



DEATH PENALTY INFORMATION CENTER

DOOMED TO REPEAT:
The Legacy of Race in Tennessee's
Contemporary Death Penalty

BY MASKED LYNCHERS.

After Forcing Its Way Into Jail the Mob
Marches Its Victims to an Open Lot
and Riddles Them with Bullets.

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“ 1901

Whenever the people of this city and county believe that capital punishment is necessary to expiate a crime, they hold their own court, selecting a jury to their liking, and if the decision of 'Guilty' is had, **they finish up their work at the old courthouse elm.”**

—The Evening Scimitar, 1901

“2023

Could I put an amendment on that [bill regarding methods of execution] that would include hanging by a tree? ”

Introduction

The historical use of capital punishment in Tennessee shows a clear connection between the extrajudicial lynchings of the 1800s and 1900s and the state sanctioned death penalty practices of today.

As one lynching expert notes, “[l]ocal traditions, situations, and personalities must be considered in any attempt to explain patterns of lynching...”¹ This emphasis on locality parallels modern death penalty trends in Tennessee—as well as the rest of the nation—wherein death sentencing is heavily

dependent on local culture, prosecutors, and perceptions. An important legacy from the lynching era and early executions is the importance of race in determining how police, court systems, and the general public respond to crimes.

Given the intertwined nature of race, history, and



the death penalty, lawmakers and Tennesseans who are considering the future of capital punishment in their state may find it useful to reflect on how Tennessee arrived at its current capital punishment system. State House Representative Paul Sherrell's suggestion to allow executions by hanging people on trees earlier this year shows the continued relevance of history.

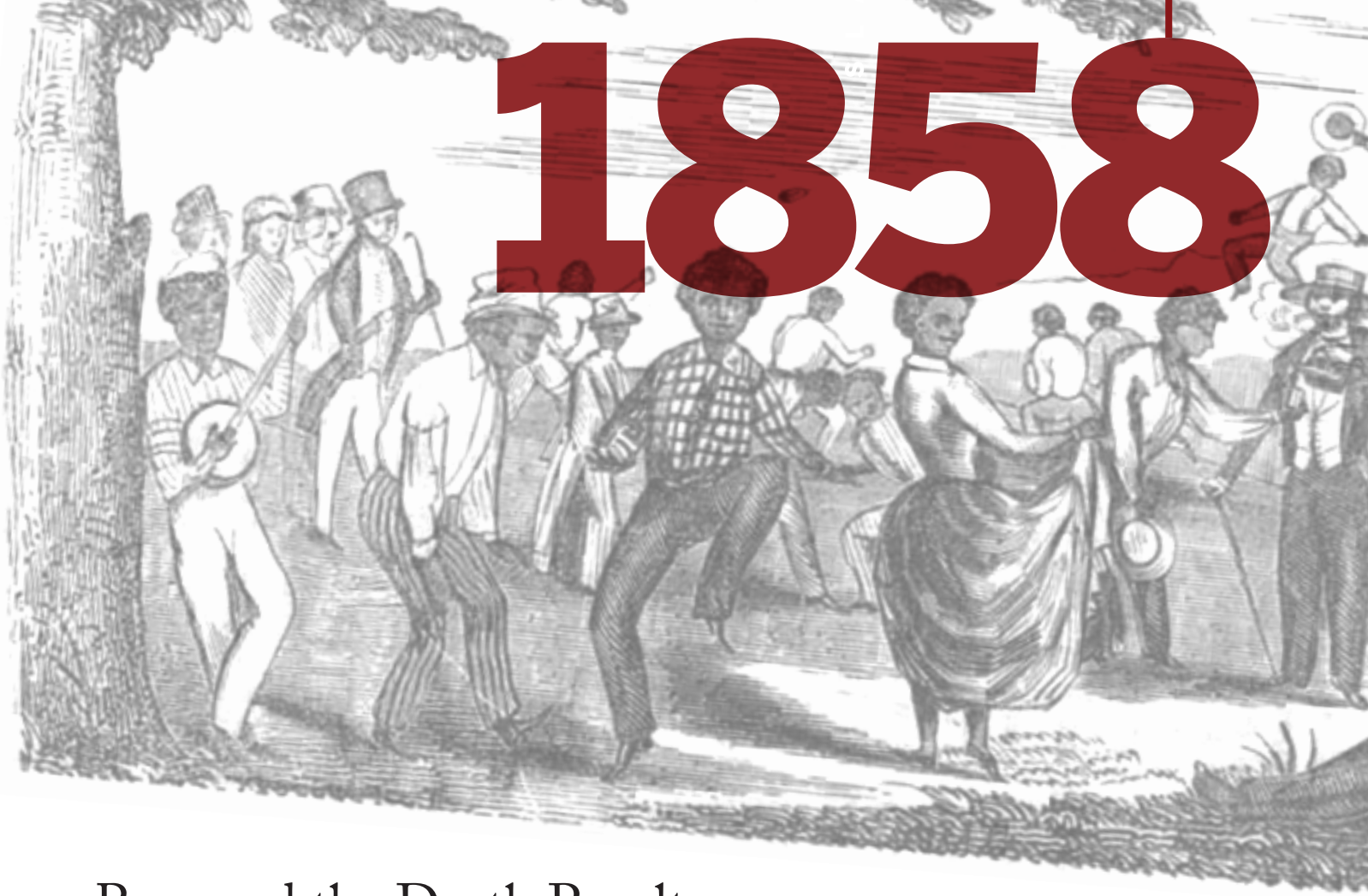
At the time of publishing this report, Tennessee is not actively executing people because a review of the Department of Correction's lethal injection protocols revealed mistakes at every step in the lethal injection process. New protocols are expected to be released soon, allowing executions to resume. Best practices for execution protocols may change, but the state cannot change the history of capital

punishment and how the legacies of racial injustice influence its modern capital punishment scheme.

This report explores the current issues with capital punishment in Tennessee through a historical lens, tracing the origins of the use of the death penalty from lynchings and other forms of racial violence directed at Black Tennesseans. The stories of individuals and communities that have interacted with different facets of Tennessee's justice system throughout history suggest that, in many ways, even though centuries have passed, the experiences of discrimination toward Tennessee's communities of color continue. A meaningful understanding of the state's history and its legacy of violence and racism is essential to avoid repeating the mistakes of the past.

This report explores the current issues with capital punishment in Tennessee through a historical lens, tracing the origins of the use of the death penalty from lynchings and other forms of racial violence directed at Black Tennesseans.

1858



Race and the Death Penalty Throughout Tennessee's History

"The Sabbath among slaves" [graphic] / Strong, Thomas W. sc., Library Company of Philadelphia.

Capital Punishment in the Antebellum Period

Historically, race has been an important factor in the use of capital punishment in Tennessee. The Tennessee Slave Code of 1858—which compiled all state laws relevant to slavery that were passed or revised following the state's creation in 1796—outlined thirteen offenses for which Black people, both enslaved and free, could receive a death sentence. Eleven of these offenses carried a mandatory death sentence, and two provided a discretionary death sentence. By contrast, there were only two offenses that mandated the death penalty for white citizens.²

The two offenses that would result in a death sentence for both Black and white Tennesseans were murder in the first degree and accessory before the fact to murder in the first degree. From the first recorded execution in 1782 to the start of the Civil War in April 1861, at least 69 people were executed in Tennessee. Forty-eight of those executed had been convicted of a crime involving murder and most (31 of 48) were Black. The only 19th century executions of white people for crimes other than murder were aiding a runaway slave, Civil War espionage, and Civil War guerilla activity.³

In addition to making certain crimes only capital for Black offenders, Tennessee's Slave Code explicitly valued white victims over Black victims. Rape of a white female, assault with violence with intent to rape a white female, and intercourse or attempted intercourse with a white female under 12 were all offenses that mandated a death sentence if the defendant was Black, regardless of whether they were free or enslaved.⁴ These provisions reflected the dominant (and false) white narrative that Black men were sexual predators who targeted white women. While Black men would receive mandatory death sentences for an array of sex crimes if perpetrated against white women, there were no similar laws outlawing the rape of Black women by men of any race. Tennessee is not an outlier in this respect: nationally, researchers have yet to find a case in which a white man was executed for the rape of

a Black woman.⁵ In 1841, the Tennessee Supreme Court overturned the conviction and death sentence of an enslaved Black man because the court record did not establish whether the rape victim was white. The court noted, "Such an act, committed on a black woman, would not be punished with death. It follows, therefore, most clearly, that this fact, which gives to the offence its enormity, and on account of which, the punishment of death is inflicted, must be charged in the indictment, and proved on the trial."⁶ In explicitly "protecting" white women's bodies, the state allowed white men to assault Black women with impunity.

Chapter 4 of the Slave Code outlined very limited legal protections for enslaved people but in practice, enslaved people who were victims of crimes at the hands of white people rarely received any justice. For example, killing an enslaved person was illegal and could result in the death penalty if the accused were found guilty. There were carveouts, however, that justified the killing if they (1) were a ringleader in a slave revolt plot and resisted arrest, (2) acted in resistance to their master, or (3) died while receiving a "moderate correction."⁷ Additionally, Tennessee state courts did not allow enslaved or free Black people to testify against white people until 1866.⁸ As such, the laws meant to protect enslaved people were largely ineffective: even if someone could not justify the murder of an enslaved person under the aforementioned criteria, no Black person

could testify to the crime, and white people might be hesitant to testify on behalf of an enslaved person. As a result, no white person in Tennessee ever received a death sentence for killing an enslaved person.⁹

While Tennessee clearly had legal mechanisms for dealing with alleged capital criminal offenses, whether an offender actually faced the death penalty depended on where their crime occurred. Like the modern death penalty, lethal punishment in the 19th and 20th centuries varied greatly by geography, even within the same state. Furthermore, local communities formed their own juries, which decided if an accused criminal would be dealt with in court or in the streets.

1851

White men were typically lynched for more egregious violations of the social order, while Black men received the same lethal punishment for lesser transgressions—including some that would not be considered crimes if they were white, such as having a successful business.



Lynchings in Tennessee

The first recorded lynching in Tennessee occurred in 1851. Records show lynchings became commonplace in the state after the Civil War.¹⁰ Tensions between white and Black Tennesseans were heightened following the end of the Civil War because of stark demographic changes in many Tennessee cities. Union-captured cities, like Memphis and Nashville, attracted Black people from rural Tennessee and neighboring slaveholding states who sought refuge in these cities where they could live more freely. In addition to being upset about having to live alongside free Black people, many whites were angered and intimidated by the drastic increase in the Black population. In Memphis, for example, the Black population before

the war was less than 4,000—approximately one fifth of the total population in the city. By 1866, the Black population of Memphis and its suburbs totaled 20,000, making up at least half of the entire population in the city.¹¹

While Black Tennesseans had more freedoms following the Civil War, the social hierarchies and white perceptions of Black people had not changed. In fact, the new labor structures implemented by white plantation owners were eerily similar to what Black people endured before Emancipation. Many Black people living in Memphis, for example, continued working on plantations where their employers required them to work six days a week, from dawn to dusk, with white people overseeing



them; employers even whipped and caned Black workers as they saw necessary. White plantation owners, worrying that having money would encourage independence among Black workers, often required them to spend most nights living in small houses on the plantation (previously used to house enslaved people) and would only compensate them with a share of crops, payable after harvest. Government officials aided this effort by having armed soldiers arrest and jail any freedmen who appeared unemployed until they agreed to take work on a plantation.¹² This new version of *de facto* slavery allowed white people to maintain the social and economic status quo.



