous mental state.<sup>412</sup> They attempted and failed to introduce evidence that they described as proof that Ahmaud suffered from mental health issues and was raised in an unstable home environment.<sup>413</sup> They tried to paint Ahmaud as a mentally unstable product of a pathological black family.<sup>414</sup>

"I kept saying, stop for a minute, please stop."<sup>415</sup> Gregory said the same, "Stop! We want to talk to you!"<sup>416</sup> Ahmaud did not speak.<sup>417</sup> Travis described Ahmaud as looking "very angry – mad; It wasn't what I expected."<sup>418</sup> Ahmaud was clenching his teeth, "which made [Travis] think that something has happened."<sup>419</sup> Travis insisted Ahmaud should not have been startled when he and Gregory pulled up next to Ahmaud in his two-and-a-half-ton,<sup>420</sup> F-150 pickup truck, armed with guns and demanding answers to questions.<sup>421</sup> He expected Ahmaud to stop and answer calmly.

Ahmaud's default was not reflexive obedience. He did not answer. Ahmaud turned around and ran.<sup>422</sup> Travis reversed his truck and pulled up to Ahmaud again.<sup>423</sup> Travis kept questioning Ahmaud. He asked him what was going on and demanded that he explain why Gregory was upset and why Albenze was pointing down the road.<sup>424</sup> Ahmaud stayed silent, did not make eye contact, turned around, and ran.<sup>425</sup>

He followed Ahmaud to analyze his demeanor and described him as "acting funny" and "weird."<sup>426</sup> He pulled up next to Ahmaud and told him the police were coming and that he wanted to talk to him.<sup>427</sup> He thought the situation could become

412. See Defendants Travis McMichael and Gregory McMichael's Br. In Support of Admissibility of Deceased's Mental Health, CR2000433 (Super. Ct. of Glynn Cnty. GA) (June 14, 2021); see also *McMichael Testimony II*, *supra* note 364, at 2:07:00.

413. See Defendants Travis McMichael and Gregory McMichael's Br. In Support of Admissibility of Deceased's Mental Health, CR2000433 (Super. Ct. of Glynn Cnty. GA) (June 14, 2021); Hon. Timothy R. Walmsley, Order on the Admis. Of the Victim's Mental Health Records (October 1, 2021); see also Order Denying Access to Division of Family and Children Services Records (July 22, 2021), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

414. See Order Denying Access to Division of Family and Children Services Records (July 22, 2021), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

415. *McMichael Testimony I*, *supra* note 336, at 6:15-6:20.

416. *Gregory McMichael Interview*, *supra* note 63, at 5:28:00

417. *McMichael Testimony I*, *supra* note 336, at 6:18:00.

418. *Id.* at 6:17:00

419. *Id.*

420. *How much does a Ford F-150 weigh?* JACK DEMMER FORD, <https://www.jdemmerford.com/research/new-ford-f-150-weight.htm> (last visited Nov. 2022).

421. *McMichael Testimony II*, *supra* note 364, at 26:06.

422. *McMichael Testimony I*, *supra* note 336, at 6:18:00.

423. *Id.*

424. *McMichael Testimony II*, *supra* note 364, at 27:47

425. *Id.* at 28:39.

426. *McMichael Testimony I*, *supra* note 336, at 6:21:00.

427. *Id.* at 6:22:20.

volatile because Ahmaud looked angry and like he was trying to evade the police.<sup>428</sup> Again, Ahmaud said nothing, turned around, and ran.<sup>429</sup> Gregory got out of the cab and climbed into the bed.<sup>430</sup> They lost sight of Ahmaud. Gregory told Travis to find him and cut him off, so Travis drove down another road searching for Ahmaud.<sup>431</sup> When they saw him, Roddie was stalking him in his black Chevy pickup truck.<sup>432</sup> Travis said he did not know Roddie and did not solicit Roddie's help.<sup>433</sup>

Roddie was drawn in by the spectacle of the racist imagery. He was working outside when he saw Travis and Gregory chasing Ahmaud.<sup>434</sup> Roddie yelled, "ya'll got him?"<sup>435</sup> He got into his truck and joined the hunt. "I was trying to chase this joker."<sup>436</sup> Travis and Gregory drove towards Ahmaud.<sup>437</sup> Travis said Ahmaud was attacking Roddie's truck, but he never said that in his written or verbal statements to the police.<sup>438</sup> However, Roddie stated that he pulled out of his driveway to block Ahmaud.<sup>439</sup> He cornered and blocked him five times.<sup>440</sup> Roddie admitted that he forced Ahmaud to go into a ditch, angled his truck to hit him, and tried to run him off the road several times.<sup>441</sup>

