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### See That in a Small Town: Visual Rhetoric, Race, and Legal History in Tennessee

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# ARTICLES

## See That in a Small Town: Visual Rhetoric, Race, and Legal History in Tennessee

LUCY JEWEL\*

### ABSTRACT

*When it comes to racism and the law, visual rhetoric has played and still plays an outsized role. Jason Aldean's music video for "Try That in a Small Town" aptly illustrates this thesis. The video shows Aldean and his band performing in front of the Maury County Courthouse in Columbia, Tennessee, the same location where, in 1918, a white mob violently lynched a young Black man. To some (white) viewers, the Maury County Courthouse might symbolize justice. In combination with the song's lyrics, however, the courthouse conjures up visuals of the lynching that occurred outside its doors, reminding viewers that small town justice does not serve everyone.*

*Set in Tennessee, like Aldean's song, this article examines three recent legal controversies that illustrate visual rhetoric's power to cement cultural meanings about race and racism. The first controversy involves the display of Confederate memorabilia inside the jury deliberation room in a small Tennessee town. The second controversy illustrates how Tennessee's heritage protection law prevents local citizens from removing Confederate monuments from public property. The third example explains how, under Tennessee's divisive concepts acts, conservative parents censor truthful imagery depicting U.S. history regarding race. In Tennessee, visual rhetoric has been used to reinforce white supremacy, but it can also propel society toward racial justice and equity. Whichever way it is used, when visual rhetoric touches upon race and racism in public spaces, intense conflict erupts.*

*What is happening in Tennessee maps onto national jurisprudential and cultural trends. Just as Aldean's video struck a chord across the country, the issues boiling up in Tennessee are also nationally relevant. Many other states have similar heritage protection laws that prevent the removal of Confederate monuments. And many states have enacted anti-Critical Race Theory (CRT) bills, or other bills aimed at "divisive concepts." This article analyzes these trends from a visual perspective.*

*Drawing upon the disciplines of legal rhetoric and visual rhetoric, Part I of this Article explains the rhetorical concepts that apply to Confederate imagery in the courtroom, on the courthouse lawn, and in textbook illustrations. Part II delves into the Confederate Jury Room cases, discussing the cases and exploring interdisciplinary explanations for what Confederate symbols mean historically as well as what they do to*

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observers psychologically. Part III will address Confederate monuments in Tennessee, explaining how Tennessee's Heritage Protection Act (amended many times in a reactionary fashion) operates in a highly undemocratic way, preventing local citizens from exercising control over public spaces and reinforcing toxic and traumatic narratives that bolster white supremacy and denigrate Black experiences.

This Article argues that Congress should declare all Confederate monuments on public land to be a badge of slavery within the meaning of the Thirteenth Amendment. In so doing, various state heritage protection acts would be preempted by federal law, allowing local citizens to remove these statues. Finally, IV will address Tennessee's anti-CRT, "divisive concepts" acts, particularly analyzing the role that visual rhetoric plays in these attempts to stifle truthful portrayals of history. This article will conclude by drawing together the threads and patterns contained within each scene.

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## INTRODUCTION

Jason Aldean’s music video for “Try That in a Small Town” shows the power of visual rhetoric. The video shows Aldean and his band performing in front of the Maury County Courthouse in Columbia, Tennessee.<sup>1</sup> This is the same courthouse where, in 1918, a white mob violently lynched a young Black man.<sup>2</sup> After recounting a laundry list of dog whistle topics focused on urban crime, Aldean mentions “a gun that my granddad gave me” and implores the audience to “try that in a small town.”<sup>3</sup>

1. Claretta Bellamy, *The grim history of the courthouse in Jason Aldean’s new music video*, NBC NEWS (July 20, 2023, 4:55 PM), <https://www.nbcnews.com/news/nbcblk/jason-aldean-courthouse-black-teen-lynched-try-that-small-town-rcna9508>.

2. *Id.*

3. Jason Aldean, “Jason Aldean - Try That In A Small Town (Official Music Video),” YOUTUBE, (July 14, 2023) [https://www.youtube.com/watch?v=b1\\_RKu-ESCY](https://www.youtube.com/watch?v=b1_RKu-ESCY); see also Paul Waldman, *Jason Aldean cashes in*

As a backdrop to these lyrics, the video juxtaposes Aldean and his band in front of the courthouse interspersed with news footage from the summer of 2020. The video's use of news footage powerfully employs a visual logical fallacy—synecdoche. Images of lawful protesters are indiscriminately mixed in with images of unlawful rioters so that the unlawful imagery stands in for the whole. The Country Music Network quickly took down the video after complaints that the subtext was undeniably racist and violent.<sup>4</sup>

This Article is about visual rhetoric, race, and the law in Tennessee. It is also about how white supremacist narratives have become visually entwined with the law. In 2022 and 2023, Tennessee gained significant notoriety in national news—the murder of Tyre Nichols, the Coventry Christian School mass shooting, and the expulsion of two Black lawmakers from the Tennessee legislature. Historically, Tennessee has also grappled heavily with race, violence, and the law. The Ku Klux Klan was founded in Pulaski, Tennessee, and Dr. Martin Luther King, Jr. was assassinated in Memphis, Tennessee. While this article is centered in Tennessee, the issues (urban versus rural, white versus Black, truthful history versus disinformation) are present everywhere in the United States, which is caught in a stranglehold of polarized conflict. The article is organized around three different legal scenes from Tennessee, each of which illustrates a lesson about visual rhetoric and the law.

**Scene One:** This Article begins in Pulaski, Tennessee, the town that gave birth to the Ku Klux Klan.<sup>5</sup> In Pulaski, the courthouse jury deliberation room contains the national Confederate flag known as the “Stars and Bars” on the door, above the words “U.D.C. Room.” Hanging on the walls of the jury deliberation room is a different Confederate flag, the “blood-stained banner,”<sup>6</sup> as well as portraits of Jefferson Davis, the president of the Confederate States of America, and General John C. Brown, who fought for the Confederacy.<sup>7</sup>

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*on the right-wing fantasy of violent retribution* (Opinion), WASH. POST (July 20, 2023, 2:19 PM), <https://www.washingtonpost.com/opinions/2023/07/20/jason-aldean-try-that-in-a-small-town-violent-fantasy/>.

4. Morgan Hines & Marcus K. Dowling, *CMT pulls Jason Aldean video: What to know about 'Try That In A Small Town' controversy*, USA TODAY (July 19, 2023, 9:44 AM), <https://www.usatoday.com/story/entertainment/music/2023/07/19/jason-aldean-music-video-backlash-cmt-sheryl-crow/70429773007/>.

5. Erin L. Thompson, *Smashing Statutes: The Rise and Fall of America's Public Monuments* 76 (Kindle ed. 2022); David W. Blight, *Race & Reunion: The Civil War in American Memory* 112 (Kindle ed. 2001).

6. This was the third official flag of the Confederate States of America, which has generally been referred to as the “Blood-Stained Banner.” *Flags of the Confederate States, Third flag: the "Blood-Stained Banner" (1865)*, Wikipedia, [https://en.wikipedia.org/wiki/Flags\\_of\\_the\\_Confederate\\_States\\_of\\_America#Third\\_flag:\\_the\\_%22Blood-Stained\\_Banner%22\\_\(1865\)](https://en.wikipedia.org/wiki/Flags_of_the_Confederate_States_of_America#Third_flag:_the_%22Blood-Stained_Banner%22_(1865)) (last visited Nov. 23, 2023).

7. *State v. Gilbert*, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018, at \*13-14 (Ct. Crim. App. Tenn. 2021), appeal denied, designated not for citation, May 18, 2022).

FIGURE 1. Description: This photo depicts the entry into the jury room in the Giles County Courthouse. There is a wooden door with a glass pane in the middle/center. Painted onto the glass pane is the insignia of the United Daughters of the Confederacy, which contains an image of the National Confederate Flag (the Stars and Bars flag) with a wreath surrounding it. Underneath the insignia are the words “U.D.C. Room.” Photo from the Appellate Record in *State v. Gilbert and State v. Martin*, photo courtesy of Evan Baddour, Esq.



“U.D.C.” refers to the United Daughters of the Confederacy, an organization of elite women founded in Nashville, Tennessee in 1894.<sup>8</sup> The U.D.C. promoted (and still promotes) false “Lost Cause” narratives about the Civil War, de-emphasizing the Confederacy’s embrace of legalized chattel slavery. They honor the heroic valor of Confederate male soldiers, lament the federal intrusion into the South during Reconstruction, and ultimately mourn the disappearance of an idyllic, antebellum way of life where enslaved people were faithful to the master class and happy to serve.<sup>9</sup>

8. Karen L. Cox, *Dixie’s Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture* 5, 17, 31-33 (2003) [hereinafter Cox, *Dixie’s Daughters*].

9. See *id.* at 37, 44; Angela Downes, *Look Away: The Impact of the Lost Cause on Civil Rights, Social Justice, and Critical Race Theory, How Storytelling and Mythology Shaped American History*, 3 *LSU Journal for Social Justice and Policy* 21, 24 (2023); Cynthia Mills & Pamela H. Simpson, *Monuments to the Lost Cause: Women, Art, and the Landscapes of Southern Memory* 160 (2003); Blight, *supra* note 5, at 5.

Recently, two defendants of color challenged the impartiality of the proceedings that took place in the Pulaski U.D.C. jury deliberation room in Giles County, Tennessee. Those challenges spawned two Tennessee Court of Criminal Appeals cases. In both cases, the defendants argued that holding jury deliberations in the Confederate courtroom violated their right to an impartial jury. These two Court of Criminal Appeals cases, decided by different panels of judges, reached different outcomes. One, *State v. Gilbert*, ordered a new trial because the defendant met his burden that jurors were exposed to extraneous information.<sup>10</sup> The Tennessee Supreme Court declined to hear the State's appeal while simultaneously designating the *Gilbert* case as "not for publication."

The other case, *State v. Martin*, denied the defendant a new trial, finding that the defendant waived his right to object to the jury room and failed to meet the higher burden of appellate "plain error" review.<sup>11</sup> The *Martin* court explicitly held that it was not required to follow its sister court's opinion in *State v. Gilbert* because the Tennessee Supreme Court had designated that opinion as "not for publication."<sup>12</sup> The Tennessee Supreme Court, without opinion, declined to hear the *Martin* case, designating that appellate decision as "published" and therefore binding. Thus, the Supreme Court of Tennessee held that a Black defendant has no recourse when brought to trial in a courthouse where the jury deliberates under an inflammatory flag and heroic imagery of a treasonous sovereign, the Confederate States of America.

Not wanting any more appeals about its jury room, Giles County officials (where Pulaski is situated) acted to remove the Confederate memorabilia from its jury deliberation room.<sup>13</sup> County officials could not do this immediately, however, because the Tennessee Heritage Protection Act ("THPA") mandates a time-consuming and labyrinthine process before any Confederate artifact can be removed from a public space.<sup>14</sup>

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10. *Gilbert*, 2021 WL 5755018 at \*21 (Ct. Crim. App. Tenn. 2021).

11. *State v. Martin*, 2022 WL 3364793, No. M2021-00667-CCA-R3-CD, 2022 WL 3364793, at \*9 (Ct. Crim. App. Nashville 2022) appeal denied (January 11, 2023).

12. *Id.* at \*8, n.4.

13. Mariah Timms, *Giles County to remove Confederate memorabilia from jury deliberation room after appeal*, *The Tennessean* (June 21, 2022, 9:00 PM), <https://www.tennessean.com/story/news/crime/2022/06/22/giles-county-remove-confederate-memorabilia-jury-room/7661037001/>.

14. See Tennessee Heritage Protection Act of 2016, Tenn. Code Ann. § 4-1-412 (West 2023); Tennessee Historical Commission, *Procedures for Contested Case Hearings Pursuant to the Tennessee Heritage Protection Act*, Tn.gov., [https://www.tn.gov/content/dam/tn/historicalcommission/outreach/tn-heritage-protection-act/thc\\_thpa\\_contested-case-hearing-procedures.pdf](https://www.tn.gov/content/dam/tn/historicalcommission/outreach/tn-heritage-protection-act/thc_thpa_contested-case-hearing-procedures.pdf). In its most recent incarnation, the Tennessee Heritage Protection Act replaced the Tennessee Historical Commission with a new bureaucratic commission, the Tennessee Monuments Commission. Commentators have suggested that the new Monuments Commission was an attempt to wrest control over the process away from the Governor, after Governor Bill Lee agreed that a statue of Nathan Bedford Forrest should be removed from the Tennessee Capitol Building. See *infra* notes 416-21 and surrounding text.



FIGURE 2. Description: This photo shows the U.D.C. jury room with the door opened. Inside, hanging on the back wall, one can see the Third National Flag of the Confederate States of America. Photo from the Appellate Record in State v. Gilbert and State v. Martin, photo courtesy of Evan Baddour, Esq.





FIGURE 3. Description: This photo contains a close-up image of the framed confederate flag in the Giles County Jury Deliberation Room. The battle flag is white with a red stripe on the right side. On the left side is the iconic Confederate “Southern Cross,” a red square with a blue X shape with stars inside. This flag was the third official flag of the Confederate States of America, which has generally been referred to as the “Blood-Stained Banner.” Photo from the Appellate Record in *State v. Gilbert* and *State v. Martin*, photo courtesy of Evan Baddour, Esq.



FIGURE 4. Description: This is a photo of the plaque underneath the framed flag indicating that the flag is the property of the Giles County Chapter #257 of the U.D.C. Photo from the Appellate Record in *State v. Gilbert and State v. Martin*, photo courtesy of Evan Baddour, Esq.

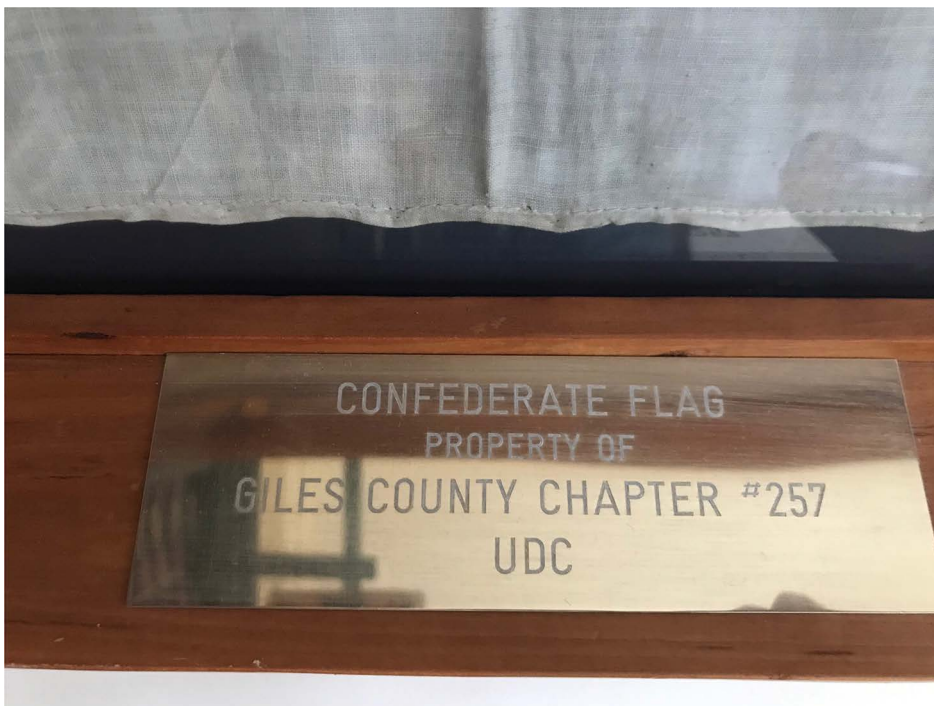
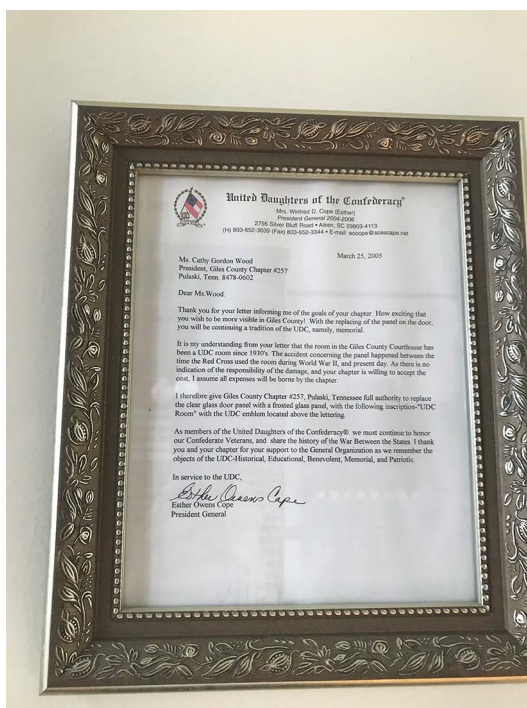


FIGURE 5. Description: On the left side of this photograph hangs a portrait of Jefferson Davis, president of the Confederate States of America. On the right side hangs a portrait of General John C. Brown, a Confederate officer from Giles County. Photo from the Appellate Record in *State v. Gilbert* and *State v. Martin*, photo courtesy of Evan Baddour, Esq.



FIGURE 6. Description: This photograph shows a framed letter, hanging on the wall in the Jury Deliberation Room. The letter, dated March 25, 2005, is from the U.D.C national headquarters and is addressed to the Giles County U.D.C. chapter. The letter gives permission to the Giles County U.D.C. to restore the glass panel door with the U.D.C. insignia on it. Photo from the Appellate Record in *State v. Gilbert* and *State v. Martin*, photo courtesy of Evan Baddour, Esq.



**Scene Two:** Beyond the phenomena of Confederate memorabilia existing *inside* the courthouse, in Tennessee, Confederate monuments and imagery generally proliferate in prominent public spaces *outside* the courthouse. A recent survey identified a total of seventy Confederate monuments, with thirty-seven situated in and around county courthouses, twenty-one in other public spaces, and twelve in cemeteries.<sup>15</sup> When one steps outside the Pulaski courthouse, one is confronted with a large monument commemorating Sam Davis, a Confederate soldier executed in Pulaski, Tennessee during the Civil War for spying on Union forces.<sup>16</sup> A few miles north of

15. *The Confederate statues and monuments in Tennessee: where are they and when were they built*, The Tennessean (Jan 3, 2019), <https://www.tennessean.com/story/news/2019/01/03/confederate-statues-monuments-tennessee-removed/2474530002/>.

16. *Statue of Sam Davis, Rebel Martyr*, Roadside America, <https://www.roadsideamerica.com/story/35774> (last visited Nov. 15, 2023).

Pulaski, in Franklin, Tennessee, another large pedestal Confederate monument sits outside the county courthouse.<sup>17</sup> Further, when citizens enter county offices in Franklin County, they encounter the official Williamson County Seal, which contains imagery of the Southern Cross Confederate battle flag and a cannon.<sup>18</sup> Local citizens have sought to re-design the County Seal, but pro-Confederates have stopped the process under the Tennessee Heritage Protection Act, a statute designed to protect and preserve Confederate monuments.<sup>19</sup>

FIGURE 7. The Williamson County Seal. Description: This image shows the official seal of Williamson County, Tennessee. In the top left quadrant, one can see a cannon with the Southern Cross Confederate Battle Flag hanging upon it.



17. *Confederate Monument (Franklin, Tennessee)*, Wikipedia, [https://en.wikipedia.org/wiki/Confederate\\_Monument\\_\(Franklin,\\_Tennessee\)](https://en.wikipedia.org/wiki/Confederate_Monument_(Franklin,_Tennessee)) (last visited Nov. 15, 2023).

18. *Williamson County Seal*, Williamson County Government, <https://www.williamsoncounty-tn.gov/571/Williamson-County-Seal> (last visited Nov. 15, 2023).

19. Anika Exum, *Fate of Williamson County Seal again on hold nearly two years after vote to remove Confederate flag*, *The Tennessean* (June 24, 2022, 6:01AM), <https://www.tennessean.com/story/news/local/williamson/2022/06/24/williamson-county-seal-efforts-remove-confederate-flag-hold/7669161001/> [hereinafter Exum, *Fate of Williamson County Seal again on hold*]; Sage Snider, *Grey State, Blue City: Defending Local Control against Confederate "Historical Preservation"*, 24 *Vand. J. Ent. & Tech L.* 851, 885 (2022).

**Scene Three:** Visual rhetoric has also become intertwined with the divisive concepts and anti-CRT movements that have recently roiled Tennessee and many other states. By way of background, Tennessee recently enacted two statutes regulating how race and gender are taught in public K-12 schools and in public higher education.<sup>20</sup> After a set of conservative talking points concerning Critical Race Theory, structural racism, and white privilege went viral, the Tennessee legislature acted alongside many other states to ban or severely curtail lessons on a variety of concepts, with a catchall provision banning lessons that cause “an individual to feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual’s race or sex.”<sup>21</sup>

Visual rhetoric has been at the center of complaints brought under the divisive concepts law. For example, in Franklin, Tennessee, Moms for Liberty, a conservative parents group, filed a complaint under Tennessee’s K-12 Divisive Concepts Act, arguing that children’s books about Martin Luther King, Ruby Bridges (participant in the effort to end segregation in New Orleans public schools), and Sylvia Mendez (participant in the effort to end segregation in California) violated the Act<sup>22</sup> because the images in the books caused public schoolchildren to feel bad about their race.<sup>23</sup> The complaint focused on several images in the books,<sup>24</sup> with specific objections levied at the images of Black schoolchildren walking to school through crowds of screaming adults opposing integration. One of the images objected to, reproduced below, shows a fearful and vulnerable Ruby Bridges with federal marshals beside her. Bridges looks terrified as a throng of white segregationists yell at her and hold up signs in favor of schools for whites only. The text says that the “crowd seemed ready to kill her” and that “the marshals were frightened.”

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20. Restrictions on course instruction that includes or promotes certain concepts related to race or sex, Tenn. Code Ann. § 49-6-1019 (West 2021) (“K-12 Divisive Concepts Act”); Public Institutions of Higher Education—Instruction of Divisive Concepts, Tenn. Code Ann. § 49-7-1901 (West 2021) et seq (“Higher Education Divisive Concepts Act”).

21. Tenn. Code Ann. § 49-6-1019(a)(6); Tenn. Code Ann. § 49-7-1902(f).

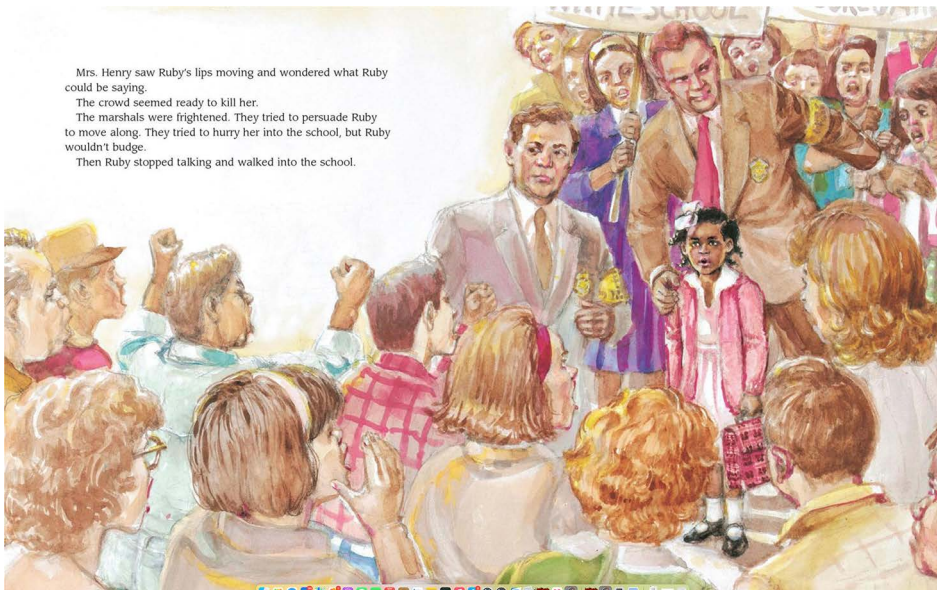
22. Restrictions on course instruction that includes or promotes certain concepts related to race or sex, Tenn. Code Ann. § 49-6-1019 (“K-12 Divisive Concepts Act”).