It is worth noting that this slavery-adjacent employment system continued well into the 20th century. As late as the 1940s, thousands of Black men were pressured by Memphis public officials to choose between going to jail, and eventually prison, on fabricated vagrancy charges or working in the fields for white landowners. Every day, Black men were bused to nearby fields to pick cotton in the summer and harvest crops or chop weeds in the fall. They worked for low wages—often between \$0.50 to \$3.00 per day, depending on how many hundreds of pounds of cotton they picked and how desperately the white landowners needed labor. This was an intentional scheme concocted by Memphis' political machine to ensure Black people remained at the bottom of the socioeconomic chain.¹³

1851

From 1851 to 1947, an estimated 507 people were lynched in Tennessee. Nearly 75% of lynching victims were Black.

Lynchings were another tool white people used to control and terrorize newly freed Black people. From 1851 to 1947, an estimated 507 people were lynched in Tennessee. Nearly 75% of lynching victims were Black. Lynchings happened throughout the state, with 84 of Tennessee's 95 counties having one or more documented lynching.¹⁴

There were clear racial differences in the alleged reasons for lynchings. While both Black and white lynching victims were often accused of a crime involving murder, rape accusations were primarily made against Black lynching victims. From 1851 to 1947, there were 156 lynching victims accused of

offenses involving rape or attempted rape; 138 of them were Black. The cases of white lynching victims accused of rape were usually either accompanied by accusations of a more serious crime (e.g., attempted murder) or involved sexual assault of young or otherwise vulnerable girls.¹⁵ White men were typically lynched for more egregious violations of the social order, while Black men received the same lethal punishment for lesser transgressions—including some that would not be considered crimes if they were white, such as having a successful business, as demonstrated by *The Lynching at the Curve*.



PEOPLES GROCERY

Delivery by horse and buggy. Credit: Historic Memphis

1892

The Lynching at the Curve

Calvin McDowell, William Stewart, and Thomas Moss were lynched in Memphis on March 9, 1892. Moss owned People's Grocery, a successful grocery store in Memphis, where he employed McDowell and Stewart. All three were Black men. William Barrett, a white grocer, was allegedly upset by the success of People's Grocery and circulated rumors that the Black community was planning to attack the white people in the area. Moss sought—and was subsequently denied—police protection after there were calls in the local newspaper to organize a posse to move against the Black community. Later, a group comprised of a county sheriff and five deputized white people

baby of Denver will
be at home at 2436

calico hop takes
Monday the 28th.

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returned to her
Kan.

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f the ever popular
ake place at Central
great event. Full

of his race attend the

The Lutheran church is keeping lent
reaching every Friday night and Sun-
day. All are invited to call.

Young people's meeting every Wed-
nesday evening at 6th street A. M. E.
church, Rev. T. W. Henderson, pastor.

That member of the 6th street A. M.

went to the house and loaded his table
with good things. He returns his many
thanks.

Order. Some speak of order. What
is order? It is the topic of the day.
Young men in the presence of ladies or
in the House of the Lord, this should be
a rule which should be well kept.



THOMAS H. MOSS
MURDERED BY THE MEMPHIS MOB.

Helena, Montana.

y of the ever popula
ll take place at Centra
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er of his race attend th
el Church Sunday nigh



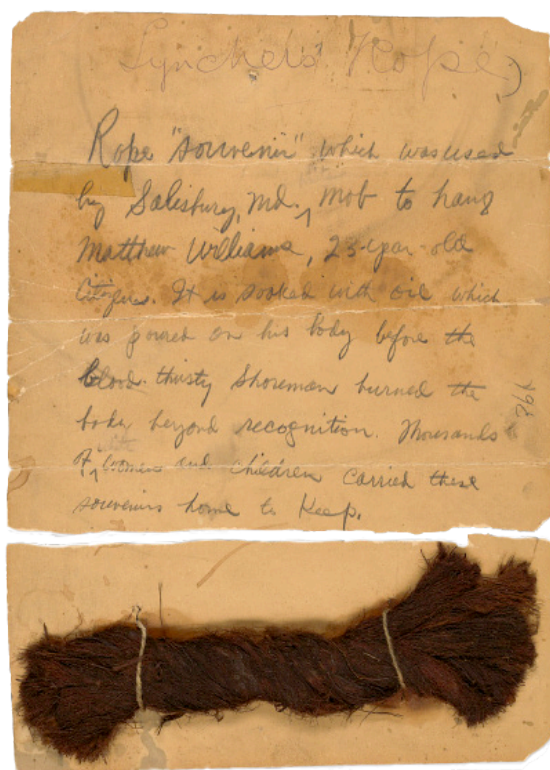
**Tell my people to go west.
There is no justice
for them here.**



approached People’s Grocery and began shooting. Moss, Stewart, and McDowell returned fire. When another group of deputized white citizens arrived, the trio were arrested and jailed. Stewart, Moss, and McDowell were later abducted from the jail and shot to death in a rail yard. Moss’ last words were “Tell my people to go west. There is no justice for them here.”¹⁶ What became known as “The Lynching at the Curve” exemplifies the lengths to which the white community would go to ensure Black people did not prosper. The event further demonstrates the complicity of law enforcement in maintaining racial stratification.

Many lynchings happened at the hands of clandestine organizations. The Ku Klux Klan (KKK), which was founded in Pulaski, Tennessee in 1865,¹⁷ is perhaps the most well-known organization of this kind, but there were others, such as the Whitecaps. While the KKK was an explicitly white supremacist group, other vigilante groups often had broader agendas and weren't centralized around race-based ideologies.¹⁸ A book documenting the history of Whitecaps in Sevier County noted that the organization derived from a desire to rid the county of "immoral characters," such as adulterers.¹⁹ In some counties, Whitecaps members were represented in every facet of society, including law enforcement, the courts, and government offices.²⁰ Even so, these organizations largely used their "influence" to uphold the existing racial dynamics. In 1893, a Black man named Bob Hudson was lynched in Weakley County for defending his wife from the Whitecaps. The group had targeted his wife—dragging her from her home and whipping her severely before Mr. Hudson attempted to intervene—after she filed assault and battery charges against a white man.²¹ Stories like these reveal that the true motivations of these organizations were to maintain the status quo and protect their white members.

Lynchers operated without fear in Tennessee as local authorities regularly refused to investigate lynchings. Law enforcement often concluded that deceased lynching victims had been killed by unknown parties, despite photographic and other evidence proving otherwise.²² In one article about a lynching attended by at least 6,000 people, a reporter noted that "There was no effort on the part of any members of the mob to disguise themselves."²³



Rope used to lynch Matthew Williams
Collection of the Smithsonian National Museum of African American
History and Culture, Gift of The Estate of Paul S. Henderson



Rope "souvenir" which was used
by Salisbury, Md., mob to hang
Matthew Williams, 23-year-old

1865

Pulaski, Tennessee

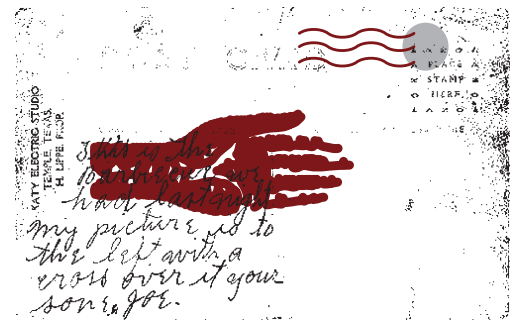
Coroners also came to improbable conclusions in their reports on lynching victims. In 1939, a white shopkeeper instigated an altercation with a 20-year-old Black man named Jesse Lee Bond because he asked for a receipt of his purchase. A mob of white men castrated Bond and dragged his body from the back of a truck in broad daylight to the Loosahatchie River. The men staked his corpse beneath the water where he stayed for five days until local authorities retrieved his body. On his

death certificate, the coroner recorded that he "fell in the Hatchie River and accidentally drowned."²⁴ Authorities also informed his family that the body was not mutilated or otherwise harmed, despite the fact that his sister witnessed the attack.²⁵ The men who murdered Bond were eventually tried for murder, but acquitted.²⁶ Other local officials who did not directly participate in lynchings were complicit in the attacks on Black communities by covering up wrongdoing.





Similarities Between Lynchings and Executions in Tennessee



Lynchings and legal executions were two methods with the same goal: to maintain white control over Black people. One important way to demonstrate that control was to do so publicly. Until 1883, legal executions in Tennessee were carried out publicly, often attracting large and enthusiastic crowds. Two thousand people gathered in Memphis to watch a double execution in 1861. Public interest continued even after the state moved executions to a private venue and limited the number of people who could attend executions. A 1905 triple execution in Shelby County, for example, attracted a large crowd of people “who crushed each other” for a chance to look into the jail yard and catch a glimpse of the execution.²⁷

Lynchings were also often a public spectacle. More than 5,000 people swarmed a Memphis jail anticipating the lynching of Lee Walker, a 19-year-old Black man accused of a multitude of offenses including attempted rape of a white woman; roughly 100 people actively participated in his assault and murder. It was widely known that a mob of white men intended to lynch Walker after his arrest. The *Memphis Public Ledger* sent a telegram to the *Inter-Ocean* newspaper in Chicago reading, “Lee Walker, colored man, accused of raping white women, in

jail here, will be taken out and burned by whites tonight. Can you send Miss Ida Wells to write it up?”²⁸ The sheriff publicly acknowledged the calls for lynching Walker and stated that he did not want a lynching to occur. Yet he ordered the 25 armed deputy sheriffs guarding the jail not to harm anyone or actively prevent the lynching.²⁹ When the mob entered the jail to abduct Walker, the jailer gave them the key to his cell.³⁰

Officials also promised executions as a bargaining chip to deter lynch mobs. In 1918, Frank Ewing, a 20-year-old intellectually disabled Black man, was convicted and sentenced to death for the rape of a white woman in Davidson County. Alibi witnesses and work records indicated he could not have committed the crime, and someone else even confessed because they felt sorry “for the old n***er.” Still, Tennessee Governor Albert H. Roberts would not commute his death sentence because he thought the execution would be the “most certain remedy against the disease of mob violence which is too prevalent in this country.”³¹ In another case, a criminal court judge pleaded with a mob seeking to lynch two Black men accused of murder, telling them he would expedite the trial if they retreated. The mob, comprised of 500 people, took the young

Race Disparities in Tennessee Lynchings from 1851–1947

Tennesseans for Historical Justice has documented 507 lynchings in Tennessee from 1851 to 1947. This graphic shows the racial breakdown of lynchings for accusations of murder, rape, and attempted rape. Nearly 75% of those lynching victims were Black. While both Black and white lynching victims were often accused of a crime involving murder, rape accusations were primarily made against Black lynching victims. By the 1900s, one kind of death sentence was exchanged for another: lynchings for rape fell by 80%, as executions for the same crime increased by 617%.

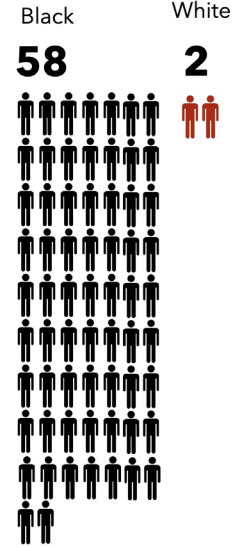
MURDER



RAPE



ATTEMPTED RAPE



men from the jail and hanged them from a telephone pole.³²

Lynching and execution data suggest that the practices served the same purpose when it came to accusations of rape. Many lynchings of Black people in the 1800s occurred after rape accusations. By the 1900s, though, one kind of death sentence was exchanged for another: lynchings for rape fell by 80%, but executions for the same crime increased by 617%.