Eventually, they pinned Ahmaud in between their trucks. Ahmaud said nothing and tried to run away.<sup>442</sup> First, he ran away from Roddie, which meant he ran toward Travis.<sup>443</sup> Travis pointed his shotgun at Ahmaud, and Ahmaud turned around.<sup>444</sup> Upon seeing Roddie, Ahmaud turned around and faced Travis and Gregory. Travis aimed his shotgun at Ahmaud. Gregory stood in the bed of the truck and aimed his 357 Magnum at Ahmaud.<sup>445</sup>

## 2. Ahmaud Dismantled the Asymmetrical Power-Relation Between White Supremacy & Blackness

A pursuer may justify any use of force as a legitimate means of enforcing or reconstituting the historical, asymmetrical power-relation between white supremacy and blackness. In the pursuer's mind, the power relation is enforced or reconstituted when the person is physically restrained, controlled, trapped, wounded, or

428. *Id.* at 6:24:00.

429. *Id.* at 6:23:00.

430. *Id.* at 6:25:00.

431. *Id.* at 6:31:00.

432. *Id.* at 6:34:00.

433. *Id.* at 7:07:00.

434. *Bryan Interview*, *supra* note 64, at 00:58.

435. *Id.* at 2:00.

436. Klasfeld, *supra* note 59.

437. *McMichael Testimony I*, *supra* note 336, at 6:32:00-6:37:00.

438. *Id.*

439. CBS Mornings, Bodycam footage shows William "Roddie" Bryan telling police, "I made a few moves" at Ahmaud Arbery, YOUTUBE, at 3:00, <https://www.youtube.com/watch?v=kRMa97psggk>.

440. 11Alive, *Ahmaud Arbery death trial, Investigator testifies to William 'Roddie' Bryan's role*, YOUTUBE, at 2:15 (Nov. 10, 2021), <https://www.youtube.com/watch?v=Ikh8JvhA17I>.

441. CBS Mornings, *supra* note 439, at 7:30 (Bodycam footage shows William).

442. *McMichael Testimony II*, *supra* note 364, at 1:04:44.

443. *McMichael Testimony I*, *supra* note 336, at 6:43:00.

444. *Id.* at 6:45:00.

445. *Id.* at 6:50:00.

killed. Displays of physical brutality and psychological violence are intended to have the psychological impact of paternal corporal punishment. “Corporal punishment mark[s] its object as inferior, and in particular, as inferior to its subject.”<sup>446</sup> Whether occurring in public or private, physical and psychological violence are “degradation ceremon[ies]”<sup>447</sup> designed to “unmask”<sup>448</sup> the proper legal and societal status of the black person.

Ahmaud was lynched because he refused to play the role assigned to him by white supremacists. Travis, Gregory, and Roddie resented Ahmaud for entering their neighborhood. They resented Ahmaud for not appearing to be scared of them on February 23<sup>rd</sup>, 2020, even after Gregory yelled, “Stop! I’ll blow your fu\*\*\*\*\* head off!”<sup>449</sup> Travis resented Ahmaud for not being scared of him on February 11<sup>th</sup>, 2020. The resentment increased each time Travis and Gregory asked Ahmaud a question, and he stayed silent. “If the guy would’ve stopped this would’ve never happened.”<sup>450</sup> It increased because the look on Ahmaud’s face was one of anger and not deference.

In five minutes, Ahmaud dismantled their identities as white men and the position of supremacy they believed they occupied in relation to black people. Therefore, they stalked and threatened him in an attempt to prove their power. The encounter was intended to be a degradation ceremony that marked Ahmaud as inferior. Roddie recognized and understood the ceremony from the outset, and that is why he recorded it.