23. *Moms For Liberty Letter to Tenn. Dept. of Educ.* (June 30, 2021), <https://drive.google.com/file/d/16W9grkwSFsIPRQOSpQfnAHNjzvDH5Bkk/view>.

24. See *infra* notes 473-88 and surrounding text.



FIGURE 8. Description: This image is from one of the books referenced in the Moms for Liberty Letter. The image shows text from the book describing what Ruby Bridges was seeing and feeling as she became the first Black child to attend her elementary school. The photo shows that Ruby Bridges has stopped in her journey to school. She is looking in fear at the crowd of white adults yelling at her. Two federal marshals stand protectively around her. The book's text says: "[t]he crowd seemed ready to kill her "and that "[t]he marshals were frightened." Illustration from ROBERT COLES AND GEORGE FORD, *THE STORY OF RUBY BRIDGES* (Scholastic 1995) (reproduced with permission from Scholastic, Inc.)



Whereas public facing Confederate rhetoric falsely whitewashes enslavement's violence and celebrates white heroism before, during, and after the Civil War, these civil rights images tell a compelling counter-story. They make real the fear, pain, and suffering felt by Black children. Conservative white parents in Tennessee do not want their children exposed to these images. They would scrub all disturbing images of racial oppression from history while at the same time allowing Tennessee's public Confederate monuments, as well as commemorations to the Confederacy in modern government seals, to stand tall forever.

### **Threading the Scenes Together**

Each of these three controversial scenes within the state of Tennessee illustrate how visual rhetoric has become a flashpoint in contemporary culture wars about race, history, and memory. As the above examples show, visual rhetoric has played and is playing an outsized role in how the United States, particularly the Southern

states, engages with its history. From Confederate symbols and statues, which proclaim a false “Lost Cause” narrative of the Civil War, to contests over the pictures in children’s books, which depict the truthful history of the civil rights movement, the battle is over what we see and what we do not see.

Tennessee law makes it difficult for people to avert their eyes from Confederate visual rhetoric. Confederate artifacts are stationed in public spaces, specifically inside and outside of courthouses, throughout Tennessee. This Article details how Confederate images induce trauma and diminish a sense of community belonging, especially for minoritized citizens.<sup>25</sup> And yet, Tennessee law, in the form of the Tennessee Heritage Protection Act, makes these images immovable; citizens cannot escape this visual trauma.

In terms of connecting past rhetorical strategies to the present, notably, *children* play a special role. As Southerners began to rewrite the narrative of the Civil War to comply with Lost Cause precepts, they understood that children’s susceptibility to narrative and persuasion would help cement the message that the Civil War was a just cause, that the Confederacy was a heroic undertaking, and that white supremacy was and is right and moral. In fact, the public-school children who memorized, wrote about, and orated on Lost Cause principles (through the catechisms and the like) became the loudest proponents of segregation in the 1950s and 1960s, as the civil rights movement swept through the South.<sup>26</sup>

Now, conservative parents’ groups are activating these same pathways but this time, the effort is to conceal visual imagery of the humiliation, abuse, and suffering that Black children and Black people endured at the hands of white segregationists during Jim Crow and during the civil rights movement. Conservative parents, for instance, objected to side-by-side photographs of two water fountains (one for whites and one for Blacks) with the question, “[w]hich of these fountains looks nicer to you?”<sup>27</sup> Another objection centered on an illustration of a segregated Latino/a school next to a fly infested cow-pasture.<sup>28</sup> Finally, multiple complaints centered on illustrations of Black schoolchildren walking to a formerly all-white school, with white crowds spewing hateful insults.<sup>29</sup> On the one hand, Tennessee citizens are forced to behold a specific narrative that favors whiteness and white supremacy while denying the violence and trauma of the racialized past. On the other hand, visual imagery meant to teach children truthful history is censored as “divisive.”

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25. See *infra* notes 88-111 and surrounding text; see also, Teri Dobbins Baxter, *Traumatic Justice*, 56 Richmond L. Rev. 331 (2022) (discussing the physical and mental trauma that afflicts Black individuals after watching videos of racialized police violence); Emily Behzadi, *Statues of Fraud: Confederate Monuments as Public Nuisances*, 18 Stan. J. C.R. & C.L. 1 (2022) (discussing the negative mental and physical health effects engendered by Confederate monuments); Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 Socio. Theory 335 (2016) (discussing how collective trauma emerges from routine, expected incidents of racial terror, such as the not-guilty verdict in the Emmett Till trial.)

26. See *infra* note 211 and surrounding text.

27. See *Moms For Liberty Letter*, *supra* note 23, at 3.

28. See *id.* at 5.

29. See *id.* at 4-5.

Drawing upon the author's expertise in legal rhetoric and visual rhetoric, Part I explains the rhetorical concepts that apply to Confederate imagery in the courtroom, on the courthouse lawn, and in textbook illustrations. Part II will delve into the Confederate Jury Room cases, discussing the cases as well as interdisciplinary explanations for what these Lost Cause symbols mean historically and what they do to observers psychologically. Part III will address Confederate monuments in Tennessee, explaining how Tennessee's Heritage Protection Act (amended many times in a reactionary fashion) operates in a highly undemocratic way, preventing local citizens from exercising control over public spaces and reinforcing toxic and traumatic narratives that reinforce white supremacy and denigrate Black experiences. Finally, Part IV will address Tennessee's anti-CRT, "divisive concepts" acts, particularly analyzing the role that visual rhetoric plays in these attempts to stifle truthful portrayals of history. This Article will conclude by drawing together the threads and patterns contained within each scene.

### I. THE POWER OF VISUAL RHETORIC

This Article is about visual rhetoric, race, and the law. The Greek word *eir* or "I say" is the root word of rhetoric.<sup>30</sup> Rhetoric generally refers to the art of persuasion and the process of discovering truth by argumentation.<sup>31</sup> Rhetoric appears in a wide range of settings, the common denominator being the use of language, conversation, words, and images.<sup>32</sup> With respect to images, visual rhetoric considers how visual arguments are constructed and how they work to persuade audiences.<sup>33</sup> Emerging from a variety of disciplines, including art history, communication, English, history, media, visual studies, and film,<sup>34</sup> visual rhetoric studies how images and symbols create and then reify collective cultural meanings through the power of "ocularcentric" messaging.<sup>35</sup> Historically, scholars ignored image-based meanings on account of the fact that images and pictures are less intellectual than words and text.<sup>36</sup> But during the 19th and 20th centuries, as communication became more ocularcentric with photography, television, and film, rhetoric scholars started paying more attention to how images persuade and visual rhetoric became a discipline.<sup>37</sup>

Five points are relevant for understanding visual rhetoric in the context of this article: (A) in general, rhetoric affects individuals in an embodied way; (B) when

30. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663, 665 (2017) [hereinafter Jewel, *Neurorhetoric*].

31. *Id.*

32. *Id.*

33. Lucy Jewel, *Through A Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 239 (2010) (citing Charles A. Hill, *The Psychology of Rhetorical Images*, in *Defining Visual Rhetorics* 25, 25-40 (Charles A. Hill & Marguerite Helmers eds., 2004)) [hereinafter Jewel, *Through a Glass Darkly*].

34. Lester C. Olson et al., *Preface in Visual Rhetoric* xv (Lester C. Olson et al. eds, 2008).

35. *Id.*

36. Marguerite Helmers & Charles A. Hill, *Introduction in Defining Visual Rhetorics* 3 (Charles A Hill & Marguerite Helmers eds. 2004).

37. See Bruce E. Gronbeck, *Foreword: Visual Rhetorical Studies Traces Through Time and Space in Visual Rhetoric*, *supra* note 34, at xxi, xxiv.

presented visually, rhetoric becomes even more powerful; (C) visual rhetoric appears throughout the law and legal language; (D) because of its power, visual rhetoric is a powerful advocate for social and racial justice, but the rhetoric's success may produce a backlash; and (E) visual rhetoric, especially when it depicts violence against marginalized communities, can physically and mentally harm individuals exposed to it; in other words, visual rhetoric comes at a cost.

#### A. *All Rhetoric is Embodied*

All kinds of rhetoric, whether written, spoken, or visual, interact with the body and the mind. Science tells us that it is incorrect to believe that we can reason with our minds separate and apart from our bodies and emotions.<sup>38</sup> The ancient Sophists knew what today's neuroscientists know: rhetoric can have the same effect on the brain as a drug.<sup>39</sup> When rhetoric influences us, it does so in an embodied way, triggering electrochemical reactions which travel through the brain's neural pathways, beyond the borders of conscious thought. With rhetoric, we feel before we can rationally think.<sup>40</sup> Our bodies, minds, and emotions are deeply interconnected and entwined. For instance, when we use language, we are often drawing upon our bodies and bodily experiences to create meanings. For instance, saying that we are feeling "down" draws upon our experiences of lying down when feeling weak or sick.<sup>41</sup> The embodied and metaphorical use of language permeates the law, with concepts like the statute of limitations has "run" or the cause of action is "colorable."

However, the embodied nature of rhetoric creates problems when language triggers a stereotype or trope, which then quickly signals a negative association with a particular concept and a class of people. Embodied rhetoric becomes especially dangerous when language or imagery is used to signal a racial stereotype. For example, when the seeds of a racialized stereotype are first planted in the culture, the term becomes initially linked to negative concepts like disgust, immorality, and fear. The welfare queen trope first appeared in U.S. culture in the 1970s as a news story about a Chicago woman who allegedly exploited the welfare benefits system.<sup>42</sup> Then-President Ronald Reagan picked up the trope and amplified it as a powerful, implicit way to denigrate poor Black women.<sup>43</sup> As the trope is repeated, people experience negative emotional reactions to the stereotype, over and over again. The stereotype became cemented in the individual's neural pathways, canalized.<sup>44</sup> Now, the term welfare queen rapidly and illogically links negative stereotypes of laziness and bureaucratic exploitation with women of color. As will be discussed further below, Confederate imagery is also experienced in an embodied fashion<sup>45</sup> and it too

38. Jewel, *Neurorhetoric*, *supra* note 30, at 664.

39. *Id.*

40. *Id.*

41. George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 46-51 (1999).

42. Jewel, *Neurorhetoric*, *supra* note 30, at 668 (citing Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & Soc. Just. 233 (2014)).

43. *Id.*

44. *Id.* at 671.

45. See *infra* notes 330-356 and surrounding text.

generates stereotypes, such as generalizations that white Confederate men and women were consistently honorable and that Black people benefited from being enslaved and subordinated.<sup>46</sup>

*B. Visual Rhetoric is Experienced in a More Embodied Fashion than Text or Spoken Rhetoric*

When rhetoric is visual, the embodied impact is enhanced. This is because when presented with visual images, the human brain rapidly processes the sensory image using unconscious, non-cognitive methods.<sup>47</sup> With respect to the two types of brain systems—the rapid, unconscious, and atavistic system (system one) and the analytic, conscious, rational system (system two)—it is system one that does most of the work when processing visual images.<sup>48</sup> System two’s process for making sense out of visual images is crude, automatic, and relies on intuitive gut responses.<sup>49</sup> When the brain is processing a visual image, system one does not have access to conscious, cognitive thought processes.<sup>50</sup> The rapid-fire way we respond to visual stimuli is actually an evolutionary response. To survive in the wild, our ancestors had to be able to quickly determine whether something was harmless or harmful.<sup>51</sup>

Spoken or written rhetoric interacts with our bodies, but eventually, the rational system two is activated and we think, deliberate, and analyze, although sometimes our thinking is still influenced by cultural biases. When visual rhetoric is combined with analytic thinking, however, an image can trigger an emotional reaction in our mind without us even knowing about it.<sup>52</sup> Without using conscious processing, in a split second, we decide on an image’s substantive meaning; in that split second, our decision can be influenced by cultural or unconscious bias.<sup>53</sup> Additionally, visual imagery can subconsciously “prime” us in a way that influences our thinking without our conscious awareness.<sup>54</sup>

As explained more fully below, the Confederate flag operates as a highly troubling priming device.<sup>55</sup> Despite the fallibility of human perception, we still give enormous weight to what we see.<sup>56</sup> In my 2010 article on visual rhetoric, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, I cautioned that “visual arguments often conflict with principles of fairness in legal argument because they rely too heavily on emotion instead of logic, and they are often apprehended too rapidly, allowing time for rational deliberation.”<sup>57</sup>

46. See *infra* notes 145-230 and surrounding text.

47. Jewel, *Through A Glass Darkly*, *supra* note 33, at 248-250.

48. *Id.* at 249.

49. *Id.*

50. *Id.*

51. *Id.* at 252.

52. *Id.* at 252 n. 103.

53. *Id.* at 255-256.

54. *Id.* at 259.

55. See *infra* notes 311-333 and surrounding text.

56. Jewel, *Through A Glass Darkly*, *supra* note 33, at 260.

57. *Id.* at 292.



Recently, three state supreme courts cited *Through a Glass Darkly* as authority for overturning convictions based on a prosecutor's inappropriate use of visual imagery to suggest the defendant's guilt.<sup>58</sup> All three cases involved the use of the defendant's booking photograph with text interposed on top. *In Re Glassman*, the Washington Supreme Court case, involved a prosecutor who used five slides that juxtaposed the defendant's face with argumentative captions, in a bright red font, that read: "DO YOU BELIEVE HIM?," "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?," and "GUILTY X."<sup>59</sup> In *Watters v. State*, during the prosecution's opening argument, the prosecutor used a booking photograph of the defendant, who was bleeding and scarred from the intense altercation arising out of his arrest, with the word "guilty" superimposed over the defendant's face.<sup>60</sup> In *Missouri v. Walter*, the prosecutor projected an image of the defendant's booking photograph with the defendant wearing an orange jumpsuit; the prosecution superimposed the word "GUILTY" in large blocks of red letters running diagonally across the defendant's face.<sup>61</sup>

These state supreme courts are reaching the right decisions in reversing these convictions. Although Confederate imagery is different from a booking photo, both types of images produce bias. As explained further below, study subjects exposed to the Confederate flag exhibited more culturally associated prejudice against Black people and showed a significantly lower likelihood of voting for a Black politician in comparison to a white politician.<sup>62</sup> Thus, the visual rhetoric cases involving prosecutorial overreach support the conclusion that Confederate imagery is equally prejudicial in a trial setting because it also triggers unconscious, rapid, and biased decision-making.

### C. Visual Rhetoric is Embedded in the Law

In another recent article, *Death in the Shadows*, co-written with an art historian, we explained how visual imagery combines with the law to become part of the "law-culture-law cycle."<sup>63</sup> In the law-culture-law cycle, social norms influence culture and vice versa.<sup>64</sup> In the context of race, U.S. law becomes a petri dish for dark, visual imagery to interact and fuel the law-culture-law cycle.<sup>65</sup> "The embodied power of visual imagery. . . explains how the law becomes intertwined with the visual to produce deep-rooted collective belief systems that perpetuate domination and oppression."<sup>66</sup>

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58. See *In re Glasmann*, 175 Wash. 2d 696, 708 (2012); *Watters v. State*, 313 P.3d 243, 248 (Nev. 2013); *State v. Walter*, 479 S.W.3d 118, 127 (Mo. 2016) (all decisions granted defendant a new trial because the prosecution improperly referred to inflammatory visual arguments).

59. *In re Glasmann*, 175 Wash.2d at 706.

60. *Watters*, 313 P.3d at 245.

61. *Walter*, 479 S.W.3d at 122.

62. See *infra* note 330 and surrounding text.

63. Mary Campbell & Lucy Jewel, *Death in the Shadows*, 16 *Hastings Race & Poverty L. J.* 157, 175 (2019) (citing Elizabeth Berenguer, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 *Am. J. Trial Advoc.* 255, 260–61 (2013) (citing Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 8 (2000))).

64. *Id.*

65. *Id.*

66. *Id.* at 176.



As an example, we discuss how colonial legal codes emphasized the visual in the description of public corporal punishment, including public shaming, branding, gauntlet running, immersion on a ducking stool, and whipping.<sup>67</sup> These colonial penal laws provided that the punishment for enslaved persons and persons of African descent be meted out with more quantity (more “stripes”).<sup>68</sup> For instance, one 1699 statute mandated 24 stripes for a white hog thief, but 39 stripes for a Black hog thief.<sup>69</sup> In discussing the U.S.’s tormented legal history, we pointed out that these laws “used the *sight*—real or imagined—of . . . agony as a disciplinary tool.”<sup>70</sup>

The visual terror inscribed in old U.S. law came to influence U.S. culture. The violence and terror embedded in these laws, even as punishment grew to be more humane (for white people), lived on in collective thought patterns as “somatic markers,” a term devised by neuroscientist Antonio Damasio.<sup>71</sup> We argued that cemented memories of painful, racialized corporal punishments eventually surfaced in the culture as extra-legal public lynchings of Black men.<sup>72</sup> Lynching, a public, traumatic, and painful spectacle, was fueled in part by somatic markers, which were themselves engendered by visual imagery imprinted in the law itself.<sup>73</sup> Our article is relevant to this paper because the craze for Confederate memorabilia and monuments reached its popularity at the very same time that the federal Reconstruction was concluding; Jim Crow was on the rise, and the very public racial terror of lynching was at its peak.<sup>74</sup> In fact, the very same public spaces where Confederate monuments stand tall are also the sites of horrifying lynchings.<sup>75</sup> As explained more fully below, through the law-culture-law cycle, Confederate monuments have come to represent false Lost Cause narratives, Jim Crow, and the terror of lynching all in one symbol, which cannot be covered up or taken down. These monuments are an ongoing form of racial terror.

*D. Visual Rhetoric has and does Produce Persuasive Arguments for Civil Rights, Racial Justice, and Social Change, but it can Also Engender Powerful Counter-Rhetoric Aimed at Covering up Visually Based Arguments*

Despite its tendency to traffic in bias and systems of terror and oppression, visual rhetoric has and can powerfully advocate for racial and social justice. One of the most compelling examples occurred in 1955 when Mamie Till, Emmett Till’s mother, held an open casket funeral for her son, murdered and lynched in Jim Crow

67. *Id.* at 182-83.

68. *Id.* at 183-84.

69. *Id.* at 184 (citing 3 Hening’s Statutes 179 (1699)).

70. *Id.* at 184 (emphasis in original).

71. *Id.* at 175 (citing Antonio R. Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* 171 (1994); William E. Connolly, *Neuropolitics: Thinking, Culture, Speed* 34-37 (2002)).

72. *Id.* Part of our article analyzed *Parson Weems’ Fable*, a 1940 painting of George Washington by Grant Wood, which, when turned upside down, appears to depict a lynching.

73. *Id.*

74. Karen L. Cox, *No Common Ground: Confederate Monuments and the Ongoing Fight for Racial Justice* 3 (UNC Press 2021) [hereinafter Cox, *No Common Ground*]; Blight, *supra* note 5, at 87; Snider, *supra* note 19, at 853.

75. Sherrilyn A. Ifill, *On the Courthouse Lawn* 5-8 (2007).

Mississippi.<sup>76</sup> Black journalists attended the funeral and widely published photos of Till's brutalized body in the Black press.<sup>77</sup> The Black press published one photo of Till, a young man smiling with the future ahead of him, alongside a photograph of his corpse.<sup>78</sup> This visual rhetoric technique triggered a visceral, emotional response as the viewer understands that Till would never see the future and would never become a man.<sup>79</sup> The Till photos galvanized Black citizens living outside the deep South to organize the civil rights movement.<sup>80</sup> Black public figures Muhammad Ali, Kareem Abdul Jabbar, and James Baldwin all credited the photos as igniting flames of anger about Till's murder, inspiring each to do something.<sup>81</sup> On the power of these images, James Baldwin stated, "I do not know why the case pressed on my mind so hard—but it would not let me go."<sup>82</sup>

As the civil rights movement progressed, the movement would "come to equate pictures with weapons."<sup>83</sup> As bell hooks observed, the civil rights movement "could be characterized as a struggle *over images* as much as it has also been a struggle for rights, equal access."<sup>84</sup> The civil rights movement was powered by an "arsenal," a "vast number of potent images, disseminated by new or enhanced technologies of visual communication, that made their way into the culture at large."<sup>85</sup> *For All The World To See*, a book about visual imagery and the civil rights movement, documents how images of everyday life in the South—separate, inferior water fountains, humiliating apartheid signage, high-pressure fire hoses, and snarling police dogs—built the consensus that Jim Crow must be destroyed.<sup>86</sup> Understanding their power, the South's segregationists despised these visual records of civil rights battles in cities like Birmingham and Montgomery. Many segregationists argued that the photos were fake, inaccurate, or the product of too much editorial license.<sup>87</sup>

In the present day, visual images continue to compel us emotionally, especially in the context of continuing police violence against Black and Brown people. Social media now allows bystanders to use smartphone video cameras to capture the trauma of police killings and then widely disseminate the appalling footage.<sup>88</sup> Video footage

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76. Christine Harold & Kevin Michael DeLuca, *Behold the Corpse: Violent Images and the Case of Emmett Till*, *Rhetoric and Pub. Affs.* 263, 273 (2005).

77. *Id.* at 265.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 273, 275.

82. *Id.* (citing Thomas Doherty, *The Ghosts of Emmett Till*, *The Chron. of Higher Educ.* B11 (January 17, 2002)).

83. Maurice Berger, *For All the World To See: Visual Culture and the Struggle for Civil Rights* 3 (Yale Univ. Press 2010).

84. *Id.* at 5 (quoting bell hooks, *In Our Glory: Photography and the Black Life in Picturing Us: African American Identity* 46 (Deborah Willis ed. 1994)) (emphasis added).

85. *Id.* at 6.

86. *Id.* at 6, 123.

87. *Id.* at 123.

88. Mia Fischer & K. Mohrman, *Black Deaths Matter? Sousveillance and the Invisibility of Black Life*, 10 *Ada: A J. of Gender, New Media, and Tech.* 1 (2016), available at <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/26804/ada10-black-fis-2016.pdf?sequence=1&isAllowed=y>

of police killing vulnerable victims powerfully persuades viewers that what they are seeing is wrong, tragic, and must change. The video of Philando Castile's death, taken by his girlfriend, and later of George Floyd's death, taken by a 17-year-old bystander, are just two examples of what scholars are labeling "sousveillance," the practice of citizens documenting instances of police brutality on the ground and then sharing or streaming the footage on social media.<sup>89</sup> These visceral images give voice to marginalized communities, countering dominant media narratives that tend to demonize and dehumanize crime victims and create sympathy and empathy for police officers.<sup>90</sup> In the summer of 2020, the George Floyd video propelled mass protests, and it seemed that the majority agreed that Black Lives Matter, that policing must change, and that we must become a less carceral society. The protests of 2020, fueled in part by powerful, traumatic visual rhetoric, created a consensus where most Americans agreed that racism and policing were tragically entwined and that structural, institutional, and historic racism must be remedied.

However, when visual images persuade people to see the true contours of continued, deep-seated racial injustice, we can expect the conservative backlash to be swift and brutal. Visual rhetoric, in the form of police brutality videos, fueled a new, hopeful consensus on race, policing, and structural racism. And then, immensely threatened by the consensus, conservative rhetors reframed the debate, making CRT the bogeyman instead of the police or institutions. Conservative provocateur Christopher Rufo engineered the anti-CRT movement (which resulted in numerous state laws banning the teaching of Critical Race Theory) in direct response to the majoritarian consensus on race and racism that was brewing in 2020.<sup>91</sup> As described in more detail below, Tennessee's new anti-CRT laws inspired conservative parent groups to demand that their children not be exposed to historic images depicting the civil rights movement in the 1950s and 1960s.<sup>92</sup> Visual rhetoric is at the forefront of this volatile tug-of-war.

*E. Visual Rhetoric, Especially Images of Harm Befalling Minority Communities and Community Members, Can Lead to Negative Mental and Physical Health Effects*

Even when visual images are used to argue for change, however, this method of persuasion carries a high cost. The problem with visual rhetoric aimed at challenging white supremacy is that it usually depicts injustice in a highly visceral, violent way. In this manner, the imagery reinforces murderous white supremacy while at the same time challenging it.<sup>93</sup>

89. *Id.*; Baxter, *supra* note 25, at 358, 359; see also Joseph Brandim Howson, *The Visuality of Professionalized Sousveillance*, 18(2) *Surveillance & Society* 276 (2020) (discussing sousveillance in Brazil).