1906

Ed Johnson

Ed Johnson, a Black man, was lynched from the Walnut Street Bridge in Chattanooga, Tennessee, on March 19, 1906, for allegedly raping a white woman.³³ Johnson only came under police suspicion after a white man named him as a suspect to collect a reward. Johnson could produce a dozen witnesses to testify that he had been working at the time of the assault, and the victim herself said that she “[would] not swear that he is the man.”³⁴ Despite this evidence, he was found guilty and sentenced to death by an all-white jury. Before the trial even took

place, a lynch mob had formed to murder Johnson, and was only unsuccessful because he had been moved to a different jail. A later investigation found that “[i]t was because of this intense excitement and the feeling that speedy execution of Johnson might prevent his being lynched that Johnson was so quickly indicted and tried.”³⁵

After Johnson was found guilty, Noah Parden and Styles Hutchens, two Black attorneys from Chattanooga, took his appeal up to the U.S. Supreme Court, and Justice Harlan granted the

Ed Johnson Who Was
the jail office. Then a few

Court's first stay of execution in a criminal case, so that the Court could hear Johnson's argument that he had only been convicted because of public outrage and racial bias. On March 19, the night before Johnson was scheduled to be executed, the Court telegraphed Sheriff Shipp of Hamilton County, informing him of the stay of execution and instructing him to retain custody of Johnson until the appeal could commence.

By 6 p.m. on March 19, news of the stay had spread throughout the town, and Shipp and his deputies had "every reason to believe" that a lynch mob was gathering to murder Johnson. Despite this, Shipp and his deputies withdrew most of the jailhouse guards and moved other detainees away from Johnson's cell, "[rendering] it less difficult and less dangerous for the mob to prosecute and carry into effect its unlawful design and purpose of lynching Johnson . . . pretending to perform their official duty of protecting Johnson . . . [while] they aided and abetted the mob."³⁶

The mob "entered the jail and went directly and without resistance" to Johnson's floor.³⁷ The jailer handed over the keys without a struggle. There were a dozen men involved in actively breaking into the jail and a crowd of spectators following along. Without any police intervention, the mob dragged Johnson from his cell and to the Walnut Street Bridge, six blocks away. Whenever he stumbled, he

was beaten and kicked until he got back to his feet. The crowd taunted him, telling him to confess and they would set him free. Johnson's last words were, "God bless you all. I am an innocent man."³⁸

The crowd attempted to hang Johnson twice. The first time, the rope slipped, and he fell to the ground. After he was hanged a second time, members of the crowd shot at him. A bullet severed the rope, and he fell to the ground again. Someone in the crowd said that he was still moving, so a man approached him, placed a revolver to his head, and fired five times.³⁹

The lynch mob was not yet satisfied. They pinned a note to his chest, which read, "To Justice Harlan. Come get your n****er now."⁴⁰

In the aftermath, the U.S. Supreme Court held its first and only criminal trial and found that Shipp and his deputies were in contempt of court for aiding the lynch mob. None of their sentences exceeded 90 days, and they were welcomed back to Chattanooga as heroes.⁴¹ Meanwhile, the Black attorneys who brought the appeal to the Supreme Court had to flee the city to avoid violence.⁴² Ninety-four years later, in 2000, a Hamilton County judge overturned Johnson's conviction and death sentence. In his decision, the judge stated, "It really is hard for us in the white community to imagine how badly blacks were treated at that time. It's still a continuing struggle."⁴³

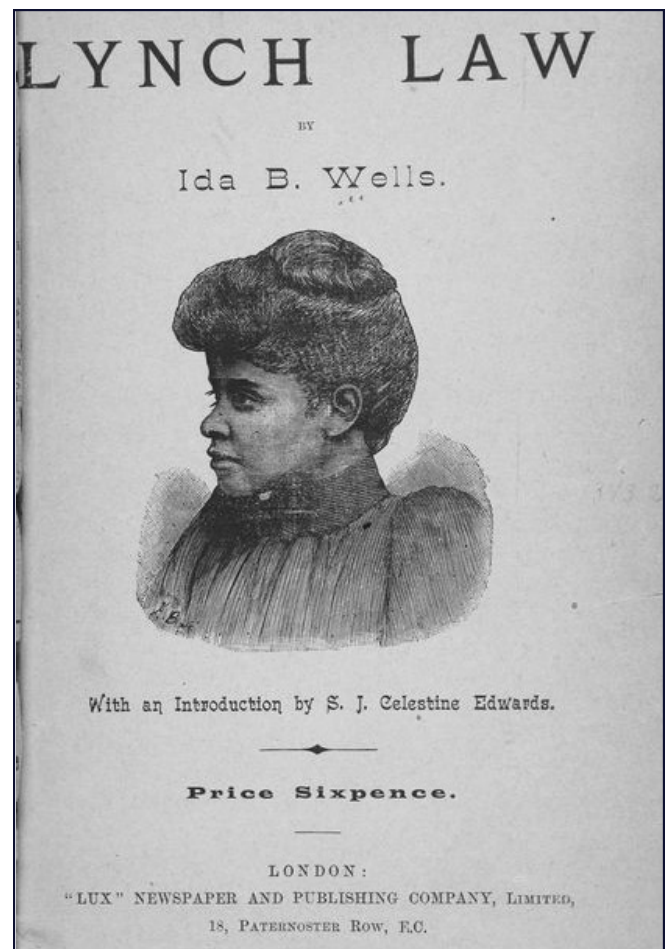
Anti-lynching Efforts

Legislative efforts to end lynchings in Tennessee began as early as 1870. The first anti-lynching legislation passed that year stipulated that any masked or disguised assailant found guilty of assault with the intent to murder would automatically receive the death penalty. This law targeted groups like the Ku Klux Klan. A similar statute was enacted in 1897 targeting the Whitecaps; it provided punishment for people who conspired to take a human life.⁴⁴

An 1881 law outlined punishments for sheriffs who negligently or willfully let a prisoner be taken from his custody and lynched. In addition to being convicted of a high misdemeanor, a sheriff that was convicted had to pay a fine, lost his office, and was banned from holding office in the future.⁴⁵ This law indicated that the government recognized the frequency with which lynch mobs successfully infiltrated jails, and the culpability of law enforcement in these unlawful abductions and executions. Furthermore, in 1919 the legislature created a 600-member police force to be appointed by and responsible to the governor. This police force had orders to “suppress all affrays, riots, routs, unlawful assemblies, or other acts of actual or threatened violence to persons or property in this state.”⁴⁶ The creation of this separate police force suggests the government did not trust local

police forces to stop lynchings and points to the failure of the 1881 law.

Other anti-lynching efforts came from the Black community. Journalist and advocate Ida B. Wells-Barnett was inspired to launch her anti-lynching campaign and review the accusations people made to justify lynchings following the triple lynching



of Thomas Moss—a close friend of hers—and his employees Calvin McDowell and William Stewart in Memphis. On May 21, 1892, Wells-Barnett published an article in *Memphis Free Speech*, a Black newspaper which she co-owned, about how lynching victims were often targeted for minor offenses or non-criminal transgressions.⁴⁷ This was a rebuttal to the dominant white narrative that lynchings were a response to Black men sexually assaulting white women. In her pamphlet, *Southern Horrors: Lynch Law in All Its Phases*, Wells-Barnett quoted a portion of an editorial in *The Daily Commercial and Evening Scimitar* of Memphis, which demonstrated the pervasive stereotypes the white community held regarding Black criminality:

The generation of Negroes which have grown up since the war have lost in large measure the traditional and wholesome awe of the white race which kept the Negroes in subjection, even when their masters were in the army, and their families left unprotected except by the slaves themselves. There is no longer a restraint upon the brute passion of the Negro.

What is to be done? The crime of rape is always horrible, but (sic) the Southern man there is nothing which so fills the soul with horror, loathing and fury as the outraging of a white woman by a Negro.

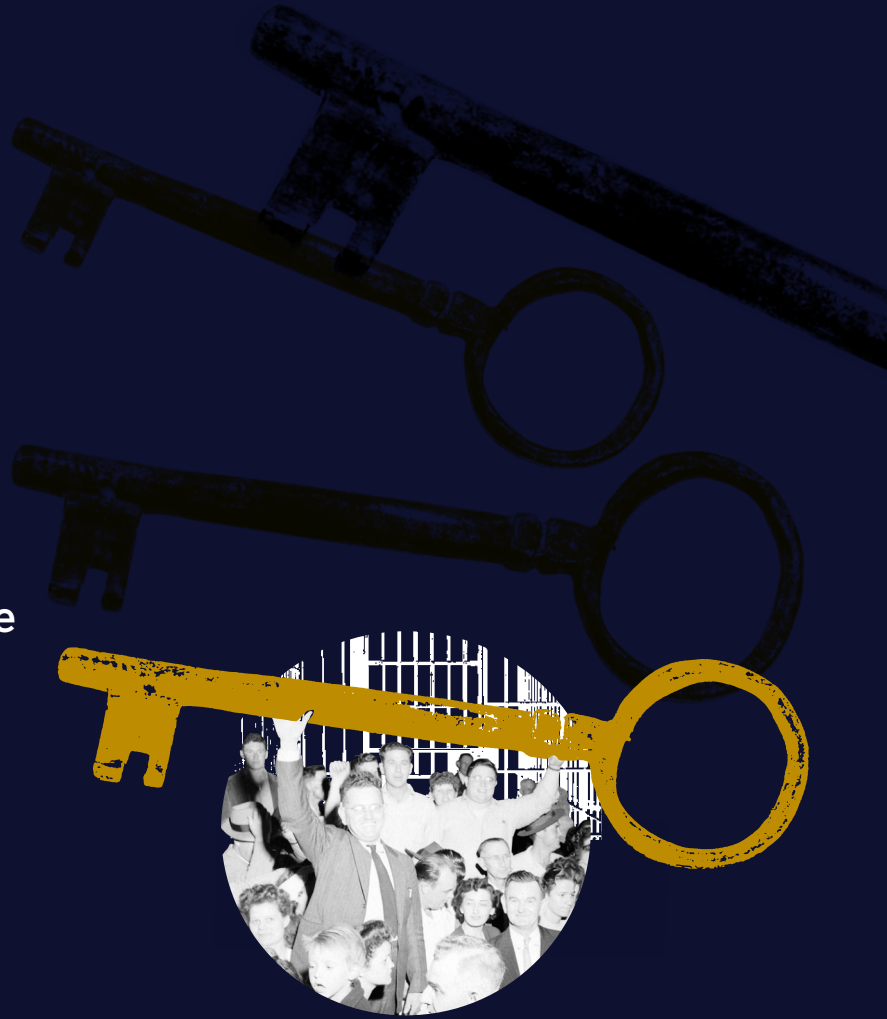
It is the race question in the ugliest, vilest, most dangerous aspect. The Negro as a political factor can be controlled. But neither laws nor lynchings can subdue his lusts. Sooner or later it will force a crisis. We do not know in what form it will come.⁴⁸

In the days following Wells-Barnett's article in *Memphis Free Speech*, Memphis' white newspapers derided her article and character. On May 27, while Wells-Barnett was out of town, a white mob burned down the newspaper and warned her that she herself would be lynched if she returned to Memphis. Undeterred, Wells-Barnett continued writing about lynchings and the false narratives used to justify them.⁴⁹



We have reached the unprecedented low level; the awful criminal depravity of substituting the mob for the court and jury, of giving up the jail keys to the mob whenever they are demanded. We do it in the largest cities and in the country towns; we do it in midday; we do it after full, not to say formal, notice, and so thoroughly and generally is it acquiesced in that the murderers have discarded the formula of masks."

Col. A.S. Colyar⁵⁰





Mass Racial Violence

Lynchings were not the only form of racial violence Black Tennesseans encountered. There have been at least eight “race riots” or race massacres in Tennessee: Nashville (1856 and 1976), Memphis (1866), Pulaski (1868), Trenton (1874), Knoxville (1919), Columbia (1946), and Chattanooga (1971).⁵¹ Like lynchings, white people who participated in large scale “race riots” very rarely faced consequences for their involvement. In some instances, this may be explained by the overlap between white rioters and

white public officials.