Travis’s attorney spent considerable time depicting Travis as a de facto law enforcement officer whose specialized knowledge made his actions reasonable and prudent. He emphasized that Travis served in the Coast Guard from March 2007 to July 2016 and received law enforcement training. He emphasized that Travis completed the Basic Boarding Officer Course, where he received SEAS II training – search, examination, arrest, inspect, and inquire, pursuant to 14 U.S.C. § 89(a).<sup>451</sup>

Travis received the same type of use of force training that police officers throughout the nation receive. Travis learned the six levels of the Coast Guard’s Use of Force Continuum.<sup>452</sup> The Continuum is a policy that is supposed to help officers determine the force needed to make a suspect comply. Level one is officer presence.<sup>453</sup> The officer’s presence, demeanor, and badge are sufficient because the person recognizes the officer as an authority figure. Level two is verbal commands and is used when a person does not respond to the officer’s presence.<sup>454</sup> Level three is control techniques.<sup>455</sup> The officer uses physical control techniques that have a low

446. DUBBER, *supra* note 95, at 34.

447. *Id.* at 34-5.

448. *Id.*

449. 11Alive, *I’ll blow your (expletive) head off: Transcript of statements in Ahmaud Arbery death trial*, YOUTUBE (Nov. 9, 2021), at 3:20, <https://www.youtube.com/watch?v=IHbZXtX4P8g>.

450. *Bryan Interview*, *supra* note 64, at 7:40.

451. *McMichael Testimony I*, *supra* note 336, at 4:23:00-4:39:00.

452. *Id.* at 4:31.

453. *Id.*

454. *Id.* at 4:32.

455. *Id.* at 4:34.

probability of causing connective tissue injury. Level four is aggressive response techniques.<sup>456</sup> The officer uses kicks, stuns, punches, or pepper spray. Level five is intermediate weapon use.<sup>457</sup> The officer may use a weapon like a baton, taser, etc. At level six, the officer may use deadly force when the individual poses a serious threat of bodily harm to the life of the officer or another individual.<sup>458</sup>

Travis acknowledged that the “best weapon retention technique is to not make your weapon visible to anyone.”<sup>459</sup> Moreover, he acknowledged that deadly force is a last resort option, and you should never point your gun at a person unless you intend to kill them.<sup>460</sup> He admitted that he understood the Fifth Amendment right to remain silent and therefore, understood that even if he was attempting to arrest Ahmaud, Ahmaud had no obligation to speak to him.<sup>461</sup>

As a part of his training, he learned the rule for probable cause, yet he incompletely stated it.<sup>462</sup> He said that based on his knowledge and training, he determined that he had probable cause to arrest Ahmaud. First, he linked his probable cause to the February 11<sup>th</sup> encounter, although he saw the video where Ahmaud had not committed a crime.<sup>463</sup> He later admitted he did not have probable cause based on the February 11<sup>th</sup> incident.<sup>464</sup> Then, he asserted that he had probable cause to believe that Ahmaud committed other crimes in the neighborhood. Lastly, he said he thought Ahmaud committed a crime on February 23<sup>rd</sup>.

Travis’s use of force training was inconsequential, as has been the case with many police officers. He did not accept Ahmaud’s right to remain silent because he did not recognize Ahmaud as having any rights that he was bound to respect.<sup>465</sup> Travis pursued Ahmaud, knowing he did not have probable cause or reasonable suspicion. Travis tried to use Ahmaud’s silence as probable cause. Travis insisted he thought Ahmaud was an armed threat based on their February 11<sup>th</sup> interaction,<sup>466</sup> although Ahmaud never spoke, yelled, threatened, or brandished a weapon.<sup>467</sup> Contradictorily, Travis stated that he would never pursue someone that he thought was armed.<sup>468</sup> He knew the best weapon retention technique was to not show his gun to Ahmaud. However, he showed Ahmaud the gun and then proclaimed that he was scared Ahmaud was going to take it away. Like the police officers in *Lyons* and *Graham*, he escalated from Level 2 to Level 6, deadly force, because only the Rule mattered.

Travis continued to contradict himself. When questioned about why he got out of his truck the first time, he said he did it because he did not feel like Ahmaud was a

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456. *Id.* at 4:35.

457. *Id.* at 4:37.

458. *Id.*

459. *Id.* at 7:39:00.

460. *Id.* at 7:41:00.

461. *Id.*

462. *Id.* at 4:29:00.

463. *McMichael Testimony II*, *supra* note 364, at 5:34.

464. *Id.* at 10:32.

465. *Dred Scott*, 60 U.S., at 404-405.

466. *McMichael Testimony II*, *supra* note 364, at 4:37.

467. *Id.* at 23:38-25:12.