90. Baxter, *supra* note 25, at 332.

91. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, *The New Yorker* (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

92. See *infra* Part IV.

93. Fischer & Mohrman, *supra* note 88.

Professor Teri Baxter's recent article lucidly illuminates this disturbing paradox. Baxter begins by pointing out that living in a racist society and culture has caused Black Americans to suffer palpable and deleterious health outcomes.<sup>94</sup> The negative effects of a racist culture include the experience of watching and seeing racism on the screen.<sup>95</sup> Viewing acts of violent racism causes harmful physiological reactions, as well as psychological disorders and physical symptoms.<sup>96</sup> The George Floyd video, for instance, led to a spike in depression and anxiety among Black people.<sup>97</sup>

The visual trauma within images of police brutality is deep-seated and can be traced back to the visual trauma of slavery, including but not limited to: overseers and slave patrollers mounted on horseback, public spectacle lynching, the white KKK costume, and the KKK's flaming cross.<sup>98</sup> Almost every example of U.S. racial terror comes with a strong visual component. And much of this visual terror is replicated in Confederate monuments, such as the Confederate soldier towering on horseback or a pedestal.

Because the trauma is so deeply embedded, when members of Black communities engage with visual rhetoric depicting police violence, the intergenerational trauma is re-enacted, again and again.<sup>99</sup> From a neuroscientific perspective, rhetoric's power becomes stronger when it is reiterated.<sup>100</sup> Reiterated words and images create deeper pathways in the brain, and deeper neural pathways for the trauma to live and thrive.<sup>101</sup> Baxter's article engages with the ironic reality that the very communities that are helped by this powerful visual rhetoric are also hurt by it.<sup>102</sup> Ultimately, Baxter concludes that "activists and community leaders need to be educated about the harm inflicted by videos depicting violence against members of their own race."<sup>103</sup>

As a threshold matter for this Article, it must be stated that Confederate visual rhetoric is traumatizing to minoritized people and likely produces the same ill effects as other racially hostile rhetoric. The somatic markers<sup>104</sup> embedded in Confederate imagery and monuments generate deep-seated memories of racial trauma experienced by whole communities.<sup>105</sup> Professor Emily Behzadi has compellingly argued that Confederate monuments inflict "cultural trauma," a unique, palpable type of trauma every time these monuments are viewed.<sup>106</sup> Concerning Confederate

94. Baxter, *supra* note 25, at 333-34.

95. *Id.* at 339.

96. *Id.* (citing Raja Staggers-Hakim, *The Nation's Unprotected Children and the Ghost of Mike Brown, or the Impact of National Police Killings on the Health and Social Development of African American Boys*, 26 J. Hum. Behav. Soc. Env't 390, 393 (2016).

97. *Id.* at 360.

98. *Id.* at 341-48; *see also infra* notes 407-08 and surrounding text.

99. *Id.*

100. Jewel, *Neurorhetoric*, *supra* note 30, at 670-71.

101. *Id.*

102. Baxter, *supra* note 25, at 333-34.

103. *Id.* at 364.

104. *See supra* notes 56-58 and surrounding text.

105. Behzadi, *supra* note 25, at 43-44.

106. *Id.* (citing Jeffrey Alexander, *Toward a Theory of Cultural Trauma*, in *Cultural Trauma and Collective Identity* 1, 1 (Jeffrey C. Alexander et al. eds., 2004)).

memorials and monuments, “[t]he memorialization of such trauma essentially reinforces that trauma anew” again and again.<sup>107</sup> Monuments and memorials normalize this trauma, which is another way that these visual artifacts continue to harm minoritized communities.<sup>108</sup> As a form of cultural gaslighting, when individuals state that a Confederate monument does not glorify white supremacy or slavery, denial of the trauma exacerbates the cultural trauma and increases the community’s suffering.<sup>109</sup> Finally, the recent “heritage” statutes discussed below, which undemocratically prohibit local community members from taking down Confederate statues in their public spaces, also reinforce this trauma because it is a forced viewing of white supremacist visual rhetoric.

Confederate flags and Confederate monuments commemorate a history, both antebellum and postbellum, where white Southerners terrorized, disenfranchised, and excluded Black people from all civic life.<sup>110</sup> This imagery symbolizes a failed sovereignty created to perpetuate slavery.<sup>111</sup> These images have no place in public spaces, *a fortiori* inside a jury deliberation room. But the Confederacy is alive and well inside the Giles County Courthouse in Pulaski, Tennessee. We now turn to this scene.

## II. CONFEDERATE ARTIFACTS OUTSIDE AND INSIDE TENNESSEE’S COURTHOUSES

### A. *White Supremacy in Tennessee’s Public Spaces*

To understand the *Gilbert* and *Martin* decisions, which focused on Confederate artifacts *inside* the Giles County courthouse, it is helpful to look at the spatial environment *outside* the courthouse. History explains a lot about the troubling visual culture, which is littered with visual reminders of the Lost Cause and the Confederacy. The U.D.C., the organization responsible for decorating the Giles County Jury Deliberation Room, erected most of these markers. As a framework for understanding *Gilbert* and *Martin*, this section considers the stories that these public markers tell.

#### 1. Sam Davis

On the court square, right outside the courthouse, a towering pedestal commemorates Sam Davis, “rebel martyr.”<sup>112</sup> On November 27, 1863, Union forces executed Davis, a twenty-one-year-old Confederate Scout/Spy.<sup>113</sup> Davis was caught with “detailed drawings of Union fortifications in Nashville and other towns in Middle

107. *Id.* at 44; see also See Jewel, *Neuroretoric*, *supra* note 30, at 670-71.

108. Behzadi, *supra* note 25, at 46.

109. *Id.*

110. James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *Yale L. J.* 505, 514 (1991-1992).

111. Cox, *Dixie’s Daughters*, *supra* note 8, at xxii. W.E.B. Dubois aptly stated that the best inscription for any Confederate monument should be: “Sacred to the memory of those who fought to perpetuate human slavery.” *Id.* (quoting W.E.B. DuBois, *The Crisis* 279 (August 1931)).

112. *Statue of Sam Davis, Rebel Martyr*, *Roadside America*, <https://www.roadsideamerica.com/story/35774>.

113. Edward John Harcourt, *The Boys Will Have to Fight Battles Without Me: The Making of Sam Davis, Boy Hero of the Confederacy*, Fall 2006 *Southern Cultures* 29, 31 [hereinafter Harcourt, *The Making of Sam Davis*].

Tennessee.”<sup>114</sup> White Pulaski residents protested the overtly visual nature of the public hanging, but the Union commanding officer stated: “I want him hung *where you all can see him*.”<sup>115</sup>

War-time executions were “not uncommon,” which fueled a reactionary counter-narrative, in multiple visual forms.<sup>116</sup> Lost Cause rhetors reconned the twenty-one-year-old Davis from a recalcitrant enemy spy to a “boy hero” and a martyr.<sup>117</sup> The Confederate Veteran, a popular Lost Cause magazine based in Nashville, printed numerous stories about Sam Davis, inciting the idolatry.<sup>118</sup> The magazine printed a steady stream of stories about Davis’s idyllic boyhood life on the plantation, his beloved horse, and his brave behavior at the gallows.<sup>119</sup> The Pulaski U.D.C. chapter erected the Pulaski court square monument in 1906.<sup>120</sup> In 1963, the State of Tennessee consecrated the spot where Davis was executed.<sup>121</sup> The shrine now contains a museum exhibiting the gallows’ location, the leg shackles he wore to the gallows, as well as plates, coffee mugs, Christmas ornaments, postcards, and a forty-five rpm record, all valorizing Davis.<sup>122</sup> The State of Tennessee owns and operates a museum at Davis’s boyhood plantation home in Smyrna, Tennessee.<sup>123</sup> There is an additional monument to Davis on the grounds of the State Capitol in Nashville.<sup>124</sup> All of these monuments to Davis are on public property.

## 2. Pulaski’s KKK Plaque

Around the corner from the Giles County Courthouse, on the walls of the old courthouse, is a plaque, currently turned inside out, that commemorates the beginnings of the Ku Klux Klan.<sup>125</sup> In 1866, shortly after the Union victory, a small group of young Confederate veterans from Pulaski formed the Ku Klux Klan (KKK).<sup>126</sup> They were of Scotch-Irish descent, which explains the Scottish (Klan) references.<sup>127</sup> At this time, Federal troops occupied the area and helped, somewhat, protect formerly enslaved people as they exercised their new rights as citizens, including the

114. *Id.*

115. *Id.* at 33 (emphasis added).

116. *Id.* at 34.

117. *Id.* at 29.

118. *Id.* at 35-41.

119. Edward John Harcourt, *That Mystic Cloud, Civil War Memory in the Tennessee Heartland, 1865-1920* 242, 245 (May, 2008) (Ph.D. dissertation, Vanderbilt University), available at <https://ir.vanderbilt.edu/bitstream/handle/1803/11820/ejhcourt.pdf?sequence=1>.

120. *Sam Davis – Pulaski TN*, Waymarking, [https://www.waymarking.com/waymarks/WMV0FP\\_Sam\\_Davis\\_Pulaski\\_TN](https://www.waymarking.com/waymarks/WMV0FP_Sam_Davis_Pulaski_TN).

121. *Hanging Site of Sam Davis – Pulaski, TN*, Waymarking, [https://www.waymarking.com/waymarks/wm16DFG\\_Hanging\\_Site\\_of\\_Sam\\_Davis\\_Pulaski\\_TN](https://www.waymarking.com/waymarks/wm16DFG_Hanging_Site_of_Sam_Davis_Pulaski_TN).

122. *Sam Davis Hanging Site*, Roadside America, <https://www.roadsideamerica.com/story/35773>.

123. Harcourt, *The Making of Sam Davis*, *supra* note 113, at 45.

124. *Id.* at 35.

125. Michael Lewis & Jacqueline Serbu, *Kommemorating the Klan*, 40(1) SOCIO. Q. 139, 139-40 (1999); *Backwards Plaque Shuns the KKK*, Roadside America, <https://www.roadsideamerica.com/story/17994> (last visited Nov. 23, 2023).

126. Thompson, *supra* note 5, at 74; Blight, *supra* note 5, at 112.

127. Thompson, *supra* note 5, at 75.



right to vote. The KKK named a fellow Tennessee veteran, Nathan Bedford Forrest, as the organization's first Grand Wizard.<sup>128</sup> One of the Klan's early purposes was to prevent Black people from voting in the 1868 election.<sup>129</sup> The KKK whipped, raped, and burned their way through communities in the South, using terroristic violence to "win back as much of a status quo antebellum as they could achieve."<sup>130</sup> The Klan targeted teachers, Black students, Black and white politicians with Union sympathies, and any Black citizen who had gained economic rights.<sup>131</sup>

The KKK enacted visual forms of terror through public whippings and lynchings. Pulaski's original KKK chapter was no different. In 1868, Pulaski KKK members dragged John Dunlap, a white principal of a Black school, from his home; in front of a crowd, they pulled down his pants and whipped him with five lashes.<sup>132</sup> Brutal pain combined with public humiliation and shame coerced citizens into compliance with what would soon become the Jim Crow regime. The KKK also lynched hundreds of people,<sup>133</sup> another form of visual terror designed to "psychologically torture entire communities."<sup>134</sup> After the Civil War and Reconstruction, when federal troops left the South, white supremacist lynchings continued to terrorize Black citizens.<sup>135</sup> Court and public spaces in front of courthouses were a "deliberate choice of venue for lynchings. The truth is that the same white citizens who gathered to watch a [B]lack man get lynched in their town were often the same white citizens who gathered for the unveiling of a confederate monument."<sup>136</sup>

The Equal Justice Initiative reports that there were at least six lynchings in Giles County/Pulaski.<sup>137</sup> Online documentation is difficult to come by for each one. But one haunting record is telling. In 1908, a Pulaski Black man named Elmo Howard was lynched, dragged from the jail "passing up the street north to the [Pulaski] public square and across the public square to the point where the new courthouse was being constructed" and hung from a bridge.<sup>138</sup> Around this same time, sometime between 1907 and 1909, the Giles County U.D.C. chapter was busy decorating the jury room in the new courthouse with Confederate memorabilia.<sup>139</sup>

128. Liliana Segura, *Forrest the Butcher*, *The Intercept* (Sept. 2, 2017), <https://theintercept.com/2017/09/02/memphis-wants-to-remove-statue-honoring-kkk-grand-wizard-nathan-bedford-forrest/>.

129. Thompson, *supra* note 5, at 75.

130. Blight, *supra* note 5, at 113.

131. *Id.*

132. *Id.* at 114.

133. *Id.*

134. Baxter, *supra* note 25, at 349; Orlando Patterson, *Rituals of Blood* 209 (1998).

135. The intuitive conclusion that lynchings may have increased after Reconstruction ended and federal troops abandoned the South may not be accurate. The Equal Justice Institute has recently gathered previously undocumented evidence of widespread lynchings that occurred during the Reconstruction era, while federal troops were still present in the South. *Documenting Reconstruction Violence*, Equal Justice Institute, <https://ejj.org/report/reconstruction-in-america/documenting-reconstruction-violence/> (last visited Nov. 23, 2023).

136. Cox, *No Common Ground*, *supra* note 74, at 22; *see also* Ifill, *supra* note 75, at x-xi, 7-8.

137. Equal Justice Initiative, *Lynching in America Interactive Map: Tennessee*, <https://lynchinginamerica.eji.org/explore/tennessee> (last visited Nov. 23, 2023).

138. *Elmo Howard Lynched in Pulaski Tennessee*, *The Nashville Globe* (October 23, 1908), [https://www.newspapers.com/article/9353984/nashville\\_globe\\_oct\\_23\\_1908\\_elmo/](https://www.newspapers.com/article/9353984/nashville_globe_oct_23_1908_elmo/).

139. Martin, 2022 WL 3364793 at \*11.

The Pulaski U.D.C. chapter gifted the plaque to the Town of Pulaski in 1917.<sup>140</sup> From 1917 until the 1980s, white Pulaski residents

proudly featured [the plaque] in local publications and guidebooks, [and the plaque became] the centerpiece of Pulaski's historical narrative. Drawing on the [L]ost [C]ause' conception of the Klan, Pulaskians continued to relish their town's designation as the birthplace of what they considered to be a noble and chivalrous organization that had saved the South during post-Civil War Reconstruction.<sup>141</sup>

In the 1980s, around Martin Luther King Day, the KKK would frequently parade around Pulaski and stop to kiss the KKK plaque in quasi-religious rituals.<sup>142</sup> At this point, when old-school, crude racism was not in favor anymore, the Pulaskians who owned the building turned the KKK plaque to face inward so that its inscription could not be seen.<sup>143</sup> Notably, in the 1980s, there was no Tennessee Heritage Protection Act in place. Today, if the owners of the building had wanted to turn the plaque inward, the Heritage Protection Act would prevent them from doing so.<sup>144</sup>

### 3. The U.D.C.'s Visual Rhetoric

The U.D.C. was and is a national organization, but it was founded in Tennessee, two counties to the north of Giles County, in Davidson County, Nashville.<sup>145</sup> Only elite, upper-class white women could join the U.D.C. and the organization tried very hard to reinforce the image of Southern womanhood as well-mannered and gentle.<sup>146</sup> During an era where women had no political voice, the U.D.C. allowed elite white Southern women to engage in public action.<sup>147</sup> Male Confederate veteran organizations encouraged the U.D.C.'s efforts to memorialize the Confederate cause and the men who fought for it; this was an appropriate activity for proper white ladies to do.<sup>148</sup>

The U.D.C. began as an organization dedicated to moving the Confederate dead from battlefields to cemeteries, but the U.D.C. soon focused its efforts on raising the money necessary to erect celebratory public monuments (such as Pulaski's Sam Davis pedestal monument) to valorize Confederate soldiers and "transform military defeat into a political and cultural victory, where states' rights and white supremacy remained intact."<sup>149</sup> The U.D.C.'s predecessor organizations, local Ladies' Memorial

140. Lewis & Serbu, *supra* note 125, at 140.

141. *Id.*

142. *Backwards Plaque Shuns the KKK*, Roadside America, <https://www.roadsideamerica.com/story/17994> (last visited Nov. 23, 2023).

143. Lewis & Serbu, *supra* note 125, at 140.

144. See Tenn. Code Ann. §4-1-412 (a)(7)(b) and (b)(1). Even though the plaque was on private property, because it was first erected on public property, the Heritage Protection Act prohibits removal, relocation, or altering.

145. See *supra* note 8 and surrounding text.

146. Cox, *Dixie's Daughters*, *supra* note 8, at 5, 31-33.

147. Cox, *Dixie's Daughters*, *supra* note 8, at 26; Cox, *No Common Ground*, *supra* note 74, at 39; Thompson, *supra* note 5, at 38.

148. Cox, *No Common Ground*, *supra* note 74, at 39; W. Stuart Towns, *Enduring Legacy: Rhetoric and Ritual of the Lost Cause 22* (Kindle Ed. 2012).

149. Cox, *Dixie's Daughters*, *supra* note 8, at 1.

Associations, first erected Confederate monuments in cemeteries, with a funerary purpose and mournful rhetorical style.<sup>150</sup> Then, when federal troops left the South, abandoning Reconstruction and leaving white Southerners the space to resubordinate Black people through poll taxes, literacy tests, and other Jim Crow laws, the monuments moved to the public square and courthouse lawn.<sup>151</sup> On display in open public spaces, these monuments defied the Northern values that emancipated the enslaved and upended the traditional, agrarian Southern way of life.<sup>152</sup>

As an institution, the U.D.C. skillfully used monuments, confederate imagery, and speeches to generate collective buy-in for Lost Cause narratives, which hold that:

T]he South during the Civil War [w]as valiant and chivalrous and its soldiers [were] men who fought against enormous odds to defend and maintain their way of life. Through this honorable cause, 'all Confederates automatically became virtuous, all were defenders of the rights of states and individuals . . . all steadfast, all patriotic.'<sup>153</sup>

Thus, the U.D.C.'s Lost Cause narratives became deeply embedded in white Tennessee culture after the Civil War, due in part to the way that public-facing Confederate monuments (and the rituals conducted around them) visually reinforced and reiterated its tropes.

One of the ways these narratives became enmeshed with the visual was the powerful, embodied way in which spoken words, pageantry, and visual symbols combined. The dedication speeches given at Confederate Monument unveilings imbued the monument with its white supremacist meanings.<sup>154</sup> Thousands of veterans and well-wishers would attend these unveilings, where Confederate flags and bunting covered everything.<sup>155</sup> A band would play "Dixie."<sup>156</sup> Confederate veterans would give speeches.<sup>157</sup> Although the women raised the money for the Confederate monuments, only the men were allowed to speak.<sup>158</sup> The speeches at a monument's unveiling elevated the stature of all white people, trumpeting a proud Confederate heritage.<sup>159</sup>

The speakers proudly proclaimed that the Confederate cause was "noble, just, [and] honorable."<sup>160</sup> At one monument unveiling in Alabama, a speaker insisted that

150. Caroline E. Janney, *Burying the Dead but not the Past: Ladies' Memorial Associations & The Lost Cause* (2008).

151. Towns, *supra* note 148, at 34; Blight, *supra* note 5, at 8; Behzadi, *supra* note 25, at 43-44.

152. Towns, *supra* note 148, at 34; Cox, *No Common Ground*, *supra* note 74, at 87.

153. Lewis & Serbu, *supra* note 125, at 143 (quoting Frank E. Vandiver, *The Confederate Myth*, 46 *Southwest Review* 199, 200 (1961)).

154. Towns, *supra* note 148, at 2, 10, 20 (explaining how the speeches at Confederate monument unveilings were part of an intense pageantry that gelled the crowd's identity as proud white Southerners standing strong against encroaching forms of equality).

155. David Currey, *The Virtuous Soldier: constructing a usable confederate past in Franklin Tennessee in Monuments to the Lost Cause: Women, Art, and the Landscapes of Southern Memory* 143 (Eds. Cynthia Mills and Pamela Simpson Univ. of Tenn. Press Knoxville 2003) (describing the Confederate monument unveiling in the public square in Franklin, Tennessee).

156. *Id.*

157. *Id.*

158. Towns, *supra* note 148, at 22.

159. Thompson, *supra* note 5, at 125-26.

160. Towns, *supra* note 148, at 68.

Confederate soldiers did their duty to protect their families from “the hideous specter of a threatened race equality.”<sup>161</sup> Other speakers vilified the federal “radicals” that occupied the South during Reconstruction on account that they threatened and weakened the South’s system of white supremacy.<sup>162</sup> In 1892, Mississippi Supreme Court Chief Justice Josiah A. P. Campbell, speaking to veterans in Jackson, stated that Black people have “[no] capacity for a voice in public affairs” and that “[i]t devolves on us, the superior, the capable, the governing race, to do for them, to plan and shape for them.”<sup>163</sup>

The U.D.C.’s visual rhetoric also reinforced a social hierarchy where lower-class whites were expected to remain in place with white supremacy offering a social-hierarchy consolation prize.<sup>164</sup> This is, in fact, what W.E.B. Dubois meant when he referred to the “wages of whiteness.”<sup>165</sup> White supremacy provided a divide-and-conquer approach that discouraged white people from forging a worker’s solidarity with Black people.<sup>166</sup> The rhetoric around Confederate monuments elevated whiteness and denigrated Blackness, but also encouraged whites to stay in their place.<sup>167</sup> This divide and conquer approach came to be used to discourage whites from joining together with Black people to unionize.<sup>168</sup> For instance, in 1905, when the U.D.C. erected a major Confederate monument in Birmingham, Alabama, the city elites hoped that when white workers’ “wages were cut, they should . . . think about the Confederacy instead of Unionization.”<sup>169</sup>

Confederate monuments sent the message that working and lower-class white men should remain staid and not engage in any of the threatening socio-political activities of the day, integrated labor groups, populist groups, and the like. One of the most popular standard U.D.C. Confederate monuments depicted a nameless soldier standing high on a pedestal, at “parade rest.”<sup>170</sup> These popular statutes were mass-produced at national foundries and could be ordered from catalogs.<sup>171</sup> Parade rest is a military stance where the soldier stands and rests on his rifle.<sup>172</sup> At parade rest, the soldier “listen[s] to instructions about the next piece of drill they would have to master.”<sup>173</sup> While at parade rest, the soldier must remain silent; he was not allowed to speak while the drill instructor spoke.<sup>174</sup> In the late 1800s, Confederate monuments

161. Thompson, *supra* note 5 at 128 (quoting *Eloquent Oration by General Harrison at the Unveiling*, Birmingham News (April 26, 1905)).

162. Towns, *supra* note 148, at 99.

163. *Id.* at 114 (internal source omitted).

164. Thompson, *supra* note 5, at 125-26.

165. W.E.B. Dubois, *Black Reconstruction in America* \*16462 (Oxford Kindle Ed. 2007).

166. *See id.*

167. Thompson, *supra* note 5, at 48-49.

168. *Id.* at 125-26.

169. *Id.* at 126.

170. *See* Kirk Savage, *Standing Soldiers, Kneeling Slaves: Race, War, and Monument in Nineteenth Century America* 162 (Kindle ed. 2018) (A typical confederate monument of a common soldier at parade rest spoke to the “heroism of the ordinary white man defending the nation.”).