The Memphis Massacre of 1866 lasted three days and became one of the bloodiest racial conflicts in the state’s post-Civil War history. The massacre was primarily instigated by the white underclass, the city’s police officers, and other city government officials.⁵² Police officers and judicial officials promised immunity from arrest prosecution for any white citizens who joined them.⁵³ Initially, the police targeted specific Black men who were

1866

involved in an earlier confrontation.⁵⁴ Their mission eventually broadened, with one of the officers telling the mob to “Kill every n***er, no matter who, men or women.”⁵⁵ Black people who came home from work, shopping, or elsewhere unknowingly found themselves on a battlefield, at risk of being assaulted, robbed, and killed.⁵⁶ Even those who stayed indoors were not safe: in addition to breaking into people's homes, the mobs soon set houses, churches, and schools on fire.⁵⁷ The lack of water sources in many predominantly Black neighborhoods—and the slow response from firefighters⁵⁸—resulted in the burning of four Black churches, 12 schools, and 91 homes. At least 46 Black people died, 75 were injured, five were raped, and hundreds were robbed.⁵⁹ Three white people died during the massacre, but none had been killed by Black people.⁶⁰

Despite their identities being well known, none of the aggressors were held responsible. Since police and other city government officials led the attack, they were not inclined to arrest anyone.⁶¹ (Shortly after the massacre the police force was disbanded after a new law revamped the police department and instituted hiring requirements for police.⁶²) Many

efforts were made to arrest, try, and punish the rioters at the federal level, but pleas from officials in the Freedmen's Bureau and U.S. congressmen ultimately failed. U.S. Attorney General James Speed concluded, upon reading reports on the massacre, that “This conduct constitutes no offense against the laws and dignity of the United States of America....”⁶³ Black Memphians still had hope for the future, though their perceptions of police and the federal government's commitment to protecting their communities waned.⁶⁴





Other Ways of Terrorizing and Exerting Social Control

Black Tennesseans lived with threats of violence and death for decades until the frequency of lynchings and legal executions slowed in the 1940s and 1950s, respectively. These threats were not the only methods white communities used to control Black people, though. After the end of the Reconstruction Era in 1877, states implemented Jim Crow laws, which further codified racial discrimination and white supremacy. Relatedly, legal limitations on the voting rights of Black Tennesseans were used as a tool to subvert Black voices and sociopolitical power. Legislative efforts to oppress Black communities only tell part of the story: though it was no longer socially acceptable for white people to create mobs for the purposes of killing Black people extralegally, they still found other ways to limit Black freedom within their communities.

1940

You have a bunch of [REDACTED] teaching social equality, stirring up social hatred. I am not going to stand for it. I've dealt with [REDACTED] all my life, and I know how to treat them.... This is Memphis. We will deal with them in no uncertain terms and it won't be in the dark—it will be in broad daylight.”

Edward H. Crump

Former Mayor of Memphis

Member of the U.S. House of Representatives from Tennessee

October 30, 1940⁶⁵





C.T. Vivian and Diane Nash lead march to Nashville City Hall. Credit: The Nashville Tennessean

Civil Rights Movement

Tennessee is often acknowledged as the first state to implement Jim Crow laws in the U.S. with the passage of an 1881 law segregating train cars. An earlier law passed in 1875 permitted discrimination in hotels, theaters, trains, streetcars, and other public places across the state.⁶⁶ Tennessee's long history of segregationist policies is matched by an equally long history of Black Tennesseans fighting for their rights. After a private Nashville streetcar company tried to segregate its cars in 1866, for example, Black people protested by boarding the cars, paying the fares, and refusing to sit in the "colored section."⁶⁷ In 1905 when the state instituted a Jim Crow streetcar law, Black leaders organized streetcar boycotts across the state and created their own streetcar companies to escape the humiliation of white-controlled businesses and build a Black political economy.⁶⁸ Given the deeply embedded nature of racial discrimination in Tennessee, the process of unraveling the legacies of Jim Crow-era policies proved difficult.

Tennessee became the site of many pivotal civil rights challenges because of the leadership and tenacity of Black political leaders across the state. Twelve days after the first sit-ins of the Civil

Rights Movement happened in Greensboro, North Carolina, students in Nashville began staging their own nonviolent sit-ins at local lunch counters.⁶⁹ For the next two months, white shopkeepers and shoppers spat on students, sprayed them with insecticide, and otherwise assaulted peaceful Black protestors.⁷⁰ In one instance, police arrested nearly 200 students and charged them with obstructing commerce.⁷¹ After prominent civil rights attorney Zephaniah Alexander Looby's house in Nashville was bombed, Black students organized protests in Nashville that led to the mayor conceding that the city's lunch counters should be integrated. Nashville thus became the first city in the South to begin downtown desegregation.⁷² Black protestors continued to fight for further change, including staging additional sit-ins at restaurants and movie theaters. Roughly a year later in the spring of 1961, 13 Freedom Rides—an initiative by Black protestors to challenge interstate segregation on buses and in bus terminals—originated in Nashville, even after other Freedom Riders faced extreme violence during their journeys that threatened to stop the nonviolent movement.⁷³



Though the Civil Rights Era is now past, remnants of Jim Crow and segregation persist in Tennessee. Memphis, for example, is highly segregated.

In 1968, Black sanitation workers in Memphis began protesting unsafe and unfair working conditions as well as low pay. The job was dangerous—multiple workers had been crushed to death by malfunctioning trucks—and otherwise disgusting. Workers recalled having maggots in their shoes, having to lift leaking trash containers above their heads, and having to climb into the back of the garbage trucks to load them. Nearly 1,000 sanitation workers walked off their jobs in February 1968. Martin Luther King, Jr., joined the protest in late March, and over 5,000 demonstrators participated in his “I Am A Man” march. Dr. King’s last march and last speech both occurred in Memphis, where he was later assassinated on April 4, 1968. Shortly after, the

Memphis sanitation workers’ strike ended when the city agreed to increase wages and recognized the workers’ union.

Though the Civil Rights Era is now past, remnants of Jim Crow and segregation persist in Tennessee. Memphis, for example, is highly segregated. A 2021 study found 17 of the city’s neighborhoods were at least 98% Black, and five were at least 90% white.⁷⁴ As recently as 2008, the Tennessee Advisory Committee to the United States Commission on Civil Rights identified eighteen public school districts in the state that were still under desegregation orders.⁷⁵ These overt examples of continued racial prejudice are underscored by many more instances of covert racial discrimination.

Voting Rights History

From the state's inception, voting rights have been a central focus of Tennessee's constitutions. The first state constitution, adopted in 1796, allowed all free men to vote, regardless of race or landownership. The 1834 constitution excluded Black voters, but Civil War-era amendments prioritized Union loyalty over race, and by 1869 free Black men could vote again.⁷⁶ Even though Black people have been technically permitted to vote in Tennessee for over a century, in practice, white Tennesseans have historically erected barriers to Black electoral participation.

The re-enfranchisement of Black Tennesseans in 1869 did not happen without incident. Newspaper articles that precipitated the reinstatement of Black voting rights voiced white resistance to Black political participation. In 1866, *The Memphis Avalanche* wrote, "[the Radicals] propose to give a greasy, filthy, stinking negro the right to crowd them from the polls, to exercise those rights of franchise which belong not to Indians and negroes, but to white men...."⁷⁷ Almost a year later, *The Memphis Daily Appeal* expressed a similar sentiment about the possibility of Black enfranchisement:

It would be better for the whole black breed to be swept away by a pestilence.... If one had the power and could not

otherwise prevent that curse and inconceivable calamity [black suffrage] ... it would be a solemn duty for him to annihilate the race.... The right to vote might just as well be given to so many South American monkeys as to the plantation negroes of Mississippi and Louisiana.⁷⁸

The state legislature introduced several measures designed to disenfranchise Black voters in Tennessee. The first was a poll tax, implemented in 1889. That same year, the General Assembly passed the Dortch Law of 1889, which instituted a secret ballot and allowed those who had voted in 1857 (i.e., before Black Tennesseans were permitted to vote) to obtain help in marking their ballots. This law disenfranchised illiterate Black voters while simultaneously aiding illiterate white voters. By 1898, the state adopted a grandfather clause that exempted white people from paying the poll taxes but provided no such exemption for Black Tennesseans.⁷⁹

Local communities had extralegal means of reducing Black political participation. At least three elected Black legislators were barred from taking their seats or run out of the communities they represented before Tennessee eventually outlawed the election

of Black candidates in 1897.⁸⁰ A Black man named David Rivers represented Fayette County from 1883 to 1884. Objections to his eligibility to serve in the State House narrowly failed, but, after being elected to a second term for 1885–1886, a white mob ran him and his family out of town.⁸¹ Samuel McElwee, who represented Haywood County, became the first Black person elected to a third term in the Tennessee legislature for the 1887–1888 session. He was popular even among white legislators, many of whom nominated and subsequently voted for him to become the Speaker of the House (though he was ultimately unsuccessful). Like Rivers, McElwee was driven out of Haywood County in November 1888 by a white mob to ensure he could not win another election.⁸²



In April 2023, Republican state legislators voted to remove two Black Democratic lawmakers from the state legislature in “an extraordinary act of political retaliation.” These two Black men, Representatives Justin Jones and Justin Pearson, were expelled because they participated in a protest calling for more gun control after a deadly school shooting in Nashville. The Republican leadership denies that race was a factor in their expulsion. However, a white legislator, Representative Gloria Johnson, was not expelled for her participation in the protest. Rep. Johnson explained that the differences in their outcomes for participating in the same event “might have to do with the color of our skin.”⁸³



1958

Tent City in Fayette and Haywood Counties

In 1958, an elderly Black man in Fayette County was falsely convicted by an all-white jury for a murder that occurred 18 years prior. Black residents in Fayette County—who outnumbered white residents 2-to-1 at the time—and neighboring Haywood County decided to begin registering to vote en masse to ensure they were eligible to serve on juries;⁸⁴ prior to this voter registration initiative, only one Black person was registered to vote in Fayette County. Fearing they would lose their power in elections, the white residents unsuccessfully tried to implement a “white only” primary that was soon declared

unconstitutional.⁸⁵ Their next step was blacklisting all Black people who registered or attempted to register to vote: white merchants, doctors, bankers, and farmers refused to sell land, homes, food, and gas to Black people, or otherwise serve them. Many Black families also faced eviction from their sharecropper housing, which meant they lost their livelihoods as tenant farmers, too. In response, the Black community organized a grassroots campaign to support themselves; after finding themselves without housing, several hundred people began living in tents on donated land; this community in

Fayette County become known as “Tent City”.⁸⁶ Even the few well-off Black citizens faced consequences for registering to vote. Banks routinely denied these Black farmers credit and loans, including the GI loans Black veterans were entitled to receive for their service in the military. White community members also tried to slow down the process of registering to vote. On the morning of July 7, 1960, for example, 500 Black people attended a voter registration drive; by the end of the day, only 21 people had been successfully registered. Some white people in the community helped Black residents by anonymously donating tents to people evicted from their homes or by not evicting their Black tenant farmers. Those who were discovered

helping, though, were also at risk of being blacklisted by the rest of the white community.⁸⁷

Despite the harsh circumstances during this time, most Black residents continued living in Tent City because they were determined to access their voting rights. The federal government ignored requests to aid the Black communities in Haywood and Fayette counties.⁸⁸ Outside support instead came from organizations such as the New York based National Committee for Rural Schools (NCRS). The NCRS smuggled truckloads of food and clothing to Black residents at night to help the many families who were struggling.⁸⁹ In 1962, the federal courts finally became involved, putting an end to the evictions and economic retaliation against Black voters.⁹⁰

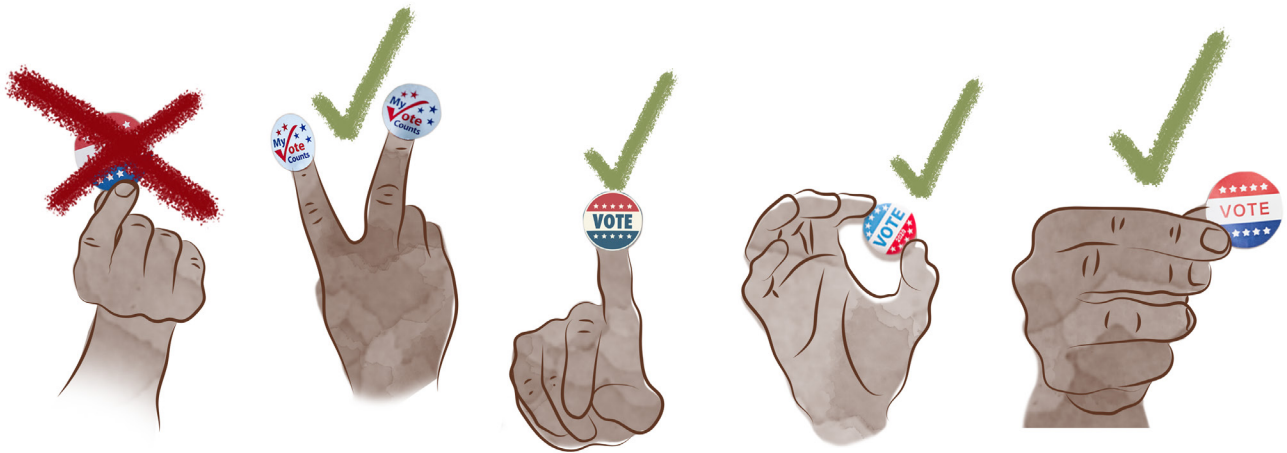


They say if you register, you going to have a hard time. Well, I had a hard time before I registered. Hard times — you could have named me 'Georgia Mae Hard Times.' The reason I registered, because I want to be a citizen. ... I registered so that my children could get their freedom.