468. *Id.* at 15:00.

threat. Previously, he said he felt threatened by Ahmaud when Ahmaud faced him and made eye contact.<sup>469</sup> Additionally, he acknowledged he knew Ahmaud did not have a weapon because Ahmaud kept his hands at his sides, never reached for anything, or displayed a weapon.<sup>470</sup>

### 3. Ahmaud Chose to Fight

A black person does not have the right of self-defense because, to white supremacists, black people occupy an existence beyond the scope of natural law and justice.<sup>471</sup> Black people have an “obligation to conform” their instincts of self-preservation to their “condition of inferiority,”<sup>472</sup> and demonstrate reflexive obedience under all circumstances. The provocations that entitle a white person to repel force with force or defend himself in any other manner are disregarded when it comes to a black person. Law and society have determined that a black person who exercises agency is an insurrectionist or an outlaw whose conduct threatens the peace and security of society.

Ahmaud placed himself in a “state of insurrection”<sup>473</sup> when he refused to acknowledge Travis’s, Gregory’s, and Roddie’s individual and collective authority and exercised his right of self-defense. Ahmaud’s right of self-defense vested the moment Travis and Gregory began stalking him. Ahmaud was not obligated to conform his instincts of self-preservation to the condition of inferiority that Travis, Gregory, and Roddie wanted him to assume. The Defendants’ arguments that Ahmaud did not have a right of self-defense were predicated purely on their fetishization of black obedience.

Once Ahmaud was pinned between the trucks, he had no choice but to confront Gregory and Travis. Travis stood on the driver’s side of his truck, aiming his shotgun at Ahmaud.<sup>474</sup> Gregory was in the bed, aiming his 357 Magnum at Ahmaud.<sup>475</sup> Gregory bragged, “[h]e was trapped like a rat. I think he was wanting to flee and he realized that something, you know, he was not going to get away.”<sup>476</sup>

Ahmaud ran to the passenger side of Travis’s truck to avoid Travis.<sup>477</sup> Travis insisted he did not allow Ahmaud to run away and went to the front of the truck because he was scared Ahmaud was going to attack his father or get into the truck.<sup>478</sup> Travis alleged that he shot Ahmaud at point-blank range because Ahmaud was beating him and thought Ahmaud was going to take his gun.<sup>479</sup> He said he did not fully aim his shotgun at Ahmaud. The video and the medical examiner’s report prove

469. *Id.* at 49:50.

470. *Id.* at 52:18.

471. See generally LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 224-66 (1987).

472. COBB, *supra* note 13, at 275; see also, WILSON, *supra* note 71, at 27.

473. COBB, *supra* note 13, at 275.

474. *McMichael Testimony II*, *supra* note 364, at 1:45:00.

475. *Id.* at 1:44:00-1:46:00.

476. 11Alive, *Officer testimony: Greg McMichael said Ahmaud Arbery was ‘trapped like a rat,’* YOUTUBE, at 0:46, <https://www.youtube.com/watch?v=wc0s713lDrc> [hereinafter *Nohilly Testimony*].

477. *McMichael Testimony II*, *supra* note 364, at 1:47:00.

478. *Id.* at 1:43:00.

479. *Id.* at 1:52:00.

otherwise.<sup>480</sup> Travis's gun was parallel to the ground and pointed directly at Ahmaud when he fired.<sup>481</sup> Blood gushed from the vein in Ahmaud's wrist after Travis shot him the first time.<sup>482</sup> The bullet hit Ahmaud's wrist because Ahmaud put his hand in between himself and the barrel of the shotgun while trying to defend himself.<sup>483</sup> The same shot blew a hole in Ahmaud's chest.<sup>484</sup> The second shot did not hit Ahmaud.<sup>485</sup> The third shot shattered his left arm and tore through a major artery and vein near his left armpit.<sup>486</sup> Ahmaud rapidly bled out as he tried to keep running.

Ahmaud's lynching proves that because the racial identity of whiteness was their most valuable form of property, Gregory, Travis, and Roddie believed the right to perpetually control and possess Ahmaud was within the scope of the privileges, benefits, and legal entitlements that accompanied their status as white men. They possessed settled, strong, and permanent expectations of being allowed to use the Rule of Black Capture to subjugate Ahmaud's life to the power of death, derive pleasure from exposing Ahmaud to recreational terror, and ultimately force Ahmaud into a system of carceral capitalism where his body would become exploitable state property. They regarded Ahmaud as a terrifying object with no purpose except that which they prescribed for him.