171. Deborah Gerhardt, *Law in the Shadows of Confederate Monuments*, 27 Mich. J. of Race and the L. 1, 83 (2021).

172. Thompson, *supra* note 5, at 45.

173. *Id.*

174. *Id.* at 47.

offered a response to the labor movement's threats to social and racial hierarchy. For instance, the U.D.C. refused to use the term rebellion or rebel for Civil War soldiers.<sup>175</sup> Instead, veterans were praised for their duty and obedience.<sup>176</sup> And the Southern elites who erected these statutes "very much wanted to be obeyed."<sup>177</sup>

An example of a parade rest soldier monument can be seen in Franklin, Tennessee's public square, one county north of Giles County.<sup>178</sup> The U.D.C. erected this monument in 1899.<sup>179</sup> David Currey, a specialist in Middle Tennessee history, explains that Franklin's ordinary soldier monument was meant to signal obedience and duty at a time when modernity was quickly encroaching upon the South's traditional culture.<sup>180</sup> Currey notes that Franklin's parade rest soldier monument could be viewed as a response to the rise of urban industrialization and national corporate industries, together with the decline of the South's traditional agrarian society.<sup>181</sup> The statue offered a retreat from the volatile social changes and allowed onlookers to continue to celebrate a social order founded on white supremacy and patriarchy.<sup>182</sup> The duty and discipline of a Confederate soldier functioned as a symbol of a past-looking virtue during a volatile time when "character seemed to be all but abandoned for the interests of corporate personalization and personal pleasure."<sup>183</sup> These rhetorical objects were the "weapons arming the fortress against the threats of populist politics, racial equality, and industrialization," the "social elite's last, best protection against the progressive and democratic society they most feared."<sup>184</sup>

In addition to a Confederate flag, the U.D.C. decorated the Giles County jury room with portraits of Confederacy President Jefferson Davis and General John C. Brown, a Confederate veteran from Giles County.<sup>185</sup> The Giles County jury deliberation room was not the first public space to contain a Confederate flag and a portrait of Jefferson Davis. The U.D.C. also worked to place Confederate flags and Jefferson Davis portraits in every Southern classroom to teach schoolchildren to venerate Confederate heroes.<sup>186</sup> For the Jefferson Davis portrait for classrooms, the U.D.C. was careful to select a picture of him as he was at the height of his powers as president, not later when his face showed disappointment, fatigue, and defeat.<sup>187</sup>

It should be disturbing that an organization like the U.D.C. was allowed to festoon a jury deliberation room with their insignia and their artifacts. The U.D.C. was

175. *Id.* at 48.

176. *Id.*

177. *Id.*

178. Currey, *supra* note 155, at 143; *see also infra* notes 433-444 and surrounding text (discussing the Franklin Square Monument Controversy and Tennessee's Heritage Protection Act).

179. *Id.* at 134, 143.

180. *Id.* at 133.

181. *Id.*

182. *Id.*

183. *Id.* at 142-43.

184. *Id.*

185. Gilbert, 2021 WL 5755018 at \*1.

186. Cox, *Dixie's Daughters*, *supra* note 8, at 121.

187. *Id.* at 132.

and is a white supremacist organization.<sup>188</sup> Their symbols and imagery are white supremacist symbols. For members of the U.D.C., the Freedmen's Bureau was an "infamous outrage."<sup>189</sup> Allowing Black people to vote "was a crime against the white people of the South."<sup>190</sup> No issue better illustrates the U.D.C.'s commitment to white supremacy than its efforts, in the 1920s, to have Congress dedicate public space in Washington D.C. for a "Mammy Monument" to honor faithful slaves.<sup>191</sup> For the U.D.C., a bronze Mammy statue would symbolize a faithful enslaved person, "content with her servitude and [approving of] white supremacy."<sup>192</sup> Such a statue would function as a "permanent marker for appropriate, safe, and appealing [B]lackness."<sup>193</sup> The Monument Bill passed in the U.S. House of Representatives, but ultimately failed in the Senate.<sup>194</sup> Various members of the U.D.C. debated the plan for the Mammy monument, surfacing even more racist thought patterns (if that were even possible). One U.D.C. member from Memphis was outraged at the idea, expressing surprise that there could be any monument to Black people "when there is not a State in the South not in mourning for some beautiful women whose lie has been strangled out by some [B]lack fiend."<sup>195</sup> This embarrassing episode in U.S. history illustrates how white supremacy was not a tacit concept for the U.D.C. Concerning sex and gender, these U.D.C. women erected monuments to white supremacy, often phallic in form, while at the same time denying the existence of white male desire for enslaved Black women and the sexual violence that went with that desire.<sup>196</sup>

#### 4. The U.D.C. and Confederate Rhetoric Aimed at Children

The portraits in the Giles County jury room echo the U.D.C.'s campaign to visually "educate" children about Lost Cause and Confederate heroes. The U.D.C.

188. *Id.* at 106-07. Even though the U.D.C. now disavows that it is a white supremacist organization, that disavowal is itself wrapped up in the false Lost Cause premise that the Confederacy was not a white supremacist institution. See *infra* note 216 and surrounding text.

189. Cox, *Dixie's Daughters*, *supra* note 8, at 132.

190. *Id.*

191. Micki McElya, *Commemorating the Color Line: The National Mammy Monument Controversy of the 1920s in Monuments to the Lost Cause: Women, Art, and the Landscapes of Southern Memory* 204 (Eds. Cynthia Mills and Pamela Simpson Univ. of Tenn. Press Knoxville 2003); See also, Teri A. McMurry-Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 U. Mem. L. Rev. 889, 904-06 (2018) (discussing the Congressional Mammy Monument Bill in contrast to the Dyer Anti-Lynching Bill, both introduced in 1922).

192. McElya, *supra* note 191, at 204.

193. *Id.*

194. *Id.*

195. *Id.* (internal source omitted). The Black press was quick to condemn the idea of a Mammy monument and brought forth a visual counter narrative in the form of a suggested monument to "white daddy," a licentious planter sexually assaulting a young, enslaved woman. *Id.* at 212-213.

196. *Id.* at 212-213. The Freudian, psycho-sexual issues inherent in Confederate pedestal monuments (phalluses) is beyond the scope of this article, suffice to say that taboo sexual fantasy is ever present in the dark narratives of the South. See, e.g., Karen Halttunen, *Humanitarianism and the Pornography of Pain in Anglo-American Culture*, April 1995 *American Historical Review* 304, 331 (1995) (explaining that Sigmund Freud reported that many of his patients became sexually aroused after reading Uncle Tom's Cabin's descriptions of children being beaten).



involved children in its rhetorical campaigns early on, understanding the unique power that rhetoric can play in an undeveloped mind.<sup>197</sup> At monument unveilings, children were let out of school and would participate in the ceremonies, pulling the new statue into town and pulling the rope down to reveal its form.<sup>198</sup> Sometimes, monument unveilings would involve a “living Confederate flag,” with children dressed in red and blue standing in the form of the flag.<sup>199</sup> Sometimes the rituals would involve thirteen young girls, representing the thirteen Confederate states.<sup>200</sup> The U.D.C. initiated The Children of the Confederacy, a Boy Scout or Girl Scout-type group dedicated to learning Confederate history.<sup>201</sup> The U.D.C.’s monument building efforts were also aimed at children. Members of the U.D.C. thought it highly important that white children see pro-Confederate images every day in public spaces like town squares and courthouse lawns.<sup>202</sup> In Franklin, Tennessee, a U.D.C. member explained that we want our children to “know by daily observation of this monument” why their ancestors fought in the war.<sup>203</sup>

One of the U.D.C.’s most successful rhetorical campaigns was its effort to ensure that public school history lessons complied with Lost Cause tenets. For this campaign, U.D.C. members worked closely with teachers to create “truthful” lessons about the “War Between the States” that dealt fairly with the South.<sup>204</sup> The U.D.C. created a Confederate card playing game and sponsored essay contests where children could win prizes for essays on Confederate battles, Confederate heroes, or Southern “history.”<sup>205</sup> There was even a Southern catechism, where Southern children were drilled to repeat key Lost Cause aphorisms.<sup>206</sup> Another approved U.D.C. educational activity involved children creating horribly racist caricatures as “poetry.”<sup>207</sup>

At this point, in the academic sphere, Lost Cause adherents were winning as Columbia University’s William Dunning popularized a history of the Civil War and Reconstruction that aligned with Lost Cause narratives.<sup>208</sup> The Dunning school perpetuated the idea that enslaved people were happy and that, after emancipation,

197. Towns, *supra* note 148, at 111.

198. James M. McPherson, *Long-Legged Yankee Lies: The Southern Textbook Crusade in The Memory of the Civil War in American Culture* 64 (Alice Fahs & Joan Waugh eds. 2004); Cox, *Dixie’s Daughters*, *supra* note 8, at 63.

199. Cox, *Dixie’s Daughters*, *supra* note 8, at 65.

200. *Id.* at 64.

201. *Id.* at 2.

202. *Id.*

203. *Id.* at 68.

204. *Id.* at 124. The U.D.C. refuses to call the war the Civil War and instead insists on calling it the War Between the States.

205. McPherson, *supra* note 198, at 66.

206. Cox, *Dixie’s Daughters*, *supra* note 8, at 138-39. One of the catechism’s call and responses was as follows: “How were the slaves treated? With great kindness and care in nearly all cases, a cruel master being rare.” *Id.*

207. Greg Huffman, *Twisted Sources: How Confederate Propaganda ended up in the South’s Schoolbooks*, Facing South (April 10, 2019), <https://www.facingsouth.org/2019/04/twisted-sources-how-confederate-propaganda-ended-souths-schoolbooks>.

208. Blight, *supra* note 5, at 295 Susan Nieman, Learning from the Germans: Race and the Memory of Evil 184 (Kindle ed. 2019); Downes, *supra* note 9, at 25.

Reconstruction failed because Black people were not capable of holding political power.<sup>209</sup> After Reconstruction, the forces of capitalism created a climate of reconciliation, which made the North more receptive toward white Southern myths.<sup>210</sup> An Ivy League professor like Dunning amplified false Lost Cause ideas and made them acceptable nationally.<sup>211</sup> Lost Cause rhetoric would continue to percolate into popular culture with films like *Birth of a Nation* and *Gone with the Wind*.<sup>212</sup>

In K-12 education, the U.D.C. endeavored to ensure that public school children were taught Lost Cause history. In 1898, at the national meetings of both the U.D.C. and their fraternal organization, the U.C.V., national leadership directed local chapters to review all public-school textbooks to determine if the books “contain[ed] incorrect or inaccurate statements or made important omissions of facts, or inculcate narrow or partisan sentiments.”<sup>213</sup> As with the Dunning school, the U.D.C.’s version of history, however, was baldly false.<sup>214</sup> Both the U.D.C. and the U.C.V. were deeply concerned that school children might develop the wrong idea—that Confederates fought to maintain slavery.<sup>215</sup> The U.D.C. considered the following concepts to be untruthful and inappropriate for public school textbooks: that the Southern secession was rebellious; that chattel slavery was cruel and unjust; or that the South fought the Civil War to perpetuate slavery (as opposed to fighting to protect state sovereignty).<sup>216</sup> As a result of the U.D.C. and U.C.V. textbook campaigns, nearly all Southern states created textbook commissions to select public school textbooks, removing the authority of local school boards.<sup>217</sup> The U.D.C.’s influence here made its way into the text of a 1920 Tennessee Textbook law, which prohibited history textbooks of a “partisan or sectarian character.”<sup>218</sup> The U.D.C. textbook campaign was successful. The “children raised on [Lost Cause rhetoric] of the 1870-1930 era became the white politicians, judges, and ministers who led the pro-segregation forces during the civil rights movement.”<sup>219</sup>

209. Downes, *supra* note 9, at 25.

210. Cox, *Dixie’s Daughters*, *supra* note 8, at xviii, 5.

211. Randall Kennedy, *Racial Critiques of Legal Academy*, 102 *Harvard L. Rev.* 1745, 1753-54 (1989) (“Dunning’s pejorative portrayal of Reconstruction. . . was enormously influential and long considered to constitute sound scholarly learning [despite being infected with racist attitudes]”).

212. Towns, *supra* note 148, at 118; Nieman, *supra* note 208, at 181; Stuart McConnell, *Epilogue: The Geography of Memory in The Civil War in Art and Memory* 259 (Kirk Savage ed. 2016).

213. McPherson, *supra* note 198, at 68.

214. Huffman, *supra* note 207.

215. McPherson, *supra* note 198, at 67.

216. *Id.* at 68.

217. *Id.* at 70; Huffman, *supra* note 207.

218. Charles B. Spahr & Neal B. Seymore, *Baldwin’s Cumulative Code Supplement*, Tennessee §1461b (1920).

219. Towns, *supra* note 148, at 118. Indeed, the remnants of Lost Cause rhetoric continued well into the 1980s. As part of my research for this Article, I purchased the Tennessee History textbook that I used in eighth grade, in 1988. Charles W. Crawford, *Tennessee: Land, History, and Government* (1984). That book omitted any description of the corporal pain and suffering or the family separations that enslaved persons endured. Instead, the textbook stated that “[s]laves were guaranteed food, shelter, clothing, and medical care. When they became too old to work, they were to be taken care of by their owners . . . The work of most slaves was long and hard.” *Id.* at 171, 175 (1984). Family separation was only mentioned later, in describing arguments that abolitionists made about slavery. *Id.* at 179. Forced separations of enslaved families was not laid out as a fact. A large, prominent text box told the story of Sam Davis, “The Boy Hero of the Confederacy.”

It was not until well after the civil rights movement that states began to adopt more factually accurate history textbooks, but even then, it took litigation in federal courts to force the issue.<sup>220</sup> In 1980, Professor James Loewen sued when the Mississippi textbook commission failed to approve his high school history textbook, *Mississippi Conflict and Change*, which did not follow Lost Cause Narratives.<sup>221</sup> Threatened by truthful-oriented visual rhetoric, one of the textbook reviewers noted that a harsh image of slavery on the plantation was inappropriate for a ninth-grader because it seemed to suggest that enslaved people were not treated well.<sup>222</sup> In formulating his decision, Judge Smith quoted Senator James Eastland (an incorrigible segregationist), who stated that Mississippi's textbook commission procedures were designed to "give our children the instruction material they must have if they are to be properly informed of the Southern and true American way of life."<sup>223</sup> Judge Smith cut through the abstracted rhetoric (the Southern and true American way of life) and found it to impermissibly reference race, supporting the inference that the textbook commission rejected the book for racial reasons.<sup>224</sup> Thus, the book's rejection violated Mr. Loewen's civil rights.<sup>225</sup> The judge ordered the textbook commission to approve the book.<sup>226</sup> In this moment, the federal court system and federal constitutional law stepped in to right the wrongs of the U.D.C.'s tradition of mandating "truthful" history textbooks. As we will see below, the U.D.C.'s textbook campaign has resurfaced today, with groups like Moms for Liberty, who, like the U.D.C., seem to be highly threatened by the idea of their children encountering truthful American history, especially in visual images.<sup>227</sup>

In addition to erecting large public monuments and running campaigns for "truthful" public school history textbooks, the U.D.C. served as caretakers for Civil War artifacts, which explains the symbols prominently displayed inside the Giles County courthouse.<sup>228</sup> Inside the jury deliberation room, over the jury members, these artifacts play the same role as a large stone monument in honor of the Confederacy. The artifacts operate to visually laud the U.D.C., the Confederacy, and its white supremacist values while at the same time, denigrating the voices and

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*Id.* at 191. And finally, in discussing the causes of the Civil War, the text discussed differences between the Northern (industrial) and Southern economies as well as the regions' different ideas about state's rights. *Id.* at 187. The text did not mention slavery until the third paragraph of the section. *Id.*

220. See Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 *St. Mary's Scholar* 255, 266 (2019) (explaining Loewen v. Turnipseed, a federal case in Mississippi that compelled the Mississippi textbook commission to adopt a history textbook that was not in the Lost Cause tradition).

221. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1141 (N.D. Miss. Greenville Div. 1980).

222. *Id.* at 1146.

223. *Id.* at 1149.

224. *Id.*

225. *Id.* at 1150.

226. *Id.* at 1155.

227. See *infra* Section IV, Sociology and the Confederate Flag.

228. *Objects of the U.D.C.*, United Daughters of the Confederacy, <https://hqudc.org/objectives/> (last visited Nov. 23, 2023) ("The [U.D.C.] collects and preserves rare books, documents, diaries, letters, personal records, and other papers of historical significance relating to the period 1861 to 1865").

experiences of the people (Black and enslaved people) that the Lost Cause narrative has cast out.

As U.D.C. expert Karen Cox notes, “The narrative of heroism and sacrifice by white [Confederate] soldiers comes with a cost, because the interpretation involves the erasure of slavery as the primary cause of the Civil War. Further, that narrative is divested of the historical contexts of racial violence, disenfranchisement, and Jim Crow.”<sup>229</sup> The U.D.C. door (with the national Confederate flag and the group’s initials) and the objects inside the room are cloaked with all of the intolerable meanings discussed in this section. Someone entering the room would assume that the U.D.C. “owns” the jury room and that it sponsors all that goes on within it. Further, the Confederate flag, the portraits, and the U.D.C. insignia are not neutral symbols. U.D.C. members knew how powerful their visual rhetoric was. One U.D.C. member, discussing why monuments were so important, noted that Confederate memorial objects “speak more quickly, impressively, and lastingly to the eye than the written or printed word.”<sup>230</sup>

### B. *State v. Gilbert*

Since 1910, Giles County juries have deliberated in a room festooned with Confederate memorabilia.<sup>231</sup> In 2021, *State v. Gilbert* was the first case to challenge the Confederate memorabilia inside the jury deliberation room. In this case, Mr. Gilbert was charged and convicted of assault with a firearm.<sup>232</sup> Upon conviction, he was sentenced to six years in prison.<sup>233</sup> Mr. Gilbert, who is Black, alleged that during his arrest, the police threw him on the floor, fracturing his skull in the process.<sup>234</sup> The evidence against Mr. Gilbert was mostly based on witness testimony, some of it deemed impermissible hearsay.<sup>235</sup> No firearm was ever found.<sup>236</sup> The Giles County Circuit Criminal Court granted Mr. Gilbert’s appeal and ordered a new trial because impermissible hearsay was introduced at trial, and the jury was presented with extraneous information (in the form of Confederate artifacts) in the deliberation room.<sup>237</sup>

Concerning the jury deliberation room, Mr. Gilbert argued that the room’s Confederate memorabilia violated his rights to a fair trial, impartial jury, due process, and equal protection, and constituted improper juror exposure to extraneous information.<sup>238</sup> Photographs from the record on appeal are described and reproduced in Figures 1-6, at the beginning of this article. The *Gilbert* court noted that the glass-paneled door to the jury room was decorated with the national flag of the

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229. Cox, *Dixie’s Daughters*, *supra* note 8, at xxxi.

230. McElya, *supra* note 191, at 205.

231. *See* Towns *supra* note 148, at 10, 20.

232. *State v. Gilbert*, 2021 WL 5755018 at \*1-5 (Ct. Crim. App. Tenn. 2021).

233. *Id.* at \*5.

234. *Id.*

235. *Id.* at \*12 (The introduction of the impermissible witness hearsays testimony was another basis for the grant of Mr. Gilbert’s appeal).

236. *Id.* at \*1-5.

237. *Id.* at \*12, \*21.

238. *Id.* at \*13.

Confederate States, known as the Stars and Bars, with “U.D.C. Room” underneath the image in text.<sup>239</sup> Inside the jury deliberation room, above the table, was a large, framed flag, the “blood-stained banner,” the third flag of the Confederate States of America.<sup>240</sup> The iconic Southern Cross Confederate battle flag is prominently featured on the left side of this white and red flag.<sup>241</sup> On the two corners of the room’s walls hung portraits of Jefferson C. Davis, President of the Confederate States of America, and General John C. Brown, a Giles County native who fought for the Confederacy.<sup>242</sup> Finally, the jury deliberation room held a framed letter from the national office of the U.D.C., which reads as follows:

As members of the United Daughters of the Confederacy®, we must continue to honor our Confederate Veterans and share the history of the War Between the States. I thank you and your chapter for your support to the General Organization as we remember the objects of the UDC-Historical, Educational, Benevolent, Memorial, and Patriotic.<sup>243</sup>

Mr. Gilbert further argued that the room was not an impartial environment, free from distractions, and that “the Confederacy and racism go hand in hand.” The Tennessee Association of Criminal Defense Lawyers filed an amicus brief, which augmented the appellant’s arguments on the racially hostile meaning and impartial nature of the Confederate flag.<sup>244</sup>

The State’s central argument was that this was an issue that Mr. Gilbert should have raised prior to trial and, because he did not do so, the correct appellate standard of review was plain error, as opposed to the more lenient, plenary review.<sup>245</sup> The Criminal Court of Appeals considered the argument and held, pursuant to Tennessee Rule of Criminal Procedure 12(b)(2), that the location of jury deliberations was not an issue that had to be raised prior to trial.<sup>246</sup>

The *Gilbert* court then considered the appellant’s core substantive claim: whether the jury was exposed to extraneous information or subjected to an outside influence.<sup>247</sup> The court began by analyzing the framed Confederate flag, noting that the point of a flag is to “symbolize some system, idea, institution, or personality, [] a shortcut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.”<sup>248</sup> The *Gilbert* court noted that the original purpose of the jury room’s

239. *Id.* at \*13; see Figure 1 *supra* Introduction, Scene One.

240. *Gilbert*, 2021 WL 5755018 at \*13; See Figures 2-3 *supra* Introduction, Scene One. (The Confederate States kept modifying their flag because it kept getting confused with the Union/American flag on the battlefield.)

241. *Gilbert*, 2021 WL 5755018 at \*13.

242. *Id.*; see Figure 5 *supra* Introduction, Scene One.

243. *Gilbert*, 2021 WL 5755018 at \*14.

244. *Id.* at \*13 (citing Brief of Amicus Curiae Tennessee Association of Criminal Defense Lawyers).

245. *Id.* at \*15-16.

246. *Id.* at \*15.

247. *Id.* at \*15-16.

248. *Id.* at \*16 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

flag was to “knit the loyalty’ of those in the Confederate states ‘to a flag’ that conveyed the political ideals of the Confederacy.”<sup>249</sup>

Notably, in response to the Lost Cause argument that the Confederate flag has very little to do with slavery, the *Gilbert* court cited the secession documents from various Confederate states, noting that “the documents published by the Confederate states identified the right to hold [B]lack people in chattel slavery as central to the Southern way of life and, thus, paramount among those jurisdictions.”<sup>250</sup> Accepting that the Confederate flag clearly signals racism, the *Gilbert* court noted that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”<sup>251</sup> Finally, the *Gilbert* Court found that having these artifacts on display in a public courthouse’s jury room created “an impression of endorsement.”<sup>252</sup>

The *Gilbert* court held that Mr. Gilbert had met his burden to show that the jury was improperly exposed to prejudicial, extraneous information. It then shifted the burden to the State to show that the information was harmless.<sup>253</sup> In support of its argument, the State emphasized the testimony of Giles County jury foreman, who testified that he had “no indication” that the Confederate memorabilia impacted the judgment of any grand jurors.<sup>254</sup> The *Gilbert* court rejected this argument, noting that

[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot.<sup>255</sup>

This court’s decision, standing on its own, represented a big win for racial justice in Tennessee. However, on May 18, 2022, the Tennessee Supreme Court denied the State’s appeal and summarily marked the case as “not for citation,” all without any reasoning.<sup>256</sup> With this move, the Tennessee Supreme Court avoided hearing the State’s appeal, while also stripping the *Gilbert* decision of any precedential value. A full discussion of the impoverished legal process inherent in the Tennessee Supreme Court’s designation of *Gilbert* as “not for citation” without explaining why is beyond

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249. *Id.*

250. *Id.*

251. *Id.* (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))).

252. *Id.* at (17-18. (quoting *Capital Square Advisory Bd. V. Pinette*, 515 U.S. at 766).

253. *Id.* at \*15-16, \*20.

254. *Id.* at \*14.

255. *Id.* at \*19 (quoting *Pena-Rodriguez*, 137 S. Ct. at 868-69).

256. *Id.* (Tennessee Supreme Court Rule 4 allows the Tennessee Supreme Court to designate a Court of Appeals case (Criminal or Civil) as “not for citation.” Once the Tennessee Supreme Court has so designated the case in this manner, “the opinion of the intermediate appellate court has no precedential value.” Tenn. Sup. Ct. Rule 4(e)1. Further, the rule prohibits appellate attorneys from citing or referring to the case in any brief, “except when the opinion is the basis for a claim of *res judicata*, collateral estoppel, law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant.” Tenn. Sup. Ct. Rule 4(e)2.)



the scope of this Article. However, the practice is troubling because it fails to develop Tennessee law (in a transparent way).