Georgia Mae Turner
Fayette County resident
December 25, 1960⁹¹



Tennessee has the highest proportion of Black residents who are disenfranchised in the United States, with more than 1 in 5 Black voters being unable to vote.



Both historical and modern disenfranchisement efforts—such as automatic voter registration purges, felony disenfranchisement laws, and last-minute voter registration denials—have had long term effects on Black electoral participation in Tennessee. Tennessee has the highest proportion of Black residents who are disenfranchised in the United States, with more than 1 in 5 Black voters being unable to vote.⁹² The state also has the highest disenfranchisement rate among Latinx residents with 8% barred from voting.⁹³ Approximately 80%

of those who are ineligible to vote because of their criminal record have already completed serving their sentence.⁹⁴ The Tennessee Advisory Committee to the United States Commission on Civil Rights found that women, the poor, and communities of color are especially burdened by legal financial obligations, which can prevent someone from being eligible to vote.⁹⁵ An additional study found Tennessee is the fourth most difficult state in which to cast a ballot.⁹⁶

Continuing Influence of Racism in the Administration of the Death Penalty

A recent study of death sentences imposed from 1989 through 2017 found a strong statistical relationship between the level of racial resentment in a state and the number of death sentences for Black defendants.

The historical legacies of lynchings in particular were shown to affect death sentencing in multiple ways. Researchers from the University of North Carolina at Chapel Hill investigating the correlation of lynchings and death sentences stated, “Our results suggest that the historical legacies of lynchings carry indirect effects for death sentencing through [two] pathways. On the one hand, lynchings indirectly increase death sentences as a function of contemporary racial resentment, consistent with a racial antipathy interpretation. On the other hand, there is also an indirect effect of historical lynchings through contemporary conservative ideologies reflective of antigovernment intervention, consistent with the vigilantism hypothesis.”⁹⁷

Additional studies have established a link between slavery and Black electoral participation. Researchers have found that the prevalence of slavery in the 1800s negatively predicts local Black voter turnout in modern elections. In other words, the researchers concluded that Black people “living in former

bastions of slavery turn out to vote at lower rates than [Black people] living elsewhere.”⁹⁸ This study also suggests legal voting rights expansions were not enough to change the culture around voting for Black communities, particularly in the South.⁹⁹

Voting rights—or the lack thereof for too many Black Tennesseans—also determine who has the ability to elect local prosecutors who reflect their values. Disenfranchisement of people of color, who are more likely to oppose the death penalty, therefore gives white residents more power to elect prosecutors who choose to seek the death penalty. Given the demonstrated links between historical racial violence—from slavery to voter suppression—and current political practices, it’s essential to assess modern death penalty trends within the practice’s larger historical context.

There have been 262 death sentences imposed in Tennessee since 1972, the beginning of the modern death penalty era. Roughly one-third of the death sentences have been imposed on Black

defendants; white defendants have received the remaining two-thirds.¹⁰⁰ Of the 45 people currently on Tennessee's death row, 50% are Black, despite the fact that only 17% of Tennessee's population is Black.¹⁰¹

Roughly 50% of Tennessee's homicide offenders in 2021 were Black.¹⁰² Experts at the World Bank have long contended that violent crime is correlated with various measures of inequality, including income and wealth.¹⁰³ The connection between violent crime and inequality may help explain the high proportion of Black homicide offenders in Tennessee: in 2021, the median income for Black households in the state was \$42,000 compared to \$60,000 for all Tennesseans and \$64,000 for white Tennessee households. Additionally, the poverty rate for Black people in the state is nearly double the poverty rate of white Tennesseans (22.2% versus 11.2%, respectively).¹⁰⁴

In the modern era of the death penalty, 78% of the cases in which people were executed in the U.S. involved the murder of white victims,¹⁰⁵ even though Black people are more likely to be victims of homicide than white people.¹⁰⁶ This race-of-victim effect is the most persistent unexplained disparity in death penalty cases. The bias for white victims holds true in Tennessee. A review of first-degree

murder convictions in Tennessee from 1977 to 2016 found that of all first-degree murder convictions, 61% of cases involved white victims; of cases where prosecutors sought the death penalty, 73% involved white victims; and of cases where a jury handed down a death sentence, 75% involved white victims.¹⁰⁷

The study concluded that when the victim is white, the prosecutor is 1.5 times more likely to seek a death sentence.¹⁰⁸ Of all death sentences imposed in Tennessee since 1972, 74% have involved white victims.¹⁰⁹ For comparison, white victims made up, on average, 39% of Tennessee homicide victims from 2010–2021.¹¹⁰

The disproportionate rate at which prosecutors seek and juries impose death sentences for crimes involving white victims is reminiscent of historical death sentence and lynching trends in which defendants accused of harming white victims were more likely to find themselves on the receiving end of some form of lethal punishment. The race of victim disparity is even more stark considering that Tennessee has one of the highest rates of homicides of Black victims in the country.¹¹¹ The effects are disproportionately borne by Black defendants, but this preferential prioritization of white victims impacts white defendants, too, as most homicides occur within the same racial group.

Outlier Counties

Tennessee's death sentencing disparities also reflect geographic arbitrariness. Shelby County, where Memphis is located, is responsible for many of the state's death sentencing trends. Despite comprising just 13% of the state's total population, Shelby is responsible for one-third of all death sentences in Tennessee. Further, 60% of death sentences for Black defendants in the state have originated in Shelby County.¹¹²

In addition to being an outlier within the state, Shelby County is an outlier nationally. Compared to counties of a similar size (population between 750,000–1,000,000), Shelby County ranks third for the number of death sentences imposed. Shelby is tied with Oklahoma County, Oklahoma for the third largest number of people currently on death

row.¹¹³ This is notable given Oklahoma County's status as an extreme death sentencing outlier.¹¹⁴

Shelby County also has a high reversal rate. Nearly 62% of death sentences imposed in Shelby County since 1972 have been reversed or have resulted in a commutation or exoneration; 79% of these reversed sentences have been for Black defendants.¹¹⁵ A reversed sentence is therefore the single most likely outcome for those sentenced to death in Shelby County. The state-level reversal rate is even higher: 65% of all death sentences in Tennessee have been reversed or have resulted in a commutation or exoneration.¹¹⁶ These statistics point to the unreliability of death sentencing at both the state and county level in Tennessee.

Racial Biases Affect All Aspects of the Death Penalty

The legacies of slavery, Jim Crow, and other forms of racism continue to influence the modern criminal legal system in the United States—and Tennessee is no exception. In addition to being afflicted by overt racism in the legal system, capital defendants are also victim to many forms of structural racism. Such structural barriers range from the way jury pools are

created in the state (selected from driver's license lists, which tend to disproportionately exclude people of color¹¹⁷), to the paucity of Black judges and district attorneys in Tennessee.¹¹⁸ Structural barriers can often have a cumulative effect on capital defendants as racial biases have been shown to affect all aspects of death sentencing in the United States.

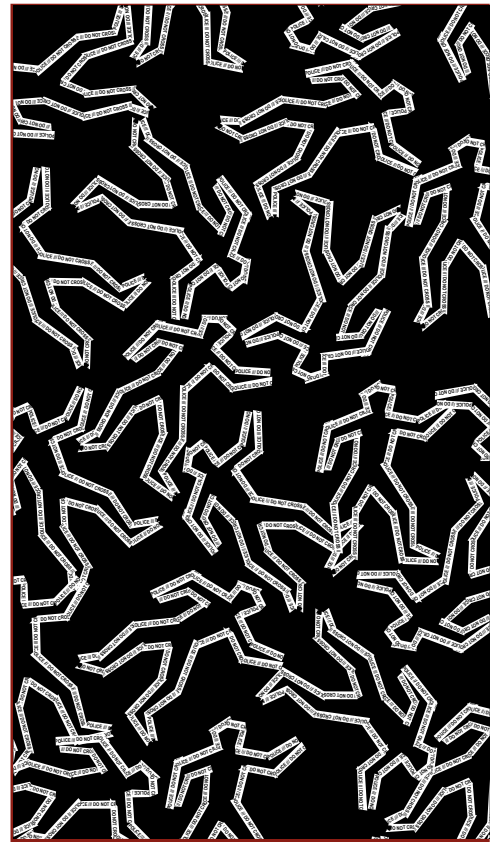
Death Sentences for White-Black Interracial Murders in Tennessee since 1972

This chart does not include sentences for offenses involving victims of multiple races.

**White Defendant/
Black Victim (5)**



**Black Defendant/
White Victim (34)**



Source: Information on File with Death Penalty Information Center.