### *C. The Trials & The Verdicts*

#### 1. Georgia v. Travis McMichael, Gregory McMichael, and William "Roddie" Bryan

Wanda Cooper-Jones attended every day of the trial. She listened as the man who stood over Ahmaud while he died and called him a "fucking n-word"<sup>487</sup> sought sympathy. Travis called the day he murdered Ahmaud "the most traumatic event of my life."<sup>488</sup> Roddie's attorney presented him as the village idiot that got in over his head. Gregory's attorney presented him as a pillar of the community and a concerned, retired police officer with a pristine record of service.

Their attorneys dehumanized Ahmaud and did not hide their racial animus. The Defendants filed a motion requesting that Ahmaud not be called a victim.<sup>489</sup> Roddie's attorney, Kevin Gough, requested that more "bubbas" and "joe-six

480. *Id.* at 1:50:00.

481. *Id.* at 1:54:43.

482. *Id.* at 1:50:00.

483. *Id.*

484. Theresa Braine, *Ahmaud Arbery never had a chance once shotgun blasts tore through arteries, jury hears during trial of 3 who killed him*, MSN (November 16, 2021), <https://www.msn.com/en-us/news/crime/ahmaud-arbery-never-had-a-chance-once-shotgun-blasts-tore-through-arteries-jury-hears-during-trial-of-3-who-killed-him/ar-AAQMAS0>.

485. *Id.*

486. *Id.*

487. *Dial Testimony*, *supra* note 384, at 1:17.

488. *McMichael Testimony II*, *supra* note 364, at 43:55.

489. See Travis and Gregory McMichael's, Motion In Limine To Exclude Use of the Prejudicial Term "Victim," State v. McMichael, No. CR-2000433 (Super. Ct. of Glynn Cnty. Ga. Dec. 30, 2020); see Motion to Limit Quantity and Content of "In Live" Photographs and to Restrict the Manner of Introduction, No. CR-2000433 (Super. Ct. of Glynn Cnty. Ga. Dec. 30, 2020); Order on Defendants' Notice of Intent to

packs”<sup>490</sup> be added to the jury pool. During a hearing, Gough proclaimed, “[w]e don’t want any more black pastors coming in here,”<sup>491</sup> arguing that they could intimidate the jury. He analogized their presence to “[i]f a bunch of folks came in here dressed like Colonel Sanders with white masks sitting in the back.”<sup>492</sup> Gregory McMichael’s attorney, Laura Hogue, used white supremacist dog whistles in her closing argument to imply that Ahmaud was a dangerous animal that deserved to be killed: “Turning Ahmaud Arbery into a victim after the choices he made does not reflect the reality of what brought Ahmaud Arbery to Satilla Shores in his khaki shorts with no socks to cover his long dirty toenails.”<sup>493</sup> It did not work. The jury found all three men guilty of numerous crimes.<sup>494</sup>

Travis McMichael: Sentenced to life in prison plus twenty years without the possibility of parole.<sup>495</sup>

Count 1 Malice Murder – Guilty: Life without the possibility of parole  
 Count 2 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 3 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 4 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 5 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 6 Aggravated Assault – Guilty 6: Merges into Count 1  
 Count 7 Aggravated Assault – Guilty: Twenty years Consecutive to Count 1  
 Count 8 False Imprisonment – Guilty: Merges into Count 1  
 Count 9 Attempted False Imprisonment - Guilty: Five years Concurrent to Count 7

Gregory McMichael: Sentenced to life plus twenty years without the possibility of parole.<sup>496</sup>

Count 1 Malice Murder – Not Guilty  
 Count 2 Felony Murder – Guilty: Life without the possibility of parole  
 Count 3 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 4 Felony Murder – Guilty: Vacated by Operation of Law

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Introduce 404(b) Evidence, No-CR2000433 (Super. Ct. of Glynn Cnty. Ga. Aug. 30, 2021), <https://www.glynncounty.org/2053/State-of-Georgia-vs-Gregory-McMichael>.

490. Benn Kessler, *Defense in trial for Ahmaud Arbery killing wants more ‘Bubbas’ and ‘Joe six-packs’ on jury*, NBC NEWS (November 3, 2021), <https://www.nbcnews.com/news/us-news/not-enough-joe-six-packs-among-potential-jurors-trial-ahmaud-n1283122>.