*C. State v. Martin*

*State v. Martin* involved another defendant of color, also convicted by a jury deliberating in Giles County's Confederate jury room. Mr. Evan Baddour, who represented Mr. Gilbert, also represented Mr. Martin.<sup>257</sup> Mr. Martin was convicted of a non-violent drug possession offense and sentenced to twelve years.<sup>258</sup> Mr. Martin's conviction was based on evidence found in his car, which the Tennessee Court of Appeals found sufficient to uphold the conviction.<sup>259</sup> As for the claim that the jury was improperly exposed to extraneous information, the *Martin* court rejected and markedly departed from the *Gilbert* court's reasoning.<sup>260</sup>

From the *Martin* decision, we learn a bit more about the history behind the Giles County Courthouse U.D.C. Jury Room. We learn that the courthouse burned down in 1907 and that it was repaired in 1909.<sup>261</sup> The U.D.C. donated the items for the repaired jury room sometime between 1907 and 1909.<sup>262</sup> These dates are relevant because they show that the U.D.C. donated the artifacts for the jury room during the height of the Jim Crow era when lynchings were prevalent. The dates also indicate how many juries were exposed to these objects while deliberating. In the *Gilbert* case, however, the jury foreman testified that "he had never been concerned that the Confederate memorabilia in the room influenced a jury."<sup>263</sup>

Rather than engage with the substantive doctrine and factual reality that there were improper, extraneous items in the jury deliberation room, the *Martin* court departed from *Gilbert* and held that this was an issue that Mr. Martin should have raised before trial. And because he failed to do so, the waiver mandated a much more strenuous standard of review, plain error review.<sup>264</sup>

On this point, the *Martin* court's conciseness conveyed an inaccurate sense that the standard of review issue was an easy and clear one. For instance, one sentence of reasoning glossed over important precedent, *State v. Vance*, which when read carefully, is not applicable because it applied to evidentiary objections, not to issues of jury impartiality, and because it involved different timing in the objection process.<sup>265</sup> The *Martin* court then cited a second case in support of its decision, an unpublished

257. *Tennessee v. Martin*, No. M2021-00667-CCA-R3-CD, 2022 WL 3364793, at \*1 (Ct. Crim. App. Nashville 2022).

258. *Id.* at \*1.

259. *Id.* at \*1, 3.

260. *Id.* at \*8, n.4 (rejecting *Gilbert* as precedential authority on the basis that the Tennessee Supreme Court designated it as "not for publication.") As an aside, this is a remarkable situation. Two Appellate Courts, at the same jurisdictional level, refusing to listen to each other. If anything, this situation illustrates the deep political polarization within Tennessee.)

261. *Id.* at \*7.

262. *Id.* at \*7-8.

263. *Id.* at \*8.

264. *Id.* at \*9 (citing Tenn. R. Crim. P. 12(b)(2)(A), (B)).

265. *Tennessee v. Vance*, 596 S.W.3d 229, 253 (2020).

decision, *State v. Hollingsworth*,<sup>266</sup> but that case turned on an objection made for the first time on appeal, not an objection made post-trial.<sup>267</sup> Nonetheless, with a succinct explanatory parenthetical, the *Martin* court indicated that impartial jury claims must always be raised at trial and cannot be made in a post-trial brief.<sup>268</sup> A final deficit in the *Martin* court's reasoning is that one does not know where the jury will deliberate before a trial has started and therefore cannot object to the location before the trial has started.<sup>269</sup> Practically speaking, the Circuit Court clerk testified there were other rooms in the courthouse and the courthouse annex that have been and were used for jury deliberations.<sup>270</sup> How was the defendant to know whether his rights would be violated before trial?

With plain error review, the *Martin* court set Mr. Martin's arguments up to fail, and fail they did. Plain error, in contrast to plenary review, required a much higher standard.<sup>271</sup> The *Martin* court ultimately held that juror impartiality rules were not broken because it is unclear "whether the average citizen would recognize the portraits of Jefferson Davis or John C. Brown, the insignia for the United Daughters of the Confederacy, or the third national flag of the Confederate States of America."<sup>272</sup> While conceding that the Confederate battle flag is a controversial symbol, the court dispensed with an analysis of its propriety by noting that the framed flag is the Confederate *national* flag, not the Confederate battle flag.<sup>273</sup> The court also found that the physical evidence against Mr. Martin was so strong that even assuming there was an error relating to juror impartiality, correcting the error was not necessary to accomplish substantial justice.<sup>274</sup>

The *Martin* court's conclusion that the Confederate imagery did not "pertain to" the defendant, a Black man, defies reality. As the *Gilbert* court noted, the portrait of Jefferson Davis and the Confederate flag symbolize a failed sovereign nation expressly established, by an act of war, to perpetuate the enslavement of persons of African ancestry.<sup>275</sup> Moreover, as can be seen from the photos reproduced above, the framed Confederate flag is immediately recognizable as the Southern Cross Confederate flag, a white supremacist symbol. While it is not the official battle flag, the Southern Cross is prominently emblazoned on the national flag.

On January 11, 2023, very quietly, the Tennessee Supreme Court rejected Mr. Martin's appeal, despite there being two conflicting appellate court decisions on the same issue.<sup>276</sup> The *Martin* decision signaled that it is acceptable for Black citizens to

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266. *State v. Hollingsworth*, No. E2015-01463-CCA-R3-CD, 2017 WL 111331 at \*24 (Tenn. Crim. App., 2017).

267. *Id.* at \*24.

268. *Martin*, 2022 WL 3364793 at \*9.

269. *Id.*

270. *Id.* at \*5.

271. *Id.* at \*9 (internal quotations and citations omitted).

272. *Id.* at \*12.

273. *Id.* (The flag in question, however, clearly contains the Confederate battle flag, the Southern Cross, within it.)

274. *Id.*

275. *Gilbert*, 2021 WL 5755018 at 16.

276. Order Rejecting Appeal, No. M2021-00667-SC-R11-CD (Tenn. Ct. App. 2023).

be tried and have their liberty stripped in a public space that visually valorizes the men who fought to keep Black people enslaved. In Tennessee, it is now acceptable for defendants to be tried in a Jim Crow courthouse raising significant questions about the integrity of Tennessee's criminal justice system.

A recurring sub-theme of this article is that injustice pools in remote places like Giles County, Tennessee. Relatedly, injustice can also occur in a hard-to-see way with judicial holdings that are expressed with minimal text that fails to deeply engage with precedential case law. Once a higher court allows a lower court's incomplete reasoning to stand (by quietly declining to grant review or engage with the lower court's reasoning), then the lower court's pithy analysis becomes precedential. The reasoning becomes binding even though the legal analysis is not well-developed or well-supported. Through this stealthy process, mediocre law becomes good law. Although these two everyday Tennessee appellate cases are not blockbuster U.S. Supreme Court cases, they nonetheless made a sizeable impact on individual defendants and future defendants seeking justice.

The Giles County jury deliberation room conflicts with the normative purpose of a public courthouse, thereby diminishing the public's faith in Tennessee's justice system. A courthouse's purpose is to signal the legitimate power of the state's authority.<sup>277</sup> As medieval "rites turned into rights," states built stately city halls and courthouses designed to symbolize justice as a virtue.<sup>278</sup> These majestic buildings generated collective buy-in for a legal system that could, if appropriate, punish and render liability.<sup>279</sup> A courthouse that deals in Confederate imagery signals that its justice is not for all. A Jim Crow courthouse leaves significant portions of the community left out, excluded, with no kind of faith that the system will treat them fairly and equitably. This type of visual rhetoric has no place in or around Tennessee's courthouses.

#### D. The "Blood-Stained Banner" Confederate Flag<sup>280</sup>

The Confederate flag hanging on the wall in the jury deliberation room (the only flag in the jury room) deserves further analysis. Flags are very powerful symbols. As the *Gilbert* court noted, flags symbolize an idea or system through a "shortcut from mind to mind."<sup>281</sup> The *Gilbert* decision did not devote much text to how flags work, but the opinion is consistent with the idea that flags operate using rapid visual logic, which contributes to the power they hold over people. On the topic of the Confederate flag and Confederate imagery, legal scholars/activists, psychologists, anthropologists, and sociologists have fleshed out the deleterious ways that the imagery tends to prime individuals toward racial bias, makes minoritized people feel like unwelcome outsiders, and contributes to the law's reproduction of injustice.

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277. See Judith Resnik & Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* xv, 13, 134-35 (Yale Univ. Press 2011).

278. *Id.*

279. *Id.* at 134.

280. See *supra* note 6.

281. *Gilbert*, 2021 WL 5755018 at \*16 (internal citation omitted).

This section raises important information about flags and the Confederate flag from law, psychology, anthropology, and sociology. Each of these disciplines augments our understanding of the disturbing rhetorical work the Confederate flag was doing in the jury deliberation room as well as the deep injustice of sanctioned Confederate imagery in and around public spaces like courthouses.

### 1. Legal Theories and the Public Display of the Confederate Flag

Legal scholars have lucidly discussed the impact of the Confederate flag, specifically in official government settings like courthouses and capitol buildings. Works by these scholars generally reflect a consensus that the presence of the Confederate flag in these settings historically symbolized white supremacist defiance towards civil rights activism and continues to have a discriminatory and exclusionary impact in the present. The two analyses summarized below help assess the impact of Confederate symbolism in the Giles County jury deliberation room today.

Relevant legal theories have focused on the discriminatory impact that occurs when the Confederate flag flies on public land where courthouses and government buildings sit. First, in a thoughtful article from 2011, two Louisiana criminal defense lawyers and activists, Cecilia Trenticosta and William Collins, addressed the presence of the Confederate flag in front of the Caddo Parish Courthouse in Shreveport, Louisiana.<sup>282</sup> Trenticosta and Collins looked particularly at the impact the Confederate flag may have played in death penalty cases.<sup>283</sup> In the years after 1976,<sup>284</sup> Caddo Parish sentenced sixteen defendants to death, and all but four were Black people.<sup>285</sup> For all of these decisions, the Confederate flag flew outside the parish courthouse.<sup>286</sup> In addition to the Confederate flag on top of the courthouse, a large Confederate monument stood as a sentinel on the courthouse lawn. The U.D. C. erected the monument in 1906: a soldier at parade rest stands on a tall pedestal with four busts of Confederate generals decorating the foundation. The motto on the monument reads: “To the just cause.”<sup>287</sup>

Caddo Parish officials likely raised the Confederate flag in defiance of the civil rights movement. This was a common, reactionary pattern in the South.<sup>288</sup>

282. Cecelia Trenticosta and William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. on Racial & Ethnic Justice 125, 125 (2011).

283. *Id.*

284. 1976 is relevant because that was the year that the Supreme Court reinstated the death penalty after it was put on hold by *Furman v. Georgia*. See *Furman v. Georgia*, 408 U.S. 238 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976).

285. Trenticosta & Collins, *supra* note 282, at 126-27.

286. *Id.*

287. *Id.* at 132-33.

288. In the South, Confederate monument building experienced two peaks, once between 1890 and 1940 (reacting against Reconstruction) and again during the civil rights movement (reacting against calls to desegregate the South). See Gerhardt, *supra* note 171, at 13-14 (citing Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (2016), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#historical-markers>). For instance, in 1956, Georgia changed its state flag to include the Confederate flag and, in 1964, reinitiated efforts to finish carving the Confederate behemoth at Stone Mountain. Both actions were undertaken in reaction to the civil rights movement’s call for desegregation); Thompson, *supra* note 5, at 91-92.

Confederate flags and Confederate imagery appeared more prominently in public spaces as the civil rights movement gained traction.<sup>289</sup> For instance, in Louisiana, the first equality freedom bus rides started in 1947, and the Confederate flag started flying outside the courthouse in 1951.<sup>290</sup>

Trenticosta and Williams traced the Confederate flag's meaning to the racialized injustices occurring in the Caddo Parish criminal justice system. The authors succinctly explain that "[t]he justice in Caddo Parish is that of the Confederate States of America, which valued the rights of the slave-owners above those of the slaves."<sup>291</sup> Drawing upon the aforementioned research on priming, Trenticosta and Williams argued that "the confederate flag impermissibly prime[d] the expression of negative views toward African Americans."<sup>292</sup> A Confederate flag flying outside a courthouse likely predisposed jury members, through implicit bias, to subconscious belief in the guilt and aggression of the accused and the probative value of the evidence against him.<sup>293</sup>

It is unclear when the Confederate flag on the Caddo Parish courthouse was taken down, but it no longer flies. As for the U.D.C. monument on the courthouse lawn, nothing was done about the memorial until June 2022, when officials removed the four Confederate busts at the base of the statue.<sup>294</sup> Officials are planning to remove the remainder of the monument to a private location in an adjoining parish.<sup>295</sup> Notably, the U.D.C. objected to the alteration of the foundation and the removal of the monument, filing litigation that made its way to the United States Supreme Court.<sup>296</sup>

Second, as a law student at Yale, Professor James Forman, Jr. also wrote about the presence of the Confederate flag in official government settings. Specifically, Forman commented on *NAACP v. Hunt*, a 1990 Eleventh Circuit decision where the NAACP argued that flying the Confederate flag at the Alabama Capitol grounds violated the federal flag code, various civil rights laws, as well as the First and Fourteenth Amendments.<sup>297</sup> The NAACP argued that Black citizens had the right to be free from the discrimination symbolized by the Confederate flag flying on top of Alabama's Capitol building.<sup>298</sup> Factually, the Confederate flag on top of the Alabama Capitol building illustrates the same reactionary pattern discussed above.<sup>299</sup> In 1963, Alabama officials raised the Confederate flag over the capitol, on the very day that

289. See Gerhardt, *supra* note 171, at 13-14 (citing Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy* (2016)).

290. Trenticosta & Collins, *supra* note 282, at 133-34.

291. *Id.* at 126.

292. *Id.* at 140.

293. *Id.* at 144-45.

294. See Kendrick Dante, *Confederate Busts removed from Caddo Courthouse monument despite threats against crew*, Shreveport Times (June 4, 2022), <https://www.shreveporttimes.com/story/news/2022/06/05/busts-confederate-heroes-removed-caddo-courthouse-monument/7484587001/>.

295. *Id.*

296. *Id.*

297. Forman, *supra* note 110 (commenting on *NAACP v. Hunt*, 891 F.2d 1555, 1559 (11th Cir. 1990)).

298. *Hunt*, 891 F.2d at 1561.

299. See *supra* notes 288-290 and surrounding text.

U.S. Attorney General Robert F. Kennedy was traveling to Alabama to meet with then-Governor George Wallace about Alabama's refusal to integrate its public schools.<sup>300</sup> Despite this uncontroverted fact, the *Hunt* court ruled against the NAACP, noting that "it is not certain that the flag was hoisted for racially discriminatory reasons."<sup>301</sup> The *Hunt* court further found that the flag did not violate the Fourteenth Amendment's Equal Protection Clause because its presence offended both Black and white people equally.<sup>302</sup> According to the *Hunt* court, if there was any First Amendment issue about the Confederate flag on the Alabama Capitol grounds (that Black people must see as they walk past), the problem was due to "the plaintiff's own emotion."<sup>303</sup>

In writing about this case, Professor Forman analogized the *Hunt* court's reasoning to the infamous *Plessy v. Ferguson* case, which looked at segregated rail cars. In *Plessy*, the Court similarly held that any notion of racial inferiority was generated not by segregation, but because Black citizens "cho[se] to put that construction on it."<sup>304</sup> Forman also criticized the *Hunt* decision for not going deeper into the context of the Confederate flag, noting that even a surface-level inquiry into the purpose of the Confederate flag would reveal its undeniable association with the racist Confederate States of America, the Ku Klux Klan, skinheads, and other white supremacists.<sup>305</sup>

Surfaced in the theories discussed above, the *Martin* and *Gilbert* decisions raise concerns about (1) the negative legal outcomes enabled by the bias-inducing Confederate flag; and (2) judicial denials that the Confederate flag is not actually discriminatory. With respect to the Trenticosta and Williams analysis, in contrast to the discriminatory Confederate flag flying above and outside the Caddo Parish courthouse, Giles County's jury deliberation room featured the Confederate flag and other objects hanging *in the room*. If a Confederate flag flying outside a courthouse imbues jurors with implicit bias toward capital defendants of color, what is the impact on jury members who have a Confederate flag framed statically over their heads as they adjudicate the guilt or innocence of the accused? Trenticosta and Williams's argument that the Confederate flag harms criminal defendants of color grows much stronger when it is applied to defendants being tried in the Giles County courthouse.

As Professor Forman pointed out, both *Hunt* and *Plessy* denied the discriminatory impact of public and legally enacted racism. Here, Forman's analogy applies to the *Martin* case and, to a more limited extent, the *Gilbert* case. Both cases denied or

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300. *Hunt*, 891 F.2d at 1558.

301. *Id.* at 1562. The court seemed to base this conclusion on the fact that the Confederate flag appeared briefly on the Alabama capitol grounds a few years earlier, in 1961, to mark the 100th anniversary of the Civil War. Civil War centennial events, however, provided cover for pro-Confederate Southerners to raise the Confederate battle flag and yell the rebel yell, commemorating "history" in a way that both celebrated the Confederacy and defied the Civil Rights movement. See Jon Wiener, *Civil War, Cold War, Civil Rights: The Civil War Centennial in Context, 1960-1965* in *The Memory of the Civil War in American Culture* 242, 253 (Alice Fahs & Joan Waugh Eds. 2004).

302. *Hunt*, 891 F.2d at 1562.

303. *Id.* at 1565.

304. Forman, *supra* note 110, at 510 (citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

305. *Id.* at 513.



minimized the historical context that gives the Confederate flag its racist meaning. While the *Martin* appellate panel noted that for many people the Confederate flag “is a symbol of racial separation and oppression,”<sup>306</sup> it summarily dispensed with analyzing the jury room’s Confederate flag by its determination that the third national flag of the Confederate States of America “is not the Confederate battle flag.”<sup>307</sup> The *Martin* court did not seem to see (or want to see) that the Confederate battle flag takes up a large portion of the Confederacy’s third national flag. The battle flag’s prominence is clearly visible in the photo of the jury room’s flag, reproduced, *infra*, Figure 3. By placing the flag in a different category than the Confederate battle flag, the *Martin* court was able to quickly move on to hold that the presence of the flag was not a source of prejudice that would require a new trial.<sup>308</sup> And while the *Gilbert* court accepted the Confederacy’s racism as an undeniable fact of history that came to be represented in the flag, it nonetheless noted that the U.D.C. “views the flag as an important historical artifact worthy of preservation and honor.”<sup>309</sup> Although the *Gilbert* panel correctly found the Confederate memorabilia to mandate a new trial, it could have been less conciliatory toward the U.D.C.’s Lost Cause interpretation of the flag.

As far as what remedies there are for Confederate images hoisted up on public property, Professor Forman offered an elegant solution, which could easily be applied to the *Martin* and *Gilbert* decisions. Under the Thirteenth Amendment, the federal government can prohibit discriminatory government speech.<sup>310</sup> This is a viable solution; Congress could enact a statute declaring that Confederate symbols on public property are impermissible badges of slavery under the Thirteenth Amendment. If this were done, then Confederate flags on public property must come down.<sup>311</sup> As discussed below, this would also be an effective solution that allows communities to take down Confederate statues (after a democratic process), despite the state Heritage Protection statutes prohibiting removal.

## 2. Anthropology and the Confederate Flag

Anthropological scholarship on flags has found that although flags can have a positive impact on group solidarity and identity, they can also promote systems of

306. *Martin*, 2022 WL 3364793 at \*12 (quoting *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir. 2001)).

307. *Id.*

308. *Id.*

309. *Gilbert*, 2021 WL 5755018 at \*56–57, \*66. In this moment, disputes over Confederate meanings take on an annoying post-modern flavor, more in line with French semiotics theory than reasonable, rational discourse. The Court seems to accept that the Confederate flag means whatever people say it means. For a discussion of how emerging conservative thinkers are deploying post-modern styles of reasoning, see Lucy Jewel, *Time is a Flat Circle, Lessons from Past and Present Conspiracy Theories*, 3 *LSU J. for Social Justice and Policy* 63 (2023).

310. Forman, *supra* note 110, at 522.

311. See Alexander Tsesis, *Confederate Monuments as Badges of Slavery*, 108 *Ky. L.J.* 695, 709–11 (2019) (arguing that the Thirteenth Amendment’s Badges of Slavery doctrine could successfully eradicate Confederate monuments on public property).

hierarchy and dominance.<sup>312</sup> The field of anthropology has an entire area of study devoted to the study of vexilloids, or symbolic physical objects.<sup>313</sup> Flags are a type of vexilloid that become imbued with a “kind of magical awe that transcends their qualities as mere objects.”<sup>314</sup> Flags then may be “treated as living, breathing, entities whose wellbeing must be cared for, as if they are persons.”<sup>315</sup> This can explain why the U.D.C. has invested so much in caretaking for the Confederate flag in the Giles County jury room, for example. This principle can also be observed in the monument-raising rituals where children dressed in blue and red would form a “living confederate flag.”<sup>316</sup> In these ritualistic ceremonies, the children actually became the Confederate flag, transforming it from a mere object to a living entity that must be collectively nurtured and preserved.

The way humans engage with flags has an evolutionary purpose. As human beings, we “cannot help but see the world in symbolic categorical terms, dividing it up according to opposed features, and organizing our lives according to themes and narratives.”<sup>317</sup> A flag’s embodied aura results from a ritualistic sanctification process where the flag comes to visually represent the collective.<sup>318</sup> By witnessing the object, members of the collective feel solidarity and are encouraged to act in conformity with the group.<sup>319</sup> Individuals, when gazing upon a flag, merge into one.<sup>320</sup>

Further, flags play a role in solidifying a group’s identity by shaping a collective narrative. Because of their association with war and battle, flags are associated with “motifs of journey, quest, liminality, magical protection, and heroic return.”<sup>321</sup> In other words, flags, through powerful visual heuristics, propel powerful narratives of heroes, quests, and journeys.<sup>322</sup> The flag becomes “self and its father, brother, mother, and sister. It is house and home; neighborhood and fatherland.”<sup>323</sup>

In addition to visually and psychologically signaling a group’s identity as a collective, a flag also signals dominance in a highly embodied way. A sovereign’s flag situated over someone’s head is an indelible image of the dominance of the sovereign’s power: “Flags, as objects raised above the head, signify the power of one’s people, one’s leader, and the success of the group.”<sup>324</sup> For instance, in ancient Rome, flags signaled military dominance and the Romans kept their standards in a special, sacred shrine.<sup>325</sup> The symbolization of dominance is also embodied. When a flag is raised, it

312. Robert Shanafelt, *The Nature of Flag Power: How flags entail dominance, subordination, and social solidarity*, 27(2) *Politics and The Life Sciences* 13, 13 (2009).

313. *Id.* at 14.

314. *Id.*

315. *Id.*

316. Cox, *Dixie’s Daughters*, *supra* note 8, at 65.

317. Shanafelt, *supra* note 312, at 16 (citing Terrence W. Deacon, *The Symbolic Species: The Co-Evolution of Language and the Brain* 416 (1997)).

318. Shanafelt, *supra* note 312, at 14.

319. *Id.*

320. *Id.*

321. *Id.* at 15.

322. *Id.*

323. *Id.* at 22.

324. *Id.* at 16-17.

325. *Id.* at 17-18.

meshes with the embodied idea that standing represents strength and vigor, whereas lying down is a sign of sickness or weakness.<sup>326</sup> The embodied metaphor of height applies to flags, but also applies to monuments like obelisks and pedestal statues, as “power [is] associated with elevation toward the sky.”<sup>327</sup>

The embodied height/strength metaphor can explain the power of a Confederate flag hanging above a jury’s deliberation table, or the power of an elevated Confederate pedestal monument. The association of height with goodness and greatness also explains why pro-Confederates become so emotionally upset when flags or monuments are taken down or removed from public spaces. When a flag is taken down, it signals humiliation.<sup>328</sup> Therefore, the metaphorical nature of these symbols helps explain the heritage protection laws, discussed more fully below, that prevent Confederate objects from being taken down.