Prosecutorial Decision Making

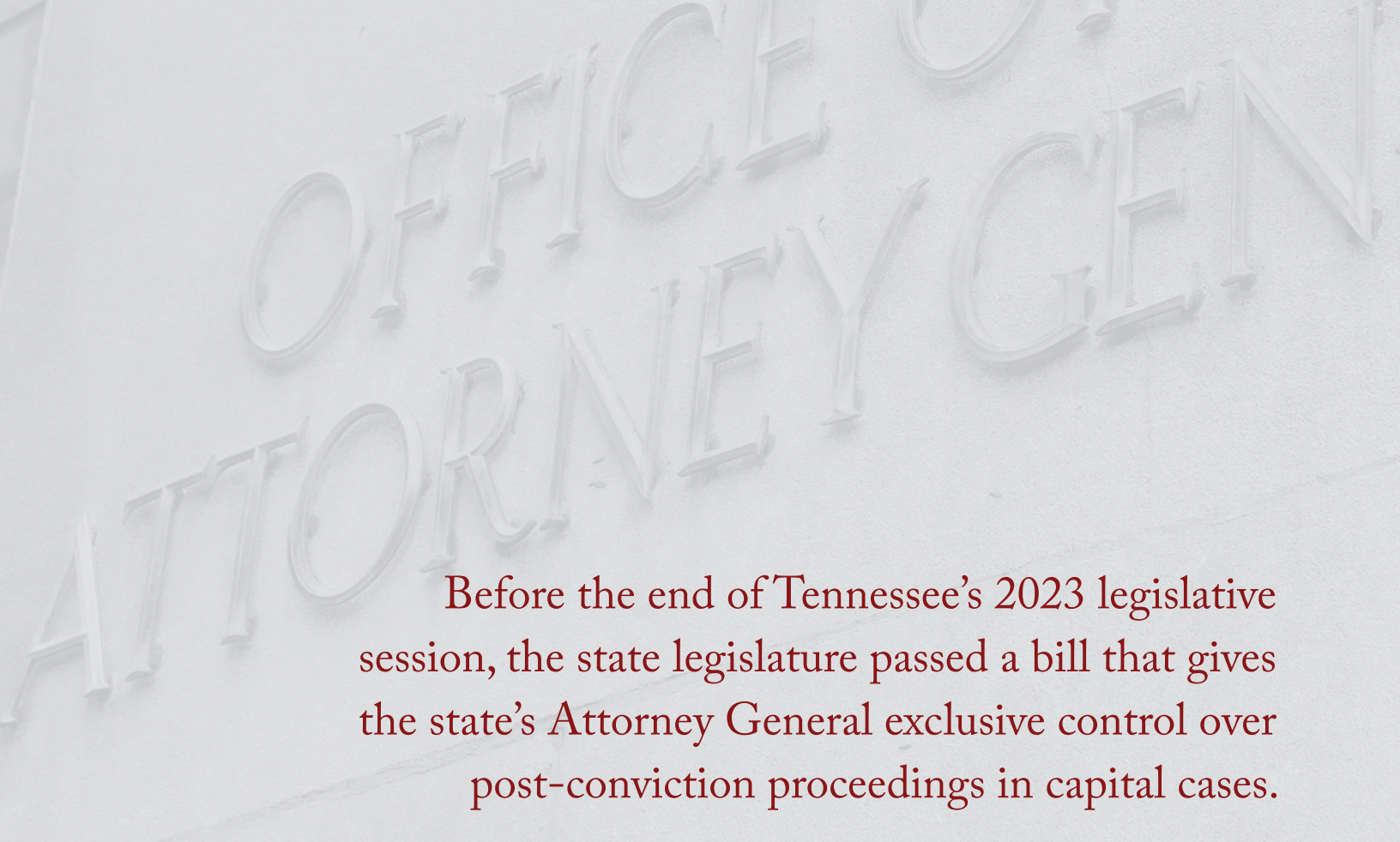
Prosecutors wield significant power over death penalty cases and studies suggest racial biases—whether implicit or explicit—may inform prosecutorial charging decisions. As discussed earlier, a study of all Tennessee first-degree murder convictions from 1977 to 2016 found that prosecutors were 1.5 times more likely to seek the death penalty in cases involving white victims. The study also compared prosecutorial charging decisions for both intraracial and interracial murders. The preference for white victims remains constant, regardless of whether the defendant is Black or white. Tennessee prosecutors sought the death penalty against Black defendants accused of murdering white victims 29% of the time, compared to 18% of the cases where Black victims were involved (an 11 percentage-point difference). Similarly, prosecutors sought the death penalty against white defendants accused of murdering white victims 31% of the time, compared to 21% of the cases where Black victims were involved (a 10 percentage-point difference).¹¹⁹

One reason why prosecutors may seek death more often in cases with white victims is because crimes committed against white victims can seem more serious given the greater societal value certain constituencies place on white lives compared to the lives of people of color.¹²⁰ Since elected prosecutors

are beholden to their constituents, they may consciously or unconsciously make decisions based on what they think voters want rather than what the law requires. High levels of voter disenfranchisement in Tennessee adversely affects poor people and people of color as they are disproportionately unable to use voting as a mechanism to ensure their interests are represented by elected officials.

Even those who can vote in Tennessee face a form of disenfranchisement at the local level as state-level officials continually interfere with local prosecutorial decision making. For years, the Tennessee Attorney General's Office has intervened to prevent reform prosecutors from correcting wrongdoings in death penalty cases. In November 2022, Assistant Attorney General Kathrine Decker argued against granting relief to Byron Black despite the Davidson County District Attorney Office's support of relief based on Black's intellectual disability.¹²¹ Former Tennessee Attorney General Herbert Slatery III also halted a 2019 plea deal sanctioned by the local district attorney that would have removed Abu-Ali Abdur'Rahman from death row because racial discrimination infected his trial.¹²²

Slatery also called for legislation (adopted in 2021) that allows the attorney general to seek to replace a district attorney in a case if he believes that the



Before the end of Tennessee’s 2023 legislative session, the state legislature passed a bill that gives the state’s Attorney General exclusive control over post-conviction proceedings in capital cases.

locally elected district attorney is refusing to enforce the law.¹²³ This legislation removes the ability of local elected officials to decide how to best represent their constituents’ interests. Recently elected Shelby County District Attorney General Steve Mulroy hinted at the effects of this legislation in his response to an ACLU of Tennessee candidate questionnaire in which he was asked if he would commit to never pursuing the death penalty. He responded no, and further explained, “I am reluctant to say I will ‘never’ prosecute a certain thing, for fear the state may take authority away from me... However, I am willing to say that I personally oppose the death penalty...”¹²⁴ Given that the Attorney General’s Office has been clashing primarily with so-called “progressive”

prosecutors in recent years, this legislation appears to be intended to prevent some prosecutors from challenging the status quo.

Though Slatery is no longer in office, the state Attorney General’s Office is continuing its efforts to remove power from local prosecutors. Before the end of Tennessee’s 2023 legislative session, the state legislature passed a bill that gives the state’s Attorney General exclusive control over post-conviction proceedings in capital cases. Some news outlets suggest this law was a response to district attorneys general in Davidson and Shelby counties agreeing to reduce sentences for people on death row whose trials had been tainted by racism or who raised substantiated intellectual disability claims.

Prosecutorial Misconduct

Prosecutorial discretion often goes unchecked, and those on death row face many legal barriers in seeking relief when that discretion becomes misconduct. Even so, at least 6% of death sentences imposed in the U.S. since 1972 have been judicially reversed for prosecutorial misconduct, or the defendant has been exonerated in a case with evidence of prosecutorial misconduct.¹²⁵ Researchers have found that race is a significant factor in official misconduct: 85% of capital exonerations of Black people in the U.S. have involved official misconduct by prosecutors, police, or other government officials.¹²⁶ In Tennessee, prosecutorial misconduct has resulted in the reversal of at least 15 death sentences, three of which were complete exonerations. Five of the 15 prosecutorial misconduct reversals were of sentences against Black defendants.¹²⁷ Importantly, these statistics don't include cases where courts recognized that prosecutors committed misconduct but denied relief because they found it to be "harmless error" or when the claim was procedurally barred, nor do they reflect misconduct reversals of capitally charged cases that resulted in life sentences. Thus, the actual number of instances of capital prosecutions involving prosecutorial misconduct may be much higher.

Shelby County's prolific use of the death penalty may help explain the county's outlier status regarding prosecutorial misconduct reversals and exonerations: four of the 12 non-exonerative reversals were of sentences from that county, making it one of only two counties in the state with more than one prosecutorial misconduct reversal.¹²⁸ Amy Weirich, who served as the Shelby County District Attorney General from 2011 to 2022, was one of four prosecutors discussed in the Harvard-based Fair Punishment Project's report about prosecutors who "have repeatedly violated their constitutional and ethical duties...." Their study found that 94% of counties in Tennessee had fewer misconduct-based reversals per capita than Shelby County. Even though this study did not solely focus on misconduct in capital cases, the findings are relevant insofar as they point to a culture of misconduct during Weirich's tenure. In 2017, Weirich received a private reprimand from Tennessee's Board of Professional Responsibility for misconduct during a murder trial.¹²⁹ Since Shelby County is a majority-minority county, with 54.6% of the population identifying as Black,¹³⁰ misconduct during Weirich's tenure likely affected many Black defendants who were already vulnerable to the effects of discrimination

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that exist in the criminal legal system. Weirich was found to have engaged in misconduct in death penalty cases even before becoming the District Attorney General in 2011. She prosecuted Andrew Lee Thomas, Jr., a Black man sentenced to death in 2001 whose sentence was overturned in 2017.

The U.S. Court of Appeals for the Sixth Circuit ruled that Weirich had unconstitutionally withheld evidence that the prosecution's key witness had been paid for her cooperation in the case and then elicited perjured testimony in which she lied about receiving payment.¹³¹



The Role of Police

Studies have shown that racial biases affect policing in a multitude of ways: Murders involving white victims are more likely to be solved than those with Black victims,¹³² police officers engage in misconduct more often when the defendant is Black,¹³³ and Black people are generally more likely to be on the receiving end of police violence,¹³⁴ among other disparities. A review of unsolved Tennessee homicides from 2013–2021 found that 29% of homicides of Black victims in the state went unsolved, compared to 11% of homicides of white victims.¹³⁵ The racial discrepancies in homicide clearing rates mean that cases involving white

victims are more likely to be prosecuted.

Research suggests that counties that disproportionately use the death penalty are also often outliers in the deadly use of police force.¹³⁶ Data on police killings from the Metropolitan Nashville Police Department reveal that from 2013–2021, police killed Black people at 3.2 times the rate of white people. Over the same time period, the Memphis Police Department killed Black people at 1.6 times the rate of white people.¹³⁷

The Memphis Police Department has recently come under scrutiny for their violent treatment of Black people. In January 2023, Memphis police stopped

29-year-old Tyre Nichols for alleged aggressive driving and then, in a widely viewed video, beat him to death. This incident sparked protests and prompted investigations into the Memphis Police Department from the Department of Justice and other organizations.¹³⁸ A review of the department's arrest data indicates that the police arrested nearly 15,000 people for violent and property crimes in 2021, which was almost twice the number of people arrested in Nashville, the largest city in the state. Notably, 86% of the people arrested in Memphis were Black.¹³⁹



Some scholars suggest that the violent treatment of Black people by police today is connected to the origins of modern-day policing.¹⁴⁰ In the early 1700s, the colony of Carolina established the first “Slave Patrol,” which was used to stop slave uprisings and to find and return any runaway slaves. Tennessee was one of the first territories to establish a Slave Patrol in 1753. These Slave Patrols would eventually become police departments following the Civil War. While no longer tasked with capturing runaway slaves, police still monitored the behavior of Black residents and protected the financial interests of the wealthy.¹⁴¹ This history is especially relevant in Memphis, which became a center of cotton and slave trading before the Civil War.¹⁴² One study of Black people in Memphis contended that city officials and police officers were involved in every major physical attack on the Black community in Memphis before the 1920s.¹⁴³



Ineffective Defense Counsel

Quality representation is often the difference between life and death in capital cases. While many capital defendants are Black, most capital attorneys are white. This disparity can affect the quality of representation if white attorneys are not aware of cultural differences and their own implicit biases that may affect the attorney-client relationship.¹⁴⁴

The Tennessee Supreme Court outlines standards for death penalty counsel, but the American Bar Association's (ABA) review of these rules found they weren't stringent enough to ensure capital defendants or those on death row received qualified lawyers.¹⁴⁵ The ABA's investigation into Tennessee's capital punishment system, the results of which were published in 2007, also reported that "Attorneys within the Offices of the District Public Defender

are burdened by some of the highest caseloads in the country. These attorneys are appointed on average over 600 cases, both capital and non-capital, a year, in addition to their pre-existing caseloads."¹⁴⁶

Further, the state places low financial caps on the amount of funding attorneys are allocated to investigate capital cases, limiting a defense counsel's ability to adequately investigate cases and secure the assistance of necessary experts.¹⁴⁷

Since the ABA's report was published 16 years ago, Tennessee's standards have not changed, and some capital attorneys suggest similar problems persist.¹⁴⁸

A separate study that reviewed death sentences imposed in Tennessee from 1977 to 2016 found 23% of death sentences had been reversed because of ineffective representation.¹⁴⁹