491. The Guardian, *Ahmaud Arbery trial: defense attorney requests ‘no more Black pastors in here,’* THE GUARDIAN (Nov. 12, 2021), <https://www.theguardian.com/us-news/video/2021/nov/12/ahmaud-arbery-trial-defense-attorney-requests-no-more-black-pastors-in-here-video>.

492. *Id.*

493. Law&Crime, *Ahmaud Arbery Death Trial Day 12 – Defense Closing Argument by Laura Hogue*, YOUTUBE, <https://www.youtube.com/watch?v=mCrZtga3rbU>.

494. Jury Verdict Form, CR2000433 (Super. Ct. Glynn Cnty., Ga.) (Nov. 24, 2021), <https://www.glynncounty.org/DocumentCenter/View/73757/Verdict-Form-Greg-McMichael>.

495. Fox 5 Atlanta Digital Team, *Men convicted of Ahmaud Arbery’s murder sentenced to life in prison*, FOX 5 ATLANTA (Jan. 6, 2022), <https://www.fox5atlanta.com/news/sentencing-hearing-men-convicted-ahmaud-arbery-murder>.

496. Original Sentence, SC-6.2 Final Disposition Felony Sentence Without Probation, CR2000433 (Super. Ct. of Glynn Cnty. GA) (Jan. 20, 2022), <https://www.glynncounty.org/DocumentCenter/View/74363/Original-Sentence-G>.



Count 5 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 6 Aggravated Assault – Guilty 6: Merges into Count 2  
 Count 7 Aggravated Assault – Guilty: Twenty years Consecutive to Count 2  
 Count 8 False Imprisonment – Guilty: Ten years Concurrent to Count 7  
 Count 9 Attempted False Imprisonment – Guilty: Five years Concurrent to Count 7

William “Roddie” Bryan: Sentenced to life in prison with the possibility of parole.<sup>497</sup>

Count 1 Malice Murder – Not Guilty  
 Count 2 Felony Murder – Not Guilty  
 Count 3 Felony Murder – Guilty: Life with the possibility of parole  
 Count 4 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 5 Felony Murder – Guilty: Vacated by Operation of Law  
 Count 6 Aggravated Assault – Not Guilty  
 Count 7 Aggravated Assault – Guilty: Merged with Count 3  
 Count 8 False Imprisonment – Guilty: Ten years 10 years consecutive to Count 3, Suspended  
 Count 9 Attempted False Imprisonment – Guilty 5 years concurrent to Count 8, Suspended

## 2. United States v. Travis McMichael, Gregory McMichael, and William “Roddie” Bryan<sup>498</sup>

The U.S. Department of Justice charged Travis, Gregory, and Roddie with five criminal counts, including hate crimes. The trial began on February 15<sup>th</sup>, 2022, and on February 22<sup>nd</sup>, 2022, the jury found them guilty of numerous crimes.<sup>499</sup>

Travis McMichael.<sup>500</sup>

Interference with Rights – Guilty  
 Attempted Kidnapping – Guilty  
 Using, Carrying a Firearm During and in Relation to a Crime of Violence – Guilty

Gregory McMichael.<sup>501</sup>

Interference with Rights – Guilty

497. Fox 5 Atlanta Digital Team, *supra* note, at 495.

498. See generally Press Release, U.S. Dep’t of Just., *Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery* (February 22, 2022), <https://www.justice.gov/opal/pr/federal-jury-finds-three-men-guilty-hate-crimes-connection-pursuit-and-killing-ahmaud-arbery>.

499. Verdict Form, United States v. Travis McMichael, Gregory McMichael, William “Roddie” Bryan, 2:21-CR-22 (S.D. Ga. Brunswick Div. Feb. 22, 2022).