The ritualistic, embodied, and evolutionary process wherein a flag takes on magical meaning seems innocuous when applied to the United States or a sports team. However, when we are talking about the flag of the Confederacy, a failed sovereign that seceded from the United States to maintain slavery, the ritualized sacralization of the flag becomes unacceptable and oppressive. Recently, mob members paraded the Confederate flag around at two frightening collective events, the Charlottesville United the Right rally and the January 6 insurrection.<sup>329</sup> Both of these events led to violence and tragic fatalities. If a flag works to impel people to think like a group, do we really want the Confederate flag, with its white supremacist meanings cemented through embodied ritual, to be the flag that speaks to the jury as it deliberates?

### 3. Psychology and the Confederate Flag

Psychological studies show that the Confederate flag triggers bias in white observers. Psychologist Joyce Ehrlinger and her colleagues conducted two psychological studies on how audiences might be primed with an image of a Confederate flag.<sup>330</sup> In the first study, the psychologists subliminally presented the Confederate flag to participants for 15 milliseconds.<sup>331</sup> Then Ehrlinger and her colleagues evaluated the participant’s likelihood of voting for President Barack Obama.<sup>332</sup> White participants exposed to the Confederate flag reported a significantly lower likelihood of voting for Obama than white participants in the control group.<sup>333</sup> However, exposure to the

326. *Id.* at 23 (citing Lakoff & Johnson, *supra* note 41).

327. *Id.*

328. *Id.*

329. Washington Post Staff, *Deconstructing the Symbols and slogans spotted in Charlottesville*, Wash. Post (August 18, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/>; Washington Post Staff, *Identifying far-right symbols that appeared at the U.S. Capitol riot* (January 15, 2022), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/>.

330. Joyce Ehrlinger et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32(1) Pol. Psych. 131, 135 (Feb. 2011). Ehrlinger’s studies drew upon past studies on implicit bias where participants responded with greater hostility than a control group after being subliminally exposed to faces of Black men. See *id.* at 133 (citing J.A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Priming in Action*, 71 J. of Personality and Soc. Psych. 230 (1996)).

331. *Id.* at 135.

332. *Id.* at 139.

333. *Id.* at 137.

flag did not result in white participants becoming more conservative in general; they found other democratic politicians like Hillary Clinton acceptable, just not President Obama.<sup>334</sup> These results led the study to conclude that the Confederate flag unconsciously surfaces racially biased thoughts.<sup>335</sup>

Ehrlinger's first study is distressing when applied to the Giles County jury deliberation room. If a Confederate flag presented for 15 milliseconds (so fast there is no conscious apprehension of the symbol) triggers bias, then the Confederate flag statically hanging on a wall above the table will also trigger racial bias, *a fortiori*.

In Ehrlinger's second study, participants were asked to read a story about a Black man and then form an impression about him.<sup>336</sup> The scientists used the "Donald" story: a classic story used in social science studies, which describes a man named Donald engaging in negative and aggressive behavior.<sup>337</sup> In this study, the participants were shown a picture of Donald, depicted as a young Black male.<sup>338</sup> Half of the participants were exposed to a Confederate flag (a sticker on a desk in the room), and half were not.<sup>339</sup> Participants who had seen the Confederate flag rated Donald more negatively than those who had not seen the Confederate flag.<sup>340</sup> Ehrlinger's findings in the second study "support the argument that exposure to the Confederate flag activates racially biased reasoning, by virtue of the flag's cultural associations with prejudice, and results in negatively biased judgments of Black people."<sup>341</sup> According to Ehrlinger, the Confederate flag did not surface a participant's personal racism, but made "culturally associated prejudice" more accessible in the participant's mind, resulting in more negative judgments about Black subjects.<sup>342</sup> In summarizing the two studies, Ehrlinger concludes "our studies show that, whether or not the Confederate flag includes other nonracist meanings, exposure to this flag evokes responses that are prejudicial."<sup>343</sup> Ehrlinger's study indicates that the Confederate flag in the Giles County jury deliberation room likely triggered unconscious biases and prejudicial responses in jury members.

In a related study, political psychologist Brian Goldman and his colleagues studied 194 participants in an Atlanta suburb to determine what impact the Confederate flag has on social dominance orientation, or the tendency to view members of an out-group as inferior and/or with prejudice.<sup>344</sup> Goldman and his colleagues found that the Confederate flag made conservatives more apt to disavow principles of equality

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334. *Id.* at 139.

335. *Id.* at 137.

336. *Id.* at 141-42.

337. *Id.* at 142.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 143.

342. *Id.*

343. *Id.* at 144.

344. Brian M. Goldman et al., *Stimulating a Response: Does Exposure to the Confederate Flag Impact People's Attitudes Regarding Social Dominance Orientation, Ethnocultural Empathy, and their Political Beliefs?*, 11(2) J. of Pub. and Pro. Socio. 2, 5 (2019).

and empathy whereas liberals, when exposed to the Confederate flag, were more likely to embrace principles of equality and empathy.<sup>345</sup> The Goldman data is distressing for demographics in rural Tennessee Counties, like Giles County, where 74% of the citizens are conservative Republicans, with only 25% identifying as liberal Democrats.<sup>346</sup> The presence of the Confederate flag might raise principles of equality and justice for the minority of Democrat jurors, but it would prime Republican jurors to disavow these concepts.

Other studies have shown that the content of flags matters. In contrast to the Confederate flag, which triggers bias, Professor David A. Butz and his colleagues found the presence of the American flag activates principles of egalitarianism and equality.<sup>347</sup> Respondents in Butz's study "responded more quickly to equality-related words following a subliminally presented U.S. flag compared to a subliminally presented Italian flag."<sup>348</sup> Exposure to the U.S. flag also reduced negative feelings toward members of an out-group, in this case, Muslims.<sup>349</sup> Thus, the U.S. flag appeared to activate concepts of egalitarianism, encouraging observers to believe more strongly in anti-discrimination and inclusivity.<sup>350</sup> The U.S. flag appears to be a visual rhetoric device that inculcates an inclusive type of nationalism.<sup>351</sup> Based on the values the U.S. flag surfaces versus the biases that the Confederate flag surfaces, there is no question that the U.S. flag is a more appropriate choice for a jury deliberation room or courtroom.

#### 4. Sociology and the Confederate Flag

Sociological studies provide another data point for how Confederate visual rhetoric negatively impacts citizens who must see it in public spaces. In 2020, sociologist

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345. *Id.* at 16. Goldman and his colleagues also found that people who held positive attitudes about Confederate symbols, people who would like to maintain and preserve them, tended to believe that unequal social outcomes were fair and just, the product of a meritocratic system. In other words, conservatives do not believe that external factors, like race and racism, play a major role in social outcomes. *Id.* at 19. Another political psychology study worth footnoting analyzed gender differences in how people evaluate the Confederate flag in conjunction with explicit invocations of racism. Professor Vincent Hutchings and his colleagues asked study respondents to consider arguments about the Confederate battle flag appearing on a state flag. Vincent L. Hutchings et al., *The Impact of Explicit Racial Cues on Gender Differences in Support of Confederate Symbols and Partisanship*, 72(4) *J. of Pol.* 1175, 1175 (2010). When the racial aspects of the confederate flag controversy were made explicit, support for the confederate flag declined among white women, but not white men. *Id.* at 1175, 1185. Hutchings and his colleagues concluded that white women held more negative attitudes about old fashioned racism (racism that is overt and explicit) than white men.

346. Giles County, Wikipedia, [https://en.wikipedia.org/wiki/Giles\\_County,\\_Tennessee](https://en.wikipedia.org/wiki/Giles_County,_Tennessee) (last visited Nov. 23, 2023).

347. David A. Butz et al., *Liberty and Justice for All? Implications of Exposure to the U.S. Flag for Intergroup Relations*, 33(3) *Personality and Soc. Psych. Bulletin* 396, 400 (2007).

348. *Id.* at 400.

349. *Id.* at 396.

350. *Id.* at 405.

351. The U.S. flag is not *politically* neutral, however. See Nathan P. Kalmoe & Kimberly Gross, *Cueing Patriotism, Prejudice, and Partisanship in the Age of Obama: Experimental Tests of U.S. Flag Imagery Effects in Presidential Elections*, 37(6) *Pol. Psych.* 883 (2016) (explaining that in political visual rhetoric, the U.S. flag benefits Republicans more than Democrats because the U.S. flag reinforces values of patriotism and intergroup prejudice, which are more affiliated with Republican as opposed to Democratic affiliation.)

Lucy Britt and her colleagues collected survey responses to conclude that “state protection of Confederate monuments leads to a diminished sense of belonging among Blacks, leaving whites unaffected.”<sup>352</sup> Britt et al. note, “Belonging is often inherently spatial, with demarcations of who does and does not belong within the landscape.”<sup>353</sup> Whereas Confederate symbols threaten Black people’s sense of belonging, whites generally have a positive attitude toward these symbols.<sup>354</sup>

The more a white person believes that inequality between Black and white people is simply a result of natural, meritocratic processes (as opposed to racism embedded in institutions), the more that person will perceive Confederate statues as being connected to history and heritage, as opposed to racial animus.<sup>355</sup> Professor Britt refers to this concept as “racial resentment,” which refers to ideas, commonly held by whites, that Black people “lack civic virtue . . . [and] do not believe in working hard their way up the ladder, or that succeeding in America is simply about individual initiative.”<sup>356</sup>

Expanding upon Britt’s work, Confederate monuments operate as a kind of visual rhetoric tautology. This tautology claims that there is no structural racial inequality in society that results from racism. Any racial inequality results from natural differences or moral or civic deficits in Black people. Because there is no such thing as structural racism, therefore, a Confederate monument conveys no message of racial inequality. Thus, Confederate monuments are not racist. The tautology omits centuries of enslavement, beginning with the Middle Passage and ending with Emancipation, the Black Codes, Jim Crow, thousands of lynchings, and the violent opposition to the civil rights movement.

Although Professor Britt’s study focused on Confederate monuments, it equally applies to the Confederate imagery decorating the Giles County jury deliberation room, where a Black jury member’s sense of belonging would be diminished. Further, as the Gilbert court noted, it would be untenable to place the burden on a juror to object to the room: “The stigma that attends racial bias may make it difficult for a juror to report [racially inappropriate information] during the course of juror deliberations.”<sup>357</sup>

### III. THE TENNESSEE HERITAGE PROTECTION ACT

Thus far, this article has discussed the visual aspects of Confederate memorabilia, the white supremacist messages communicated by these visual elements, and the prominent placement of Confederate imagery in the public sphere. This article now turns to the Tennessee Heritage Protection Act (THPA), a statute designed to

352. Lucy Britt et al., *Meanings and Impacts of Confederate Monuments in the U.S. South*, 17(1) *Du Bois Rev.* 105, 105 (2020).

353. *Id.* at 115.

354. *Id.* at 111 (reporting that only 15% of surveyed whites thought that confederate monuments reflected racial injustice).

355. *Id.* at 111, 120.

356. *Id.* at 108.

357. *Gilbert*, 2021 WL 5755018, at \*19 (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868-89 (2017)).



preserve and protect Confederate visual imagery. As will be detailed below, the THPA prevents local communities from exercising control over Confederate monuments in their public spaces. Confederate monuments are toxic visual symbols that perpetuate white supremacy in a harmful way. In response, several Tennessee communities have tried to either remove or reframe these symbols. However, pro-Confederate groups and politicians passed the THPA to stymie these efforts, continually amending the statute to further restrict community control. There are, as explained below, some potential legal solutions to the quagmire.

The THPA provides that “no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered.”<sup>358</sup> A public organization that decides to remove a memorial must submit a written petition with supporting documents to the Tennessee Monuments and Memorials Commission<sup>359</sup> and must further establish, “by clear and convincing evidence” that there is a “material or substantial need for a waiver.”<sup>360</sup> Thus, the relics in the jury deliberation room must stay in place until the commission decides on the waiver.

#### A. *The Toxic Story that Confederate Monuments Tell*

To understand the contested landscape involving Confederate monuments, we have to understand how this type of rhetoric works. Confederate monuments reify white supremacy in a harmful and embodied way. Narrative theory explains the mythical toxicity set deep within Confederate imagery. Confederate monuments and Confederate flags, when allowed to stand tall, amplify mythic stories that allow racism and oppression to remain grounded in the community. Lost Cause visual rhetoric constructs durable heroes for the conservative white community to valorize. Confederate monuments and the Confederate flag (as explained above)<sup>361</sup> are cognitive shortcuts for what Joseph Campbell refers to as the *monomyth*, a near-universal narrative arc about a hero.<sup>362</sup> The monomyth begins with the hero’s “separation from the world, a penetration to some source of power, and a life-enhancing return.”<sup>363</sup> Every major story, from Moses to Buddha, to Luke Skywalker employs this basic structure. For the Confederate Lost Cause myth, the hero goes off to war and, despite losing the war, he brings back magic and transformation for old-line Southerners.

When we think about Confederate heroes like Nathan Bedford Forrest, Robert E. Lee, or Stonewall Jackson, it is helpful to note that Joseph Campbell described the

358. Tenn. Code Ann. §4-1-412(B)(1).

359. Before May 2023, petitions were submitted to the Tennessee Historic Commission. Now, there is a special Monuments and Memorials Commission that hears these petitions. Tenn. Code Ann. §4-1-412(J)(1).

360. Tenn. Code Ann. §4-1-412(C).

361. See *supra* notes 312-329 and surrounding text. Because of their association with war and battle, flags are associated with “motifs of journey, quest, liminality, magical protection, and heroic return.” Shanafelt, *supra* note 312, at 15.

362. See generally Joseph Campbell, *Hero With a Thousand Faces* 58 (Kindle Ed. 2020).

363. *Id.* at 61.

“composite hero of the monomyth [as] a personage of exceptional gifts . . . Frequently [the hero] is honored by his society, frequently unrecognized or disdained.”<sup>364</sup> After the hero completes his adventure, he “brings back the means for the regeneration of his society as a whole.”<sup>365</sup> Thus, for the heroic Confederate soldier mounted on a pedestal or represented by the Confederate battle flag, the “life-enhancing return” means a return to the ways of slavery and racial violence. Instead of slavery per se, the old ways were reborn as the convict labor system, KKK violence, lynching, and legal disenfranchisement. This is the “life-enhancing return” that the Confederate flag and Confederate monuments celebrate.

*B. The Battle in Memphis over the Nathan Bedford Forrest Statue*

The battle over Memphis’ Nathan Bedford Forrest statue aptly illustrates the incessant chess game between local citizens and statewide pro-Confederate actors when a local majority decides to take down a Confederate monument. In 2013, before the THPA was enacted, the Memphis City Council voted to change Forrest Park (named after Confederate general and KKK grand wizard Nathan Bedford Forrest) to Health Sciences Park, a reference to the University of Tennessee’s Medical and Pharmaceutical schools situated around the park.<sup>366</sup> The park featured a towering monument to Forrest, which had long been an eyesore to the majority of Memphis citizens.

Forrest, originally from Middle Tennessee, moved to Memphis before the Civil War and amassed great wealth as a slave trader. He then fought in the Civil War to maintain slavery.<sup>367</sup> “If we ain’t fightin’ to keep slavery, then what are we fightin’ for,” Forrest reportedly said.<sup>368</sup> After the Civil War, Congress sanctioned Forrest for war crimes related to the Fort Pillow Massacre, where Confederate troops under Forrest’s command slaughtered Black Union troops with their arms up in surrender.<sup>369</sup> When Forrest was cross-examined about the events at Fort Pillow, he complained that the testimony was erroneous because it relied on “ignorant negroes.”<sup>370</sup> Although Forrest apparently made some call for racial reconciliation in a speech before his death, at the same time, he was operating his farm using the labor of Black convicts, participating in Jim Crow’s notorious convict leasing system.<sup>371</sup>

By depicting Forrest as a soldier mounted on horseback, high on a pedestal, the statue symbolized terroristic white supremacy. Historically, public monuments were meant to “perpetuate the memory of illustrious men and to give [the public] models

364. *Id.*

365. *Id.*

366. Cox, No Common Ground, *supra* note 74, at 155-57. Memphis also renamed Jefferson Davis Park to Mississippi River Park and Confederate Park to Memphis Park. Doug Stanglin, *Memphis changes names of 3 Confederate-themed parks*, USA Today (Feb. 6, 2013), <https://www.usatoday.com/story/news/nation/2013/02/06/memphis-parks-confederate-ku-klux-klan/1895549/>.

367. Segura, *supra* note 128.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

of virtue.”<sup>372</sup> The statue depicted Forrest on his horse, which is the “most prestigious form of public sculpture” for honoring a man as a hero.<sup>373</sup> There is most certainly a direct relationship between “equestrian monuments and white racial dominance rooted in violence.”<sup>374</sup> As art historian Maurie McInnis explains, equestrian monuments such as the Robert E. Lee and George Washington monuments in Richmond, Virginia referenced a “longstanding representational trope of white overseers on horseback above the enslaved working in the fields.”<sup>375</sup> Specifically, the equestrian confederate statue called up the terror of the plantation, where the overseer constantly surveilled the labor of the enslaved from above, ready to impose painful corporal punishment for falling behind.<sup>376</sup>

By 2013, the Forrest statute had become an odious symbol to the majority of Memphians forced to look upon it. After the park was renamed, pro-Confederate organizations, particularly the Sons of Confederate Victims (S.C.V.), were incensed at the possibility that the statute might be removed. Thus, in 2013, Tennessee legislators Lee Millar and Mike Beck, both of whom are also S.C.V. members, introduced the first incarnation of the THPA and shepherded its passage.<sup>377</sup> The S.C.V. blog stated that the 2013 THPA “will assist in the Memphis issue with the Nathan Bedford Forrest Park anti-renaming campaign, and will clearly hereafter protect the Forrest Statue, as well as the Jefferson Davis Statute [sic], and the S.C.V. Confederate cannons in Confederate Park.”<sup>378</sup> The blog post then lauded the statute as “one of the greatest documents in modern history for the protection and preservation of this state’s and nation’s military history and heritage.”<sup>379</sup> The THPA is an explicitly pro-Confederate statute.

Despite the passage of the 2013 THPA, Memphis citizens, led by Memphis attorney and City Councilman Van D. Turner, Jr., found a loophole. If a Confederate memorial was situated on private, as opposed to public, property, then the THPA could not apply.<sup>380</sup> Accordingly, the Memphis City Council voted to remove both

372. Malcolm Baker, *What Place for public statues in the history of art?*, Apollo The International Art Magazine (July 8, 2020) <https://www.apollo-magazine.com/public-statues-history-of-art-sculpture/> (internal sources omitted); see also Marianne Doezema & June Hargrove, *The Public Monument and its Audience* 5 (1977) (explaining the etymology of monument derives from the Latin word *monere*, to remind). Monuments are sculptures, a classical form of art that became entangled with white supremacist notions about whiteness and blackness. See Savage, *supra* note 170, at 12. The white subject within a classical sculpture became idealized as “classical whiteness” for which the Black body became its antithesis. See *id.*

373. Savage, *supra* note 170, at 133.

374. Maurie D. McInnis, *To Strike Terror: Equestrian Monuments and Southern Power in The Civil War in Art and Memory* 127 (Kirk Savage ed. 2016).

375. *Id.* at 134-35.

376. Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom 166-67* (2013).

377. *Tennessee Passes Heritage Protection Act*, Southern Heritage News and Views (May 11, 2013), available at [shnv.blogspot.com/2013/05/tennessee-passes-heritage-protection-act.html](http://shnv.blogspot.com/2013/05/tennessee-passes-heritage-protection-act.html).

378. *Id.*

379. *Id.*

380. Tennessee Heritage Protection Act of 2016, Tenn. Code Ann. § 4-1-412 (West) (Effective May 11, 2023 to present); Tennessee Historical Commission, *Procedures for Contested Case Hearings Pursuant to the Tennessee Heritage Protection Act*, TN.GOV., [https://www.tn.gov/content/dam/tn/historicalcommission/outreach/tn-heritage-protection-act/thc\\_thpa\\_contested-case-hearing-procedures.pdf](https://www.tn.gov/content/dam/tn/historicalcommission/outreach/tn-heritage-protection-act/thc_thpa_contested-case-hearing-procedures.pdf).

the Forrest statue and the remains of Forrest and his wife (who were moved to the park from their original gravesite).<sup>381</sup> Using the loophole, on December 17, 2017, Memphis sold the public land to a private non-profit organization and then removed the Forrest statue and the Forrests' remains.<sup>382</sup>

Like a game of whack-a-mole, however, the Tennessee legislature revised the statute to state that “no public property that contains a memorial may be sold, transferred, or otherwise disposed.”<sup>383</sup> This language now explicitly prevents municipalities from selling public land to a private entity so that Confederate statues may be disposed of, outside the purview of the THPA. The legislative game continued again in response to another Nathan Bedford Forrest controversy.

In 2020, Republican Governor Bill Lee decided that, perhaps, the Nathan Bedford Forrest bust should be removed from the Tennessee State Capitol building.<sup>384</sup> During this period, the THPA gave the Tennessee Historic Commission authority over petitions to remove memorials.<sup>385</sup> The governor appoints most of the members to the Tennessee Historic Commission,<sup>386</sup> which provides the governor with some control. On March 9, 2021, the Tennessee Historical Commission voted twenty-five to one to remove a bust of Nathan Bedford Forrest from the Tennessee Capitol grounds.<sup>387</sup> In response, pro-confederate members of the Tennessee legislature, perturbed by Governor Bill Lee's desire to remove the bust from the capitol, changed the THPA to create a new bureaucracy for monuments, the Tennessee Monuments Commission, to exist separately from the Tennessee Historic Commission.<sup>388</sup> The Tennessee Monuments Commission consists of nine members, three members appointed by the Governor, three appointed by the speaker of the Senate, and three members appointed by the speaker of the House of Representatives.<sup>389</sup> Because of Governor Bill Lee's leadership on the Forrest bust in the State Capitol building, the Tennessee legislature diluted his authority over Confederate monument determinations.

381. Segura, *supra* note 128.

382. *Nathan Bedford Forrest Monument*, Wikipedia, [https://en.wikipedia.org/wiki/Nathan\\_Bedford\\_Forrest\\_Monument\\_\(Memphis,\\_Tennessee\)#:~:text=It%20was%20removed%20on%20December,National%20Headquarters%20in%20Columbia%2C%20Tennessee](https://en.wikipedia.org/wiki/Nathan_Bedford_Forrest_Monument_(Memphis,_Tennessee)#:~:text=It%20was%20removed%20on%20December,National%20Headquarters%20in%20Columbia%2C%20Tennessee) (confirming removal date of December 20, 2017); Gerhardt, *supra* note 171, at 38; Behzadi, *supra* note 25, at 23; *see also*, Bill Haltom, *Where in the World is Nathan Bedford Forrest*, 54 *Tenn. B.J.* 34 (April 2018); Van D. Turner, Jr., *Memphis Greenspace Leadership*, <http://memphisgreenspace.org/leadership.php>.

383. *Tenn. Code Ann.* §4-1-412(b)(2) (effective from May 21, 2018 until May 10, 2023). Note that May 21, 2018 was just a few months after December 20, 2017.

384. Snider, *supra* note 19, at 863; Natalie Allison, *Nathan Bedford Forrest bust removal receives final approval from Tennessee Historical Commission*, *The Tennessean* (March 9, 2021), <https://www.tennessean.com/story/news/politics/2021/03/09/nathan-bedford-forrest-bust-tn-commission-gives-final-approval-removal-capitol/6764751002/>.

385. *See Tenn. Code Ann.* §4-1-412 (effective from May 21, 2018 to May 10, 2023).

386. *Tenn. Code Ann.* §4-11-102.

387. Allison, *supra* note 384.

388. *Tenn. Code Ann.* §4-1-412(A)(1) (effective May 11, 2023).

389. *Tenn. Code Ann.* §4-1-412(J)(3)(a).

*C. The Struggle Over the Williamson County Seal and the Franklin Square Monument*

The THPA's stranglehold over local control of visual symbology in public space is further illustrated by two controversies in Williamson County, Tennessee. The first involves an effort to remove Confederate imagery, and the second an effort to add new visual imagery to provide a counter-narrative. In both instances, the THPA interfered with community control over public spaces. These two examples illustrate a consistent pattern of vigorous pro-Confederate opposition to any type of visual rhetoric that might contradict the Lost Cause narrative. It is not enough that monuments have to stay standing against the wishes of local communities; pro-Confederates also want to limit any competing rhetoric that would challenge or criticize their version of reality.