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2019

Abu-Ali Abdur'Rahman

Abu-Ali Abdur'Rahman was convicted and sentenced to death in Davidson County, Tennessee in 1987.¹⁵⁰ He was represented at trial by a defense attorney who failed to prepare adequately before trial and prosecuted by a district attorney general with a history of perpetuating racial biases. Abdur'Rahman's trial attorney, Lionel Barrett, ultimately left the practice of law and attributed his change of profession to his guilt over Abdur'Rahman's conviction, saying that Abdur'Rahman was on death row "because of me."¹⁵¹

Barrett's lack of preparation for Abdur'Rahman's trial allowed the prosecution to present theories that could have been disproven by the evidence. For example, the prosecution argued that there were bloodstains on Abdur'Rahman's coat that suggested that he committed the murder, not his alleged accomplice. Had Barrett reviewed the forensic evidence, he would have known that there were no

bloodstains on the coat. The stains were paint from Abdur'Rahman's job as a painter. During sentencing, prosecutor John Zimmerman introduced evidence that Abdur'Rahman had previously been convicted of second-degree murder in what he characterized as a drug turf war; he also knowingly falsely stated that Abdur'Rahman had no history of mental illness. Barrett did not investigate Abdur'Rahman's prior conviction of second-degree murder so he could not tell the jury that Abdur'Rahman had killed his rapist, or that his history of mental illness had been presented at that trial. Barrett also could have presented evidence of the severe child abuse Abdur'Rahman endured, as well as the fact that he spent a significant amount of his life in and out of mental institutions. This evidence not only would have rebutted the prosecution's allegations, it would have given the jury reasons to spare his life. Abdur'Rahman's appeals based on the ineffective

assistance of his trial counsel, however, were denied.¹⁵²

In 2021, Abdur'Rahman successfully argued that prosecutor John Zimmerman illegally struck two Black potential jurors and attempted to justify those strikes with purportedly race-neutral explanations that were actually racist stereotypes. For example, Zimmerman struck a college-educated Black pastor, claiming the juror seemed "uneducated" and lacked "communication skills."¹⁵³

In a 2015 training lecture for prosecutors, Zimmerman, now a Rutherford County prosecutor, reportedly advocated for the race-based use of peremptory strikes. He said that in a case with Latinx defendants, he "wanted an all African-American jury because 'all Blacks hate Mexicans.'"¹⁵⁴ In a letter criticizing Zimmerman's lecture, current Davidson

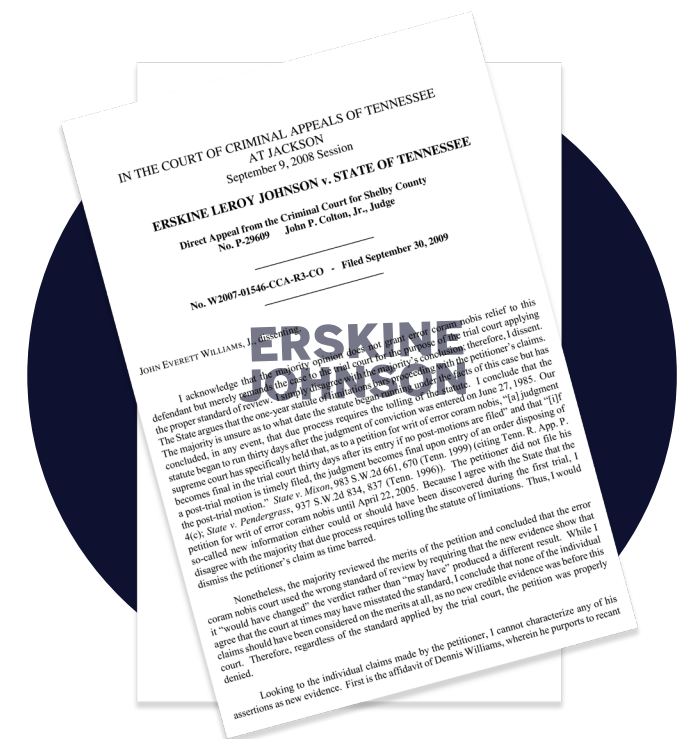
County District Attorney General Glenn Funk said Zimmerman was "encourag[ing] unethical and illegal conduct."¹⁵⁵ Zimmerman has also been accused of targeting law-abiding minority business owners in a failed 2018 sting operation.

In 2019, Funk conceded that Abdur'Rahman's trial had been infected by "overt racial bias" and agreed to a court-approved plea deal to resentence Abdur'Rahman to life in prison.¹⁵⁶ The Tennessee Attorney General's Office appealed the decision and successfully blocked the plea deal. After another round of hearings, where a trial court determined that Zimmerman's actions rose to the level of unconstitutional racial discrimination in jury selection, Abdur'Rahman was removed from death row after 34 years and resented to three consecutive life terms.¹⁵⁷

Jury Discrimination

Studies have shown that all-white juries are more likely to sentence Black defendants to death and less likely to consider all available evidence than racially diverse juries.¹⁵⁸ Many Black capital defendants in Tennessee have been tried by all or nearly all-white juries, even in majority-minority counties like Shelby. Ndume Olatushani—tried under the name Erskine Johnson—was sentenced to death in Shelby County by an all-white jury in 1985. On appeal, Olatushani’s counsel claimed all but one of the 16 or 17 excused jurors were Black, which was not reflective of the demographic makeup of that county. The Tennessee Supreme Court did not comment on the merits of these claims, however, because Olatushani’s trial counsel failed to raise the issue at the time of jury selection and thus the claim was procedurally defaulted.¹⁵⁹ This illustrates how meritorious claims of discrimination remain unremedied only because of procedural bars.

Death qualification—the process of determining whether potential jurors are willing to impose the death penalty in an appropriate case—has also been shown to decrease the racial diversity of juries. If a potential juror’s ability to impose the death penalty is substantially impaired, they are not permitted to serve on the jury.¹⁶⁰ Since Black people are more likely to be opposed to the death penalty than white



people, the death-qualification process results in Black people being disproportionately excluded from capital juries.¹⁶¹ Olatushani’s attorneys suggested that all the Black jurors who were excused were removed because they were unwilling to impose the death penalty.¹⁶² Death qualified juries also exhibit higher levels of racial bias,¹⁶³ and “support for the death penalty among whites is highly correlated with measures of anti-Black racial prejudice and stereotyping.”¹⁶⁴

There are other ways that Black Tennesseans are disproportionately excluded from juries. As mentioned previously, one in five Black people in the state are barred from voting because of their felony

convictions. Felony convictions are similarly used to permanently disqualify people from jury service in the state. Advocates suggest jury exclusion based on prior criminal convictions hinders jury diversity.¹⁶⁵ A study on jury discrimination in the south conducted by the Equal Justice Initiative (EJI) suggested that, even when prosecutors used veiled race-based reasons to strike potential Black jurors, Tennessee’s appellate courts rarely reversed decisions.

At the time of EJI’s study—and continuing for an additional six years¹⁶⁶—Tennessee was the only state studied whose appellate courts had never granted relief in a criminal case on the basis of jury discrimination. The report attributed this anomaly to the failure of trial counsel to properly raise objections at trial, as demonstrated in Olatushani’s case, and the “reluctance by appellate judges to find racial bias when claims are presented.”¹⁶⁷

Brain Injury, Intellectual Disability, and Serious Mental Illness

The U.S. Supreme Court held that executing individuals with intellectual disability is unconstitutional in *Atkins v. Virginia* (2002).¹⁶⁸ Of the 145 people in the U.S. who have been removed from death row because of an intellectual disability, the vast majority (83%) have been people of color, and more than two-thirds have been Black (69%). These numbers may suggest that people of color, especially Black people, with intellectual disabilities were at greater risk of being given a death sentence than were white people with intellectual disabilities. There have been three *Atkins* reversals in Tennessee, and all the men were Black.¹⁶⁹ Pervis Payne was granted *Atkins* relief in November

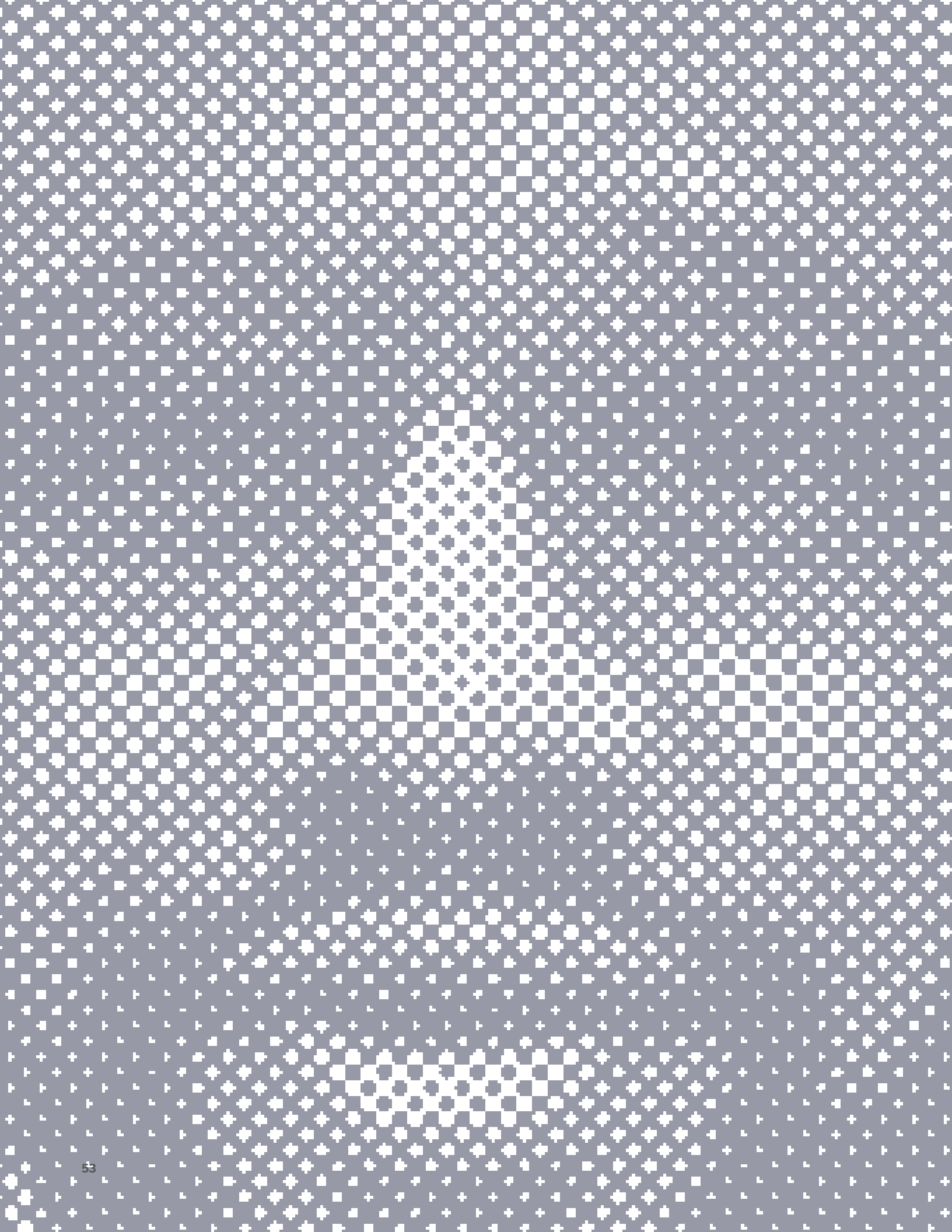
2021 following the passage of new intellectual disability legislation that same year. Advocates spent decades litigating whether Payne was eligible for the death penalty given his documented intellectual disability. Despite long-established evidence of Payne’s disability, former Shelby County District Attorney General Amy Weirich continually sought to execute Payne, who maintains his innocence. Prior to the new intellectual disability legislation of 2021, Tennessee law prevented those on death row from presenting intellectual disability claims to the state courts if their sentences had already been upheld on appeal before the U.S. Supreme Court’s *Atkins* ruling in 2002.¹⁷⁰