500. *Id.*

501. *Id.*

Attempted Kidnapping – Guilty  
 Using, Carrying a Firearm During and in Relation to a Crime of Violence –  
 Guilty

William “Roddie” Bryan.<sup>502</sup>

Interference with Rights – Guilty  
 Attempted Kidnapping – Guilty

On August 8<sup>th</sup>, 2022, Gregory and Travis received life sentences, and Roddie was sentenced to thirty-five years.<sup>503</sup> Travis and Gregory filed motions requesting that they be allowed to serve their terms in federal prison because they fear being killed in state prison.<sup>504</sup>

#### CONCLUSION

The Rule of Black Capture can no longer be dismissed as a figment of the black imagination.<sup>505</sup> Videos, which are available on demand and can be viewed in the palms of our hands, prove that the Rule is the “normative basis of the right”<sup>506</sup> to beat and kill black people. The act of hunting and capturing a human being is a spectacular display of necropower that puts the world on notice as to who has the “right

502. *Id.*

503. Joseph De Avila, *Travis McMichael, Gregory McMichael Sentence to Second Life Terms for Ahmaud Arbery Murder*, WALL STREET JOURNAL (Aug. 8, 2022), <https://www.wsj.com/articles/travis-mcmichael-sentenced-to-second-life-term-for-murder-of-ahmaud-arbery-11659979115>.

504. Russ Bynum, *Father and Son Get Life in Federal Prison for Hate Crime Shooting of Ahmaud Arbery*, TIME (Aug. 8, 2022), <https://time.com/6204459/ahmaud-arbery-killing-federal-prison-sentencel/>.

505. *E.g.*, WFTV Channel 9, *Teen says men threw stone at his car window while driving through Sanford neighborhood*, YOUTUBE (July 17, 2022), [https://www.youtube.com/watch?v=C\\_jXM-egU\\_s](https://www.youtube.com/watch?v=C_jXM-egU_s); WBNS 10TV, *City Releases Body Camera Video Showing Shooting of Andre Hill by Columbus Police Officer Adam Coy* (<https://www.youtube.com/watch?v=mNAvmWsfkn8>); Law and Crime Network, *Bodycam Shows Florida Police Tasing Woman Accused of Stealing from Publix*, (<https://www.youtube.com/watch?v=fE2FIbRLnjY>); CBS Mornings, *Family Responds to Grand Jury Indictments in Elijah McClain Death*, (<https://www.youtube.com/watch?v=INXp37YoOvI>); ABC 10, *Raw Video: Police release footage from fatal Stephon Clark shooting*, (<https://www.youtube.com/watch?v=FvCsU4w3Yec>); CBS Mornings, *Man sues Evanston police over violent arrest caught on video*, (<https://www.youtube.com/watch?v=SZwMKxFmYKM>); ABC News, *Violent Arrest of Black Woman at Traffic Stop Investigated*, July 22, 2016 (<https://www.youtube.com/watch?v=wTu-do3SkGo>); The New York Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YOUTUBE (April 7, 2015), (<https://www.youtube.com/watch?v=XKQqgVlk0NQ>); WKBN 27, *Eric Garner Death*, (<https://www.youtube.com/watch?v=19uR8-fErzE>); Democracy Now, *No Charges in Ohio Police Killing of John Crawford as Wal-Mart Tape Contradicts 911 Caller's Account*, <https://www.youtube.com/watch?v=xUcFFxC87Y0>; and *Original and unedited video of Rodney King LAPD Arrest and Assault*, (<https://www.youtube.com/watch?v=rJAm8eUX3IM>); see also *E.g.*, Daniel Eran Dilger, *How smartphones have shifted perceptions on police brutality* (June 3, 2020), <https://appleinsider.com/articles/20/06/03/editorial-how-smartphones-have-shifted-perceptions-on-police-brutality>.

506. Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 16 (2003), <https://web.archive.org/web/20151010043651/https://www.dartmouth.edu/~lhc/docs/achillembembe.pdf>

to kill, allow to live, or expose to death.”<sup>507</sup> It defines who is subject to capture and the permissible means of capture.<sup>508</sup> Due to the scant number of convictions, the world<sup>509</sup> has been put on notice that in America, white supremacists have the right to capture black people; any black person is subject to capture; and brutality and murder are permissible means of capturing black people. Therefore, white supremacists have the right to kill black people, allow black people to live, and expose black people to death.

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507. *Id.* at 12.

508. *C.f.*, Lea VanderVelde, *The Role of Captives and the Rule of Capture*, 35 ENVTL. L. R. 649, 654 (2005).

509. *See*, U.N. High Commissioner, Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers, Report of the United Nations High Commissioner for Human Rights, A/HRC/47/53 (July 9, 2021), <https://www.ohchr.org/en/documents/reports/ahrc4753-promotion-and-protection-human-rights-and-fundamental-freedoms-africans>.