The first Williamson County example involves the official seal of Williamson County, also known as "the great seal."<sup>390</sup> Williamson County is just south of Davidson County (home of Nashville). Franklin, Tennessee is its County Seat. Williamson, though just one county north of Giles County (Pulaski), is less rural and has long functioned as a Nashville suburb. The seal, reproduced as Figure 7 in this article, shows a Confederate flag and cannon on one quadrant.<sup>391</sup> The Williamson County website explains that the cannon "symbolizes the rich history in the county."<sup>392</sup> However, the seal itself is not historic. Although the motive is unknown, the seal was created in 1968, just a few months after Dr. Martin Luther King, Jr. was assassinated in Memphis.<sup>393</sup> The seal has been in use ever since. The seal appears inside the Williamson County Courthouse and all official county buildings. When Williamson County litigants walk through the courthouse, they walk over the seal.<sup>394</sup>

In 2020, the Williamson County community came together, formed a task force, and democratically decided to revamp the seal to remove the Confederate flag from it.<sup>395</sup> However, a pro-Confederate organization from an adjoining county used the THPA to intervene and successfully prevented the citizens from exercising control over their own public symbols. At the date of this Article's writing, the Confederate flag remains on the seal.

After the Williamson County's task force's recommendation, county officials began the process to revamp the seal under the THPA. They submitted a petition to the Tennessee Historical Commission requesting a waiver to remove the seal; 122 citizens of Williamson County wrote in favor of removing the seal.<sup>396</sup> Only eight

390. Williamson County Seal, <https://www.williamsoncounty-tn.gov/571/Williamson-County-Seal>.

391. See *supra* Figure 8.

392. *Williamson County Seal*, <https://www.williamsoncounty-tn.gov/571/Williamson-County-Seal>.

393. Anita Exum, *More than 100 wrote to state over Williamson County seal. Here's what they said.*, *The Tennessean* (March 16, 2022), <https://www.tennessean.com/story/news/local/williamson/2022/03/16/williamson-county-seal-public-comments-tennessee-historical-commission/6980289001/>. [Hereinafter, Exum, *More than 100*].

394. Exum, *Fate of Williamson County Seal again on hold*, *supra* note 19.

395. Snider, *supra* note 19, at 885.

396. Exum, *More than 100*, *supra* note 393.

citizens wrote in favor of keeping it.<sup>397</sup> One citizen, a recent transplant to the County, wrote:

We are a Black family with Black children who will attend public school here in Williamson County . . . Imagine the hurt and betrayal a child would feel once they really took a look at the flag hanging over their head. It's an especially hard feeling to grapple with, and if that trauma can be prevented, it should be.<sup>398</sup>

The Tennessee Historic Commission initially declared that the seal was not a “memorial” within the meaning of the THPA, meaning that it could be removed.<sup>399</sup> However, in May 2022, the Major Nathaniel Cheairs Camp 2138 S.C.V. chapter sued in Maury County Circuit Court to enjoin the removal of the flag from the seal.<sup>400</sup> The THPA gives groups like the S.C.V. and the U.D.C. broadly defined standing to appeal any decision involving a monument or a memorial, as long as the group can demonstrate “aesthetic, architectural, cultural, economic, environmental, or historic” injury.<sup>401</sup> However, in the case of the Williamson County seal, the S.C.V. sued in the incorrect venue: the THPA gives the Davidson County Chancery Court exclusive appellate jurisdiction on Tennessee Historic Commission decisions.<sup>402</sup> After Williamson County filed a motion to dismiss, the S.C.V. refiled in Davidson County. The seal remains emblazoned in all county buildings in Williamson County, pending the S.C.V.’s appeal to the Chancery Court in Davidson County. The Chancellor has heard oral arguments and should soon decide the case, but as of the writing of this Article, there has been no decision.<sup>403</sup> Still, even a decision favoring Williamson County is likely to be appealed to the Tennessee Court of Appeals.

Pro-Confederates have also obstructed community efforts to contextualize long-standing Confederate monuments with new visual elements that tell a counter-story. We can see this conflict in the controversy surrounding a large pedestal Confederate

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397. *Id.*

398. *Id.*

399. Anita Wadhvani, Confederate group seeks to restrain Williamson County from removing flag from county seal, Tennessee Lookout (July 12, 2023), <https://tennesseelookout.com/2023/07/12/confederate-group-seeks-to-restrain-williamson-county-from-removing-flag-from-county-seal/#:~:text=Their%20lawsuit%20alleged%20that%20Williamson,historic%20preservation%20law%2C%20which%20generally.>

400. Lee Rennick, *Sons of Confederacy Continue to Block Williamson County Seal Change*, Williamson County Source (Sept. 29, 2022), <https://williamsonsource.com/sons-of-confederacy-continue-to-block-williamson-county-seal-change/>.

401. Tenn. Code Ann. § 4-1-412(d) (Westlaw through 2023 Reg. Sess. and 1st Extraordinary Sess. of 113th Tenn. Gen. Assemb.).

402. *Id.*; Rennick, *supra* note 400.

403. See, Kirsten Fiscus, *Fate of Confederate Flag on Williamson County Seal Soon To Be Decided By Judge*, The Tennessean (July 14, 2023, 8:15 AM), <https://www.tennessean.com/story/news/local/williamson/2023/07/14/confederate-flag-williamson-county-seal-tennessee-historical-commission-preservation-act/70412832007/>. One can check the status of this case within the Davidson County Chancery Court at their website, although access requires payment of a quarterly fee. See *Chancery Information Access*, Davidson County Chancery Court Clerk & Master, <https://chanceryclerkandmaster.nashville.gov/cases/chancery-information-access-cial/>.



monument standing in the Franklin Tennessee town square directly outside the Williamson County Courthouse.<sup>404</sup>

In 2019, instead of advocating to remove the monument, citizens in Franklin came together to tell a more inclusive and complete story about the Civil War, a narrative that goes beyond standard Lost Cause narratives.<sup>405</sup> The community project, known as “The Fuller Story” included a plan for placing markers around Franklin’s Confederate monument to explain the Black experience before and after the battle of Franklin, and a plan for erecting a bronze statue of a Black Union soldier.<sup>406</sup> As the plan developed at a Franklin City board meeting, a lawyer for the U.D.C. came forward and argued that the U.D.C. owned the entirety of the Franklin public square and that the City of Franklin had no authority to erect any signs or statues on the square.<sup>407</sup> The Mayor and Franklin City Aldermen filed an action to quiet title and determine ownership of Franklin Square.<sup>408</sup> After court minutes from 1899 indicated that the U.D.C. was to be given ownership of the monument and the land underneath its pedestal, but that the rest of the square belonged to Franklin, the U.D.C. and Franklin settled the dispute.<sup>409</sup> The Fuller Story project was finally able to erect counter-story plaques as well as a statue of a Black Union soldier in Franklin Square.<sup>410</sup> Further, in Pulaski, another Black Union soldier statue was unveiled on public property leading up to Juneteenth in 2023.<sup>411</sup>

The two Williamson County conflicts illustrate a consistent pattern in Tennessee: pro-Confederates do not appreciate the presence of counter-narratives that challenge Lost Cause stories. This historic animosity toward counter-narratives that center Black interpretations of the Civil War can be viewed as the impetus behind the ever-evolving THPA. For instance, in 1999, before the THPA was enacted, the Black Caucus of the Tennessee legislature placed a granite marker on Capitol grounds memorializing the victims of the Middle Passage.<sup>412</sup> The Middle Passage marker is about fifteen feet away from the Sam Davis statue on the Tennessee Capitol

404. Williamson Source, *Lawsuit Settled Between UDC & City of Franklin Regarding Monument*, Williamson Source (July 23, 2020), <https://williamsonsource.com/lawsuit-settled-between-udc-and-city-of-franklin-regarding-monument/>[hereinafter, Williamson Source, *Lawsuit Settled*].

405. *Id.*; Williamson Source, *Battle of Franklin Trust To Unveil “Fuller Story” Markers*, Williamson Source (October 11, 2019), <https://williamsonsource.com/battle-of-franklin-trust-to-unveil-fuller-story-markers/>.

406. Williamson Source, *Lawsuit Settled*, *supra* note 404.

407. *Id.*

408. *Id.*

409. *Id.* It appears that the U.D.C.’s property rights functioned more as a matter of adverse possession. There was no deed and no record of the U.D.C. paying property taxes for the public square.

410. Williamson, *supra* note 404; Brinley Hineman, *Statue Stands on Franklin Square Honoring Enslaved Troops Who Served in Civil War*, The Tennessean (October 23, 2021, 3:47 PM), <https://www.tennessean.com/story/news/local/williamson/franklin/2021/10/23/franklin-tennessee-new-statue-enslaved-us-colored-troops/6033899001/>.

411. Kelly Puente, *In the Birthplace of the KKK, She Spent \$82,000 To Erect Statue of Black Civil War Soldier*, The Tennessean (June 18, 2023, 5:50 PM), <https://www.tennessean.com/story/news/2023/06/18/city-of-pulaski-unveils-us-colored-troops-monument-for-juneteenth/70331156007/>.

412. Harcourt, *The Making of Sam Davis*, *supra* note 113, at 30.

grounds.<sup>413</sup> A local S.C.V. member remarked that it was “a foolish little sophomoric prank” to put the marker there.<sup>414</sup> In the mid-2000s, at a Confederate Memorial Day event at the Sam Davis statue on the Capitol grounds, S.C.V. members threw a tarp over the Middle Passage marker.<sup>415</sup>

Moving to the present, in 2023, the enduring battle over Civil War narratives and counter-narratives prompted another effort to amend the THPA, this time to ban efforts to “obscure from view, rename, dishonor, disparage, or reinterpret with competing signage, wording symbols, objects, or other types of means of communication” concerning a memorial.<sup>416</sup> This amendment would have also fined local communities \$10,000 per day that the THPA was violated.<sup>417</sup> Currently, localities that violate the THPA lose access to new community development grant funding for five years.<sup>418</sup> Although this 2023 THPA bill failed, its introduction still illustrates how far pro-confederates are willing to go to enforce their version of visual reality.<sup>419</sup>

So much political and legal energy has gone into the THPA, and for what purpose? To prevent local communities from exercising control over their own visual spaces and to coerce a visual rhetoric that reinforces and reifies the Lost Cause. The onerous amount of legal paperwork, hearings, and appeals that must happen before a Confederate monument can be removed is a gigantic drag on efficiency.<sup>420</sup> In addition to feverishly writing legislation to maintain the symbols of the Confederacy, this year, the legislature also moved to expel Justin Jones and Justin Pearson from the legislature on account of their protests concerning mass gun violence.<sup>421</sup> There is no shortage of productive projects that the Tennessee legislature could devote their time and resources to, yet somehow protecting the visibility of Confederate monuments remains a priority.

413. *Id.*

414. *Id.*

415. *Id.*

416. S.B. 1099, 113th Gen. Assemb. 1st Reg. Sess. (Tenn. 2023).

417. *Id.*

418. Tenn. Code Ann. § 4-1-412(F)(5) (Westlaw though 2023 Reg. Sess. and 1st Extraordinary Sess. of 113th Tenn. Gen. Assemb.).

419. It is likely that this bill was inspired, in part, by what happened to Birmingham’s Confederate monument. When the mayor of Birmingham put up plywood scaffolding around the city’s Confederate monument, the Alabama attorney general sued under Alabama’s historic preservation act. *State v. City of Birmingham*, 299 So. 3d 220, 222-24 (Ala. 2019); Thompson, *supra* note 5, at 137; Roger C. Hartley, *The “Liberty of Silence” Challenging State Legislation That Strips Municipalities of Authority to Remove Confederate Monuments*, 16 FIU L. Rev. 583, 586 (2022). Although the Alabama trial court found that the City of Birmingham had a First Amendment right to cover the monument, that decision was reversed by the Alabama Supreme Court. *City of Birmingham*, 299 So. 3d at 227-29, 234-35. The Alabama Supreme Court, however, held that the language of Alabama’s Heritage Protection Act only authorized a one-time fine of \$25,000. *Id.* at 237. Knowing that, the City of Birmingham elected to just pay the fine and take down the statue.

420. See Segura, *supra* note 128 (describing the “byzantine process” required to remove monuments).

421. Kimberlee Kruesi & Jonathan Mattise, *Tennessee’s House expels 2 of 3 Democrats over guns protest*, APnews.com (April 7, 2023), <https://apnews.com/article/tennessee-lawmakers-expulsion-d3f40559c56a051ecc49e416a7b5dade>.

### Enabling Community Control over Artifacts in Public Spaces

The situation in Tennessee is not unique. Seven other states have enacted “statue statutes” aimed at protecting historical monuments.<sup>422</sup> In response, multiple legal scholars have recently written about the heritage and monuments issue of the statue statutes.<sup>423</sup> These authors have thoroughly described the contours of the issue with many good problem-solving theories. There are three major theories that could enable local communities to rid their public spaces of offensive Confederate rhetoric—public nuisance theory; home rule; and badges and incidents of slavery under the Thirteenth Amendment. As set forth below, a Thirteenth Amendment approach has the most potential for success. Beyond U.S.-centered legal theories, the German people’s reckoning with their Nazi past after WWII offers another path.<sup>424</sup> If Congress were to declare Confederate monuments on public land to be a badge and incident of slavery, citizens could remove these traumatic visual markers. Communities might begin an authentic healing process in public spaces free from noxious narratives about the Civil War, race, and racism.

#### 1. Common Law Nuisance

Because of the traumatic harm that Confederate monuments continuously cause local citizens who must view them, Professor Emily Behzadi argues the common law doctrine of nuisance authorizes local communities to take down Confederate monuments.<sup>425</sup> This argument has much merit, especially in light of the research discussed above, that supports the inference that seeing immovable Confederate monuments every day likely causes Black Americans to suffer palpable and deleterious health outcomes.<sup>426</sup> These monuments replicate a visual terror that can be traced back to slavery, a reply of the overseer mounted on horseback, surveilling and maiming. Because the trauma is so deeply embedded, when members of Black communities engage with visual rhetoric celebrating antebellum times, intergenerational trauma is re-enacted, year after year. When minoritized and marginalized people look at these monuments and flags, they see lies about the purpose of the Civil War, continuously enforced valorization for men who fought to enslave, and plain old gaslighting in the repeated argument that Confederate symbols have nothing to do with race. For Black people living near these symbols, their sense of belonging in the community is

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422. Zachary Bray, *We Are All Growing Old Together: Making Sense of America’s Monument-Protection Laws*, 61 Wm. & Mary L. Rev. 1259, 1290, n. 148 (2020) (citing “Ala. Code §§ 41-9-230 to -231; Ga. Code Ann. § 50-3-1 (2019); Ky. Rev. Stat. Ann. §§ 171.780-.788 (West 2019); Miss. Code Ann. § 55-15-81 (2019); N.C. Gen. Stat. § 100-2.1 (2018); S.C. Code Ann. § 10-1-165 (2019); Tenn. Code Ann. § 4-1-412 (2019); Va. Code Ann. § 15.2-1812 (2019).”).

423. See generally *id.*; Hartley, *supra* note 419; Snider, *supra* note 19; Gerhardt, *supra* note 171; Behzadi, *supra* note 25; Tsesis, *supra* note 312; Kristi W. Arth, *The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, 56 Gonz. L. Rev. 1 (2020); Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 Buff. L. Rev. 1393 (2020); W. Davis Riddle, *How Devolved Is Too Devolved?: A Comparative Analysis Examining the Allocation of Power Between State and Local Government Through the Lens of the Confederate Monument Controversy*, 53 Ga. L. Rev. 367 (2018).

424. See *infra* Section III., subsection D. 4.

425. See Behzadi, *supra* note 25, at 4.

426. See *supra* notes 94-111 and surrounding text.

shattered.<sup>427</sup> If these objects are causing physical and mental impacts then they are a public nuisance. The major weakness to this argument, however, is that a common law theory of nuisance will not trump a state-enacted statute designed to preserve Confederate monuments unless the statute has a public safety exception.<sup>428</sup> For a state like Tennessee, a public nuisance theory will not work.

## 2. Home Rule

Home rule is another theory that supports local control over monuments in public spaces. Professor Richard Briffault places the monuments and heritage issue as part of a larger preemption pattern.<sup>429</sup> Recently, conservative state legislatures have enacted legislation, on a whole host of issues, that preempt left-leaning local governments from making decisions that affect their communities.<sup>430</sup> In addition to the “statue statutes”, state legislatures have banned municipalities from creating a minimum wage, enacting LGBTQIA civil rights protections, providing sanctuary for undocumented migrants and immigrants, and engaging in other culture-war topics.<sup>431</sup> Like Tennessee’s Heritage Protection Act, many of these laws are punitive, with fines and sometimes personal liability for officials who violate these statutes.<sup>432</sup>

Briffault explains that there is not much that can be done to bring back democratic power to local governments operating under these state statutes. Localities, for example, cannot argue that forced maintenance of Confederate statues violates their First Amendment rights because local governments, as creations of the state, have no First Amendment rights.<sup>433</sup> Briffault does theorize that a more robust conception of state constitutional “Home Rule” doctrine could put power back in the hands of local communities.<sup>434</sup> That doctrine, however, would depend on the interpretation of a particular state’s constitution. While California and Ohio have had success with a home rule theory, it is not clear that other state constitutions would be interpreted in the same way.<sup>435</sup>

With these laws that are openly hostile to left-leaning cities, conservatives are diminishing the power of local control and local governance. Ironically, local governance has been a core ideal of the federalism principles that conservatives once embraced.<sup>436</sup> The argument for local control is that localities are in the best position

427. See *supra* notes 352-56 and surrounding text.

428. North Carolina’s preservation statute does have such an exception, which allowed local communities in North Carolina to take down their monuments. See Behzadi, *supra* note 25, at 18-19.

429. Richard Briffault, *The Challenge of the New Preemption*, 70 *Stan. L. Rev.* 1995, 2002 (2018).

430. *Id.* at 2002-2008.

431. *Id.* at 1997, 1999-2002.

432. *Id.* at 2002-03.

433. *Id.* at 2008-2010.

434. *Id.* at 2011-12.

435. *Id.* at 2013-2014.

436. *Id.* at 2017-2018; see also Haltom, *supra* note 382 (“I believe in the conservative concept of the power of local government. Citizens of Memphis, or Nashville or Knoxville or Chattanooga or Pulaski or Milan should be able to make their own decisions about issues such as parks and monuments without lawmakers or bureaucrats in Washington or Nashville telling them what to do.”)

to experiment and find solutions to problems afflicting their community.<sup>437</sup> And yet, especially with Confederate monuments, local governance is denied in favor of a bureaucratic process requiring a special commission, written petitions, hearings, and a direct right of appeal to Davidson County Chancery Court.<sup>438</sup>

### 3. Badges and Incidents of Slavery under the Thirteenth Amendment

Out of all these legal theories, the Thirteenth Amendment/Badge of Slavery argument might be the most successful, but it would take an act of Congress to declare that all Confederate monuments on state-owned property are badges of slavery.<sup>439</sup> Such a statute is not out of the realm of possibility. Congress did recently act to remove all “names, symbols, displays, monuments, and paraphernalia that honor or commemorate the Confederate States of America (commonly referred to as the ‘Confederacy’) from all [military bases and other Department of Defense assets].”<sup>440</sup> Thus, military bases such as Fort Bragg and Fort Payne are now being renamed for United States heroes, not Confederate heroes.<sup>441</sup>

Most Southern states have heritage protection statutes that stringently protect their towering Confederate monuments (think Stone Mountain, Georgia),<sup>442</sup> but demographic changes are bringing together a growing mass of local citizens who want to remove the imagery from the local landscape. Some states, like Virginia, have developed the numbers necessary to pass legislation to take down Confederate statues.<sup>443</sup> Georgia could possibly be next. However, other states, like Tennessee, are still extremely lopsided, with the majority of voters hailing from hyper-conservative rural areas, but with a growing number of liberal voters in its urban centers.<sup>444</sup> The risk

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437. *Id.* at 2020.

438. See *supra* note 14 and surrounding text.

439. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (“Congress has the power under the Thirteenth Amendment to rationally determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”). For a more fleshed-out exposition of this argument See Tthesis, *supra* note 311.

440. 10 U.S.C.A. § 113 (2023); see also Brent Staples, *When America Joined the Cult of the Confederacy*, N.Y. Times (August 10, 2022), <https://www.nytimes.com/2022/08/10/opinion/military-bases-renaming-commission.html>.

441. See Staples, *supra* note 440.

442. Even though Tennessee’s heritage protection act has a waiver process, the standard is incredibly high (clear and convincing evidence), and waivers are not commonly granted. In 2017, when the City of Memphis applied for a waiver to remove the Nathan Bedford Forrest Statue, the Tennessee Historic Commission denied the request on account that the statute was a historic landmark. See April Thompson, *Commission denies City of Memphis waiver to remove Nathan Bedford Forrest Statue*, WREG (Oct. 13, 2017), <https://wreg.com/news/tennessee-historical-commission-denies-city-of-memphis-waiver-to-remove-nathan-bedford-forrest-statue/>.

443. See *Taylor v. Northam*, 862 S.E.2d 458, 462 (2021) (Virginia’s governor (a Democrat) and the Virginia legislature acted together to successfully remove the Robert E. Lee statute in Richmond).

444. Suzanne Mettler & Trevor Brown, *The Growing Rural-Urban Political Divide and Democratic Vulnerability*, 699(1) *Annals of the Am. Acad. Pol. Sci.* 130 (2022); Ginger Adams Otis, *Tennessee’s Political Divisions Deepen Between State and Its Cities*, Wall St. J. (April 10, 2023), <https://www.wsj.com/articles/tennessees-political-divisions-deepen-between-state-and-its-cities-6ac062e2>.

here is that citizens will resort to self-help to remove or damage the monuments.<sup>445</sup> This has been the case in some instances where Confederate monuments have been repeatedly vandalized, causing a public safety issue (which supports the argument that these monuments are public nuisances).<sup>446</sup>

Thus, as a matter of federal law, given the growing consensus that Confederate monuments have no place on public land, a national movement could lobby Congress to pass a law declaring that any Confederate monument on public land is a badge of slavery and accordingly, violative of the Thirteenth Amendment. Such an effort would enable communities to take down their Confederate statues and hide them away from public view in public spaces.

#### 4. Germany's Reckoning with its Nazi Past after WWII

If the United States had followed Germany's approach after WWII, the country may have healed more thoroughly after the Civil War. It is not too late, however, to follow Germany's footsteps and authentically and truthfully engage with our violent, immoral, and terroristic past, pre-and post-Civil War. In 1945, after World War II, Allied forces issued a directive banning any monument that would "preserve or keep alive the German military tradition, to revive militarism, or to commemorate the Nazi Party."<sup>447</sup> Instead of erecting monuments to vanquished Nazis, Germany erected monuments to Nazism's victims.<sup>448</sup> In her insightful book, Susan Nieman compares Germany's recovery after Nazism and the recovery in the South after the Civil War. Although Germany struggled to come to terms with its Nazi past, it never developed anything like the Lost Cause.<sup>449</sup> There are no monuments to Nazis in Germany.<sup>450</sup> Whereas the federal government occupied the South for eleven years during reconstruction, the Allies occupied Germany for fifty years.<sup>451</sup> Nieman argues the differences between what happened in the South after the Civil War and what happened in Germany after World War II explain why Germany has come to terms with its Nazi past, but the U.S. has not fully recovered (still) from the Civil War.<sup>452</sup>

In contrast to Germany, which has mostly healed from its Nazi past, when Reconstruction was abandoned and after federal troops withdrew, the South went

445. These types of conflicts, waged outside of a legal process, raise public safety and crowd control issues. There has been at least one incident where a protester suffered grievous injury after protesters pulled down a Confederate statue at a protest. See Adriana De Alba, *One Year after a Confederate statue hit Chris Green in Portsmouth, he fights his way back from a traumatic brain injury*, 13 News Now (June 11, 2021), <https://www.13newsnow.com/article/news/local/mycity/portsmouth/one-year-later-chris-greens-wife-shares-update-on-his-recovery-after-a-severe-head-injury/291-4aa203d1-117d-46c6-8fe2-b234959e5b33>. The other risk with self-help is that pro-Confederates will also engage in self-help to protect statues, arriving at protests bearing guns.