Others on Tennessee's death row have also faced significant procedural barriers to securing *Atkins* relief, despite well documented intellectual disability claims. It is uncontested that Byron Black, a Black man sentenced to death in Davidson County in 1989, is intellectually disabled. Still, Tennessee Court of Criminal Appeals Senior Judge Walter Kurtz dismissed Black's lawyers' petition for relief under the 2021 intellectual disability legislation on procedural grounds because Black's attorneys previously filed a claim of intellectual disability in 2004, which was denied. The Davidson County District Attorney's Office did not oppose Black's 2021 petition to vacate his death sentence; county prosecutors agreed that the 2004 claim was not properly adjudicated as it was decided under what were later determined to be unconstitutionally restrictive standards. The Tennessee Attorney General's Office did, however, argue against Black receiving relief, stating that the new law wasn't intended for people on death row to get another "bite at the apple." Black's recent attempts to access relief because he is constitutionally ineligible for the death penalty have therefore been thwarted by state-level officials who overruled authority over local-level decisions.¹⁷¹

Though the United States Supreme Court has not recognized that people with brain damage and serious mental illness should be exempt from the death penalty, these conditions are often presented

as mitigating factors at sentencing given their likely effect on culpability.¹⁷² Racial disparities in the availability of health care mean the diagnosis and treatment of these conditions occur far less often for defendants of color, and ineffective defense counsel often fail to adequately investigate and present this evidence at trial.¹⁷³ Many people sentenced to death in Tennessee may have serious mental illnesses and/or brain damage.¹⁷⁴ Byron Black, for example, has brain damage and schizophrenia; his lawyers argue he cannot rationally understand the reasons for his execution because of these conditions.¹⁷⁵

Amy Weirich secured death sentences against multiple Black men with cognitive impairments in Shelby County: Corinio Pruitt was diagnosed with a neuro-cognitive disorder and has had multiple experts testify that he is intellectually disabled during his post-conviction proceedings;¹⁷⁶ Charles Rice has been diagnosed with a delusional disorder that "would impair [his] ability... to manage to make sense out of day-to-day situations";¹⁷⁷ and in Vincent Sims' post-conviction hearings, an expert concluded Sims met the criteria for intellectual disability and determined his "intellectual impairments have been present since early childhood."¹⁷⁸ The prevalence of people on Tennessee's death row with vulnerabilities such as brain damage, serious mental illnesses, and intellectual disabilities challenges the idea that the death penalty in Tennessee is reserved for "the worst of the worst."



2021

Pervis Payne

Pervis Payne spent 34 years on Tennessee’s death row after a trial marred by prosecutorial misconduct and racial bias. Payne, who is an intellectually disabled Black man, has consistently maintained his innocence in the 1987 murders of Charisse Christopher and her 2-year-old daughter, who were white. Payne claims that he was waiting for his girlfriend at her apartment when he discovered that her neighbor and children had been attacked and tried to help them. Soon after, he was arrested.¹⁷⁹

According to Payne’s attorneys, his prosecution in Shelby County—the Tennessee county responsible for the most lynchings¹⁸⁰ and death sentences in the state¹⁸¹—relied on a theory of “outdated racial stereotyping.” Without evidence, prosecutors told the jury Payne was “high from ingesting drugs” and “looking for sex,” even though they had refused his mother’s request to administer a drug test when Payne was arrested and knew that Payne had no prior criminal history.¹⁸² At the same time as they

portrayed Payne as a hypersexual drug user, the prosecutors repeatedly talked about the victim’s “white skin” during the trial.¹⁸³

The prosecution had always maintained that the crime scene was limited to Christopher’s kitchen. In 2019, however, Assistant Federal Defender Kelley Henry obtained a court order to review the evidence and discovered that prosecutors had failed to disclose evidence of bloody bedding, collected elsewhere in the apartment, to the defense. Since the existence of this bedding was not known to the defense until over 30 years after Payne was sentenced, the bedding was never forensically tested for DNA. Henry explained that the presence of blood on sheets “is completely inconsistent with any theory of the case that has ever been presented.”¹⁸⁴

Payne sought DNA testing of the key pieces of evidence from the crime scene in 2020, and in 2021 the test ultimately revealed the DNA of an

unidentified male on the murder weapon. The State also claimed to have lost other evidence such as the fingernail scrapings taken from the victim and never had them tested.¹⁸⁵

Henry characterized the DNA evidence that was tested as “100% exculpatory.” The handle of the knife carried “[m]ale DNA that is not Pervis Payne,” she said. “The person that held the knife, it wasn’t Pervis Payne, because he’s eliminated. They use that word in the report, eliminated.”¹⁸⁶

At the same time Payne was pursuing testing of the DNA evidence, the Tennessee Black Caucus of State Legislators introduced a bill, as did two Republican lawmakers working with the Tennessee Disability Coalition, inspired by Payne’s case that created a procedural mechanism for death row prisoners to present intellectual disability claims to the Tennessee courts, where they had previously been procedurally barred from doing so. After the prosecution conceded that they did not have evidence to challenge Payne’s intellectual disability claim, his death sentence was vacated in November 2021, and he was resentenced to two concurrent life sentences, making him eligible for parole in 2027. In a statement from his attorneys, Payne’s team expressed gratitude to the legislature for helping to “modernize” the intellectual disability law, but added, “Our work is not yet done. This journey will continue until we uncover the truth and Pervis is exonerated.”¹⁸⁷

The death penalty exists within the broader context of mass incarceration. Tennessee incarcerates people for all crimes at a higher rate than most other U.S. states.¹⁸⁸ There are also significant racial disparities in incarceration rates in Tennessee: for every white person imprisoned in the state, 3.4 Black people are imprisoned.¹⁸⁹ Over 80% of Tennessee death sentences were issued before 2000 during the United States' dramatic rise in mass incarceration. Just four new death sentences have been issued in the last decade in Tennessee, three of which were imposed in Shelby County during Weirich's tenure as prosecutor. Hamilton County, which has the second greatest concentration of death sentences, has not issued a death sentence since 2003.¹⁹⁰

People sentenced to death in Tennessee spend many years on death row before an execution date is set. As a result, much of Tennessee's death row population is now elderly.¹⁹¹ The cost to incarcerate an elderly person can range from two to three times more than the cost to incarcerate a younger person.¹⁹²

Beyond the costs associated with addressing the health needs of elderly incarcerated people, securing and carrying out death sentences costs more than other sentences. The most recent study on the costs associated with Tennessee's death row was conducted by the state's comptroller office in 2004. In that report, the state found that capital trials cost 48% more than trials in which the prosecutor seeks life imprisonment.¹⁹³ Interestingly, the report

noted that sentencing people to death was less expensive than sentencing people to a life term or LWOP sentence because people can be executed (as opposed to dying naturally), therefore saving the state approximately \$774,000.¹⁹⁴ This flawed reasoning ignores the reality of the death penalty: only 13 of 262 death sentences in Tennessee have resulted in an execution.¹⁹⁵ As in the rest of the country, people sentenced to death in Tennessee are much more likely to either have their sentence reversed or to die without being executed by the state.¹⁹⁶ Thus, death sentences continue to cost Tennessee more money than other sentences, which is in line with what other studies have found.¹⁹⁷ Data from one study of cost differentials in fifteen states reveal that, on average, death penalty cases cost over \$700,000 more per case than non-capital cases.¹⁹⁸

Racial Bias in Shelby County's Juvenile Justice System

Many children in Shelby County have their first contact with the justice system through the county's juvenile justice system. In 2013, the U.S. Department of Justice launched an investigation into Shelby County's juvenile justice system. The investigation revealed that Shelby County was targeting youth of color, especially Black children, for prosecution in juvenile court and was creating long records for them.¹⁹⁹ For example, a Black child in Shelby County was arrested for the first time at 10 years old and charged with a felony for stealing a Pokémon card. Experts familiar with Shelby County's juvenile justice system concluded that had this child been white, he would not have been arrested, let alone charged with a felony, for this offense.²⁰⁰

The investigation also found that Shelby County was transferring children—especially Black children—from juvenile courts to adult courts at a very high rate²⁰¹ and was failing to “provide adequate due process protections for children before transferring them to the adult criminal court.”²⁰² In 2008, 225 children in Shelby County were transferred to adult courts.²⁰³ Based on data from the Office of Juvenile Justice and Delinquency Prevention, Shelby County alone accounted for 5% of juvenile cases nationally

that were judicially waived into adult criminal court that year.²⁰⁴

The investigation determined that race was a significant factor in the juvenile transfers. Investigators concluded that “[the Juvenile Court of Memphis and Shelby County] transfers Black children to adult criminal court more than two times as often than white children.... This disproportionate impact cannot be explained by factors other than race.”²⁰⁵ In 2017, 92 youths were transferred to adult courts, but there were stark racial disparities in transfers. Eighty-one of the 92 (88%) children transferred to adult courts were Black or mixed-race.²⁰⁶ The Center for Disease Control and Prevention (CDC) has commissioned multiple studies assessing the effects of transfer laws on juveniles. It concluded that transferring children to adult courts increases the likelihood of arrest for subsequent crimes, including violent crimes, when compared to youth who stay within the juvenile justice system. The report further stated that “available evidence indicates that [transferring juveniles to adult court] do[es] more harm than good.”²⁰⁷

The DOJ's investigation into Shelby County's juvenile justice system also found that incarcerated

children were not provided with necessary procedural protections to ensure fairness. A high percentage of children involved in Shelby County's juvenile justice system had Individualized Education Programs (IEPs) on file with their schools, which is a legal document developed for public school children with special education needs. Thus, many children going through the justice system were further challenged by intellectual and mental health issues. But the investigation found that psychologists who conducted psychological evaluations of these children often wrote sub-standard reports with inadequate information about the children's needs.²⁰⁸ Criminal histories developed as a child have been shown to have a lasting effect. A study that analyzed the effect of juvenile records on those convicted of first-degree murder in Tennessee found that juries returned death sentences in 51.9% of capital convictions where the defendant had a juvenile record. The likelihood of a jury returning a death verdict for a defendant with one or two prior felonies was actually *lower* than their likelihood of returning a death verdict when defendants had juvenile records.²⁰⁹ Relatedly, researchers found that having a prior violent felony on a defendant's record is a strong predictor of prosecutorial decisions to

seek and juries' decisions to impose death sentences in Tennessee.²¹⁰ Shelby County's history of arresting and prosecuting Black children, therefore, may have increased their risk of being sentenced to death in a capital proceeding.

Efforts to improve the experiences of juveniles going through the court system in Memphis and Tennessee broadly have been mixed. In November 2022, the Tennessee Supreme Court struck down the state's mandatory life sentences for juvenile homicide offenders, holding that it constituted cruel and unusual punishment. This development allows the court to consider the ways in which children are constitutionally different from adults when deciding their sentences.²¹¹ On the other hand, Memphis announced in April 2023 their plans to create a police unit specifically targeting juveniles. A presentation about the new program stated that police would "monitor juveniles and young adult pedestrians for illegal activities," which included being inappropriately dressed, playing loud music, and handing out fliers for donations, among other things. Advocates in Memphis have likened this program to stop and frisk policies which contributed to the rise of mass incarceration and specifically targeted Black and Brown people.²¹²

Conclusion

Tennessee's troubled history of racial discrimination and racial violence should not be ignored as the state decides how to proceed with its administration of the death penalty. State Representative Paul Sherrell's request to "add hanging by a tree" as an execution method in 2023 epitomizes an unwillingness to acknowledge the profoundly disturbing history of racial terror, lynchings, and executions in Tennessee and how it has affected Black and Brown people in the state. History will continue to inform modern day practices and if Tennessee hopes to avoid making the same mistakes again, it would be beneficial for leaders to confront the past.



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