446. Cox, *No Common Ground*, *supra* note 74, at 5; See Behzadi, *supra* note 25, at 4.

447. Nieman, *supra* note 208, at 269 (quoting Directive No. 30, Official Gazette of the Control Council for Germany, Nr. 7, May 31, 1946).

448. *Id.* at 271.

449. *Id.* at 33.

450. *Id.* at 85.

451. *Id.* at 269; see also Blight, *supra* note 5, at 87 (Explaining that from the end of the Civil War until 1877, Southerners remained in fervent opposition to Federal troops occupying the states of the former Confederacy).

452. Nieman, *supra* note 208, at 269, 271.



into a state of Jim Crow lawlessness, KKK terror, and legalized disenfranchisement.<sup>453</sup> Reconstruction was never completed; there has been no true healing in the region. The federal government could emulate what was done in Germany and disallow public monuments to the Confederacy, allowing the local democratic process to decide when monuments should come down. This could possibly occur if Congress enacted a statute declaring that Civil War monuments on public land represent a badge and incident of slavery under the Thirteenth Amendment. In doing so, the federal government would be finishing the Reconstruction process that it started, but abandoned, 150 years ago.

#### 5. Laws like the THPA are anti-democratic and should be federally challenged

Democratic principles mandate that where a local community votes to remove the Confederate monuments from public land, they should be able to do so. By obstructing local governance, the THPA and similar statutes operate in an anti-democratic fashion. Sometimes, even when pro-Confederates and local governments jointly agree to remove artifacts, the THPA prevents them from doing so. In relation to the *Martin* and *Gilbert* cases discussed above, the U.D.C. and Giles County are in the process of working together to remove the Confederate memorabilia from the jury deliberation room.<sup>454</sup> They were unable to remove the artifacts immediately, however, because the THPA defines the jury room door decorations, the flag, and the portraits as a “memorial.”<sup>455</sup> The tug-of-war around Tennessee’s Confederate monuments is about controlling what citizens *must see* daily. Citizens should control the narratives they see and don’t see.

### IV. DIVISIVE CONCEPTS—CENSORING VISUAL IMAGERY

Whereas the THPA requires visual symbols to remain in public spaces, Tennessee’s laws regarding “Divisive Concepts” censor visual imagery that highlights the ugliness of racism. For the purposes of this Article, divisive concepts laws are another way that the right has been able to control the visual rhetoric concerning race. In this instance, conservatives are using divisive concepts laws to censor images that truthfully show how, historically, white actors engaged in abusive, violent, and terroristic behavior toward minoritized people, children especially.

Right-wing panic about CRT and divisive concepts was brewing well before these laws were enacted. By way of background, by the time President Obama was elected, a consensus had developed around the concepts of structural racism, institutional racism, and historical racism, ideas contained within widely read books like Ta-Nehisi Coates’s *Between the World and Me* (2017) and Richard Rothstein’s *The Color*

453. W.E.B. Dubois, *Black Reconstruction in America 16299-16463* (Kindle Ed. 2007).

454. Timms, *supra* note 13.

455. Tennessee Heritage Protection Act of 2016, Tenn. Code Ann. §4-1-412(A)(7)(b) (“Memorial means [a]ny statue, monument, memorial, bust, nameplate, historical marker, plaque, artwork, flag, historic display, school, street, bridge, or building that has been erected for, named, or dedicated on public property in honor of any historic conflict, historic entity, historic event, historic figure, or historic organization.”).

*of Law* (2017), both of which examined the embedded effects of de jure and de facto racism.

During his campaign and as President, Trump's thinly veiled white supremacist rhetoric condensed the white backlash against the lived experiences and theories centering minoritized people. Even before the divisive concepts trend, there were concerns about writers like Coates being taught in U.S. high schools. With divisive concepts and CRT as a boogeyman, conservatives attacked the idea that racism can exist anywhere outside of an individual's mind and actions.

After the summer of 2020, conservatives activated a legislative campaign against "Critical Race Theory" being taught in K-12 schools, government anti-bias training sessions, and higher education.<sup>456</sup> Tennessee's legislators joined the wave and recently enacted statutes restricting how race and gender are taught in public K-12 schools and in public higher education.<sup>457</sup> As a result, the Tennessee legislature has banned or severely curtailed lessons on a variety of "divisive concepts," with a catchall provision banning lessons that cause "an individual to feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex."<sup>458</sup> Below are two compelling examples that show that divisive concepts are an effort to restrain what children can see about race and racism.

The first Tennessee example occurred before Tennessee's K-12 Divisive Concepts Act had even passed. Sullivan County teacher Matthew Hawn assigned his students to read an essay on the 2016 election by Pulitzer Prize-winning author Ta-Nehesi Coates.<sup>459</sup> Hawn's assignment drew parent complaints.<sup>460</sup> The Sullivan County school board then warned Hawn not to talk about or give any lessons that were too racially controversial or used inappropriate language.<sup>461</sup> Later, while teaching a contemporary issues class during the pandemic, Hawn led students in a discussion focused on Derek Chauvin (the officer who kneeled on George Floyd's neck and killed him) and Kyle Rittenhouse (the white young man who killed two individuals during a Wisconsin protest with an AR-15 rifle).<sup>462</sup> To augment the discussion, which centered on racial dynamics in these two news stories, Hawn showed his students a video by Kyla Jenée Lacey, a Black poet passionately speaking about white privilege.<sup>463</sup>

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456. See Wallace-Wells, *supra* note 91.

457. Restrictions on course instruction that includes or promotes certain concepts related to race or sex, Tenn. Code Ann. § 49-6-1019 ("K-12 Divisive Concepts Act"); Public Institutions of Higher Education—Instruction of Divisive Concepts, Tenn. Code Ann. § 49-7-1901 et seq ("Higher Education Divisive Concepts Act").

458. Tenn. Code Ann. § 49-6-1019(a)(6); Tenn. Code Ann. § 49-7-1902(f).

459. Hannah Natanson, *A White teacher taught students about White Privilege. It cost him his job.*, Wash. Post (Dec. 6, 2021), <https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/>.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

Notably, Ms. Lacey's spoken word piece linked the Confederate flag to white privilege.<sup>464</sup> Hawn was then fired.<sup>465</sup>

That Hawn was fired for showing a video to his students highlights the power and threat of visual rhetoric when used to call attention to racial injustice. In moving to have Mr. Hawn fired, parents objected to their high-school-age students *being visually exposed* to anything that challenged notions of white innocence, the idea that (instantiated in the Divisive Concept laws) contemporary white people have no moral obligation to engage with the U.S.'s racist history and its continued effects.<sup>466</sup> One community member stated, "I don't think color should be an issue ever in the classroom."<sup>467</sup> Ms. Lacey's piece apparently made the white students in Mr. Hawn's class feel "discomfort, guilt, anguish, or another form of psychological distress" because of how white people have historically treated Black people in the U.S. Although white discomfort was not statutorily illegal at the time, it is now.<sup>468</sup> The African American Policy Forum would use Mr. Hawn's story in its powerful campaign against divisive concepts bills and attacks on Critical Race Theory.<sup>469</sup>

Within East Tennessee, the Sullivan County Courthouse is the only courthouse to host a Confederate memorial on its lawn.<sup>470</sup> Students in Sullivan County are prevented from learning about current events and truthful history while constantly being exposed to harmful Confederate rhetoric that cannot be removed. When read together, the THPA and the K-12 Divisive Concepts statutes control the visual field by spotlighting pro-Confederate, white supremacist narratives while censoring access to counter-narratives that would center Black and other minoritized voices.

The second example occurred in July 2021, after the K-12 Divisive Concepts bill was enacted.<sup>471</sup> Moms for Liberty, a conservative parent's group in Williamson County Tennessee filed a complaint with the Tennessee Department of Education, alleging that a second-grade lesson on "Civil Rights Heroes" violated Tennessee's

464. Kyla Jenée Lacey, *White Privilege*, YouTube (Aug 2, 2017) <https://www.youtube.com/watch?v=Qkz5UmXugzk>.

465. Natanson, *supra* note 459.

466. See Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 William & Mary L. Rev. 1, 2 (1990) (defining white innocence as the insistence that whites are innocent of past wrongs committed against Black people).

467. Natanson, *supra* note 459.

468. Tenn. Code. Ann. 49-6-1019(A)(6).

469. See African American Policy Forum, *Reinstate Matthew Hawn—Fired for Teaching about White Privilege*, Afr. Am. Pol'y F. (Dec. 4, 2021), <https://www.aapf.org/post/reinstate-matthew-hawn>.

470. See *Confederate statues and monuments in Tennessee*, The Tennessean (July 30, 2020), <https://www.tennessean.com/picture-gallery/news/2020/07/30/confederate-statues-and-monuments-tennessee/5349270002/>. Generally, public Confederate monuments are relatively rare in East Tennessee. Unlike Middle and West Tennesseans, East Tennesseans did not fervently support the Confederacy during the Civil War. There were pockets where support for the Union ran strong. *Civil War: The Civil War divided Tennessee just as it did the nation*, Tennessee Historical Society <https://tennesseehistory.org/civil-war-2/#:~:text=Though%20the%20state%20ultimately%20voted,Army%20came%20from%20East%20Tennessee> (last visited Nov. 23, 2023) ("Though [Tennessee] ultimately voted to leave the union (and it was the last state to do so), East Tennessee remained a stronghold of Unionist sentiment.").

471. See Tenn. Code Ann. § 49-6-1019.

K-12 Divisive Concepts Act.<sup>472</sup> The group alleged that their children were made to feel discomfort upon seeing what history looked like.<sup>473</sup> The group reiterated that if a school district violates the Act, then the Department of Education should withhold state funds as a penalty.<sup>474</sup> The letter stated that “[t]he relentless nature of how these divisive concepts are taught, the lack of historical context and difference in perspective, and the manipulative pedagogy all work together to amplify and sow feelings of resentment, the shame of one’s skin color, and/or fear.”<sup>475</sup> The letter stated that some children who experienced these lessons “are seeing counselors to overcome the emotional trauma inflicted upon them by what they learned in Tennessee public education.”<sup>476</sup>

The letter identified four children’s books that were objectionable:

- Frances E. Ruffin, *Martin Luther King, Jr. and the March on Washington* (2001);
- Ruby Bridges, *Ruby Bridges Goes to School, My True Story* (2003);
- Robert Coles, *The Story of Ruby Bridges* (1995); and
- Duncan Tonatiuh, *Separate is Never Equal* (2014).

The Moms for Liberty Letter specifically targeted the visual rhetoric contained in these children’s books, which, because they are aimed at first and second graders, contain a lot of visuals. Specifically, the letter listed the following visual images as evidence that divisive concepts were being illegally taught to their children:

- “[P]hotographs of white firemen blasting Black children to the point of ‘bruising their bodies and ripping off their clothes’”;<sup>477</sup>
- “[P]hotographs of white and colored drinking fountains, asking “Which of these fountains looks nicer to you’”;<sup>478</sup>
- “[P]hotographs of a neighborhood sign that reads ‘WE WANT WHITE TENANTS IN OUR WHITE COMMUNITY’ and a smiling white boy holding a sign that says “We won’t [sic] go to school with Negroes’”;<sup>479</sup>
- An illustration of “a group of white people holding up signs that read, “We want segregation [sic]” and “We don’t want to Integrate’”;<sup>480</sup>
- The “Norman Rockwell painting *The Problem We All Live With*, depicting Ruby Bridges walking to school with the ‘N word’ in the background’”;<sup>481</sup>

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472. Doktor Zoom (anonymous author), *ACHTUNG! TN Moms Have Found the Critical Race Theory, and it is Ruby Bridges’ Children’s Book!*, Wonkette (July 8, 2021), <https://www.wonkette.com/tn-moms-ruby-bridges>.

473. Letter from Moms for Liberty Williamson County to Tennessee Department of Education, 7 (June 30, 2021), <https://drive.google.com/file/d/16W9grkwSFsIPRQOSpQfnAHNjzvDH5Bkk/view>.

474. *Id.* at 2.

475. *Id.*

476. *Id.* at 7.

477. *Id.* at 2-3 (citing Frances E. Ruffin, *Martin Luther King, Jr. and the March on Washington* 22-23 (2001)).

478. *Id.* (citing Ruffin, *supra* note 477, at 18-19)).

479. *Id.* at 3 (citing Ruby Bridges, *Ruby Bridges Goes to School* 2-3 (2003)).

480. *Id.* (Citing Bridges, *supra* note 479, at 14-15)).

481. *Id.* (Citing Bridges, *supra* note 479, at 24-25)).

- Illustrated “images of white people yelling and protesting” with accompanying text explaining Ruby Bridge’s first walk to her school;<sup>482</sup>
- Illustrated “images of white protesters surrounding young Ruby [with text that reads] ‘men and women and children shouted at her. They pushed toward her.’”<sup>483</sup>
- An illustration of “children at the [segregated] Mexican school, sitting in the dirt in front of an unclean ‘clapboard shack,’ surrounded by a cow pasture complete with cow manure, electric fencing, and flies”;<sup>484</sup>
- An image of “a public swimming pool with white children in the water. Mexican children are kept on the other side of bars with downward stares while a sign saying ‘No Dogs or Mexicans Allowed’ is featured front and center.”<sup>485</sup>

All of these objectionable images are truthful, historic illustrations of what it was like to live in a time where integration was illegal, and schools and public spaces were segregated. The images show the fear, anguish, and humiliation experienced by Black and Latino/a schoolchildren made to attend segregated schools or walk through crowds of hostile white segregationists to attend a desegregated school. They show how hurtful this era was to the children who lived through it.

The Moms for Liberty Letter took umbrage that these teaching materials visually *showed* the lessons, as opposed to just *telling* them. The letter’s author objected to the teacher’s manual, which directed instructors to “focus on and emphasize the racist images” and to “introduce the text to students through the rich illustrations.”<sup>486</sup> Although the Tennessee Department of Education rejected the complaint,<sup>487</sup> the letter provides an example of the powerful impulse, recurring over decades, to cover anything that visualizes the pain and suffering of marginalized people. The letter is relevant for the “id” of the conservative psyche, and for how, where images of race are concerned, some things must be seen while others cannot.

In terms of visuality, there are clear parallels between Moms for Liberty and the U.D.C. Both female-led organizations were and are focused on controlling what schoolchildren can view. The Moms for Liberty chapter would like to restrict what children see in a lesson on Civil Rights heroes. Whereas, the U.D.C. very much wanted to compel children to see their Confederate heroes. In its efforts to control the visual imagery that public school children are exposed to in lessons on heroes, Williamson County Moms for Liberty Chapter is channeling the U.D.C.

It is not a coincidence that both the U.D.C. and Moms for Liberty are female-led conservative organizations. Recall that the Williamson County seat, Franklin, Tennessee, hosts a large pedestal Confederate monument in its town square and that

482. *Id.* at 4 (citing Robert Coles, *The Story of Ruby Bridges* 20-21 (1995)).

483. *Id.* (citing Coles, *supra* note 482, at 12-13 (1995)).

484. *Id.* at 5 (citing Duncan Tonatiuh, *Separate is Never Equal* 14-15 (2014)).

485. *Id.* (citing Tonatiuh, *supra* note 484, at 18-19).

486. *Id.* at 3, 5.

487. Herald Reports, *Complaint Filed by local Moms for Liberty chapter rejected by state*, Williamson Herald (November 29, 2021), [https://www.williamsonherald.com/features/education/complaint-filed-by-local-moms-for-liberty-chapter-rejected-by-state/article\\_81146dc4-518f-11ec-9d9a-237001a4ab9f.html](https://www.williamsonherald.com/features/education/complaint-filed-by-local-moms-for-liberty-chapter-rejected-by-state/article_81146dc4-518f-11ec-9d9a-237001a4ab9f.html).

the U.D.C. litigated to prevent contextual markers around the town square that would tell the stories of the Black people from Franklin who fought in the Civil War.<sup>488</sup> When its Confederate statue was erected, it was very important to the white citizens of Williamson County to have a public-facing monument so that white children could “know by daily observation” of the statue the heroic history of their ancestors.<sup>489</sup> Finally, the Moms for Liberty letter mirrors the vigorous past efforts of the U.D.C. to only teach “truthful” history about the Civil War.<sup>490</sup> Whereas in the past, the U.D.C. promoted incorrect history lessons on the Lost Cause, today the efforts are meant to restrict truthful but uncomfortable lessons on civil rights and racism.

It is possible that Tennessee’s K-12 Divisive Concepts bill will fall from challenges based on the First Amendment and academic freedom. In July, 2023, Tennessee teachers brought a lawsuit challenging Tennessee’s K-12 Divisive Concepts bill, which has the potential to overturn the bill on First Amendment grounds.<sup>491</sup> The lawsuit is currently pending in the federal court in the Middle District of Tennessee.

#### CONCLUSION

Injustice in Pulaski, Tennessee threatens justice everywhere.<sup>492</sup> Giles County petit and grand juries no longer deliberate in a jury room decorated with Confederate memorabilia.<sup>493</sup> Notably, however, Giles County and the U.D.C. together must submit a written petition for a waiver to the Tennessee Historic Commission (now the Tennessee Monuments Commission) before the objects can actually be removed from the courtroom.<sup>494</sup> One might ask, why bother writing about these two seemingly inconsequential cases from rural Tennessee when the harm has already been remedied? There are at least two reasons.

First, anyone interested in the law and racial justice should know about these two obscure cases. Although there was some news coverage for *Gilbert* and *Martin*,<sup>495</sup>

488. See *supra* notes 404–411 and surrounding text.

489. Cox, *Dixie’s Daughters*, *supra* note 8, at 68.

490. See *supra* notes 220–227 and surrounding text.

491. See Vinay Simiot, *Tennessee Education Association sues state over divisive concepts law*, WBIR (Aug. 4, 2023), <https://www.wbir.com/article/news/local/tennessee-education-association-sues-on-prohibited-concepts/51-0fecc1b1-dc34-44a1-83d7-7d0910f1b8ca#:~:text=up%20in%205-,Tennessee%20Education%20Association%20sues%20state%20over%20divisive%20concepts%20law,the%20vagueness%20of%20the%20law.&text=MARYVILLE%2C%20Tenn.,the%20state's%20divisive%20concept%20law>.

492. Paraphrasing Dr. Martin Luther King, Jr. *Letter from a Birmingham Jail* (1963).

493. Timms, *supra* note 13.

494. *Id.*

495. See Alisha Ebrahimji, *A Black man is entitled to a new trial after an all-white jury deliberated in a room filled with Confederate symbols, court says*, CNN (December 7, 2021), <https://www.cnn.com/2021/12/07/us/confederate-symbols-new-trial-tennessee-black-man-trnd/index.html>; Nina Golgowski, *Black man to be retried after all-white jury used room with Confederate décor*, Huffington Post (December 6, 2021), [https://www.huffpost.com/entry/gilbert-retried-confederate-giles-county-court\\_n\\_61ae0dfde4b044a1cc25fbc1](https://www.huffpost.com/entry/gilbert-retried-confederate-giles-county-court_n_61ae0dfde4b044a1cc25fbc1); Vimal Patel, *Black man wins new trial over Confederate Memorabilia in Jury Room*, N.Y. Times (December 4, 2021), <https://www.nytimes.com/2021/12/04/us/tennessee-trial-jury-confederate-symbols.html> (all discussing *Gilbert*) and Jamie Saterfield, *Tennessee court rules Confederate memorabilia in jury room not prejudicial*, Tennessee Lookout (August 17, 2022), <https://tennesseelookout.com/2022/08/17/tennessee-court-rules-confederate-memorabilia-in-jury-room-not-prejudicial/>; Hassan Kanu, *Tennessee judges ignore Confederate monuments in their own courts*,



there was no news coverage when the Tennessee Supreme Court quietly denied Mr. Martin's appeal in January 2023. It is unknown whether other similar jury rooms exist beyond Giles County. They might. Confederate imagery may not be present inside many other jury rooms in Tennessee, but symbols of the Confederacy stand proudly outside many Tennessee state courthouses in the form of large monuments honoring the Confederacy and its soldiers.<sup>496</sup> It appears that at least one remote rural courthouse in Macon, County Tennessee is flying the first National Confederate flag on its courthouse grounds.<sup>497</sup> It does not appear that there has been any protest about it.

Second, I hope this Article conveys how dangerous and toxic Confederate visual rhetoric is; it is not a neutral nod to Southern history. A common apologist salvo for Confederate imagery is that the Confederate flag and Confederate monuments represent "heritage, not hate."<sup>498</sup> This aphorism is based on a fallacious piece of logic, which is that Confederate heritage does not include hatred or hatefulness. Explicit hatred for Black people abounded in speeches in front of thousands of people that took place as Confederate monuments were unveiled;<sup>499</sup> the language of the U.D.C. members proposing monuments to faithful slaves and Lost Cause lessons for schoolchildren;<sup>500</sup> and the words of 1950s and 1960s segregationists as they raised the Confederate flag on public property and continued to force Lost Cause narratives on public school children.<sup>501</sup> After the Civil War, as organizations like the U.D.C. hosted Confederate memorial days and Confederate statue unveilings where Lost Cause rhetoric proliferated, confederate veterans "openly used the term Anglo-Saxon supremacy" to celebrate the men, the soldiers who fought to "maintain the supremacy of the white race."<sup>502</sup>

The insistence that the Confederate flag is a benign symbol completely ignores the valid perceptions of the minoritized people who have had to gaze upon the Confederate flag and Confederate statues. People of color are forced to look at these images every day, in the past and the present, and see the taunts of white people, smugly suggesting, through the permanence of the images, that Jim Crow and Dixie will stand forever.<sup>503</sup> The forced viewing of these images recreates trauma over and

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Reuters (August 26, 2022), <https://www.reuters.com/legal/government/tennessee-judges-ignore-confederate-monuments-inside-their-own-courts-2022-08-26/>; and Jonathan Mattise, *Appeals rulings at odds over Confederate-themed jury room in Pulaski*, *The Tennessean/Associated Press* (August 19, 2022), <https://www.tennessean.com/story/news/crime/2022/08/19/appeals-rulings-odds-over-confederate-themed-jury-room-pulaski/10356691002/> (discussing Martin).

496. See *The Tennessean*, *supra* note 15.

497. The photo on the Macon County government website shows a Confederate flag flying on the courthouse lawn. Macon County Tennessee Website, <http://www.maconcountyttn.gov/> (last visited Nov. 23, 2023).

498. Thompson, *supra* note 5, at 131.

499. See *supra* notes 153-163 and surrounding text.

500. See *supra* notes 191-219 and surrounding text.

501. See Trenticosta & Collins, *supra* note 282, at 144-45 and surrounding text.

502. Cox, *No Common Ground*, *supra* note 74, at 15.

503. Cox, *Dixie's Daughters*, *supra* note 8, at xxv.

over again, which then produces negative mental and physical health effects.<sup>504</sup> White supremacy and racial hatred cannot be untangled from Confederate imagery.

Beyond the *Gilbert* and *Martin* cases, the THPA and Tennessee's Divisive Concepts bills show how visual rhetoric is so deeply entangled with race and the law. These visual rhetoric examples highlight issues that are not exclusive to Tennessee; they are endemic in the U.S., particularly in the South. The THPA undemocratically prevents local citizens from removing odious Confederate monuments from public land in their community. Every day, citizens are forced to look upon visual symbols of white supremacy.

While the THPA shields Confederate monuments from removal and destruction, Tennessee's Divisive Concepts laws give groups the power to threaten teachers and censor images of past historic racism in order to present U.S. history in a false, white-washed format. The Divisive Concepts trend mirrors the past practices of the U.D.C., which erected visual testaments to Confederate heroism while at the same time mandating false history lessons celebrating the Confederacy. In the past and present, the law enforces a view where immovable Confederate monuments stand tall while the truth about history and racism, taught through powerful, compelling images, remains shrouded.

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504. See *supra* notes 93-111 and surrounding text.