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# EQUALITY AT THE CEMETERY GATES: STUDY OF AN AFRICAN AMERICAN BURIAL GROUND

By William A. Engelhart\*

## I. INTRODUCTION

In Charlottesville, Virginia, the University Cemetery serves as the final resting place of many of the most prominent community members of the University of Virginia. In 2011, the University planned an expansion. During archaeological research to this end, sixty-seven previously unidentified interments, in both adult and child-sized grave shafts, were discovered on the proposed site of expansion, to the northeast of the University Cemetery. Further archival research revealed that “at least two late nineteenth century references note that enslaved African Americans were buried north of but outside the enclosed University, in an adjacent wooded area.”<sup>1</sup> In one, Col. Charles Christian Wertenbaker recalls: “in old times, the University servants were buried on the north side of the cemetery, just outside of the wall.”<sup>2</sup> Current research suggests that at least as late as 1898 the area of land was recognized as historically utilized by the University of Virginia for “servant” burials.<sup>3</sup> Since these discoveries, a commemoration ceremony has been held.<sup>4</sup> Some beautification measures have been undertaken: a specially designed fence has been installed; some trees have been planted; and at both entrances an informational sign is posted explaining the significance of the plot. Still, this newly rediscovered sacred space stands in stark contrast to the marble tombs and gilded cenotaphs of the University Cemetery and adjacent Confederate monument.

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1. RIVANNA ARCHAEOLOGICAL SERVICES, LLC, *BEYOND THE WALLS: AN AFRICAN AMERICAN BURIAL GROUND AT THE UNIVERSITY OF VIRGINIA*, 23 (2013).

2. *Id.*

3. *Id.* at iii.

4. Anne E. Bromley, *U.VA. Group Honors Unknown Slaves at Burial Site, Sets Stage for Future Work*, UVATODAY (Oct. 16, 2014), <https://news.virginia.edu/content/uva-group-honors-unknown-slaves-burial-site-sets-stage-future-work>.

Typically, descendants of the dead reserve rights in a cemetery in the form of some kind of property interest.<sup>5</sup> Mourners and the children of mourners may return from time to time to pay their respects and tend to the graves of their dearly departed. In general, this is a well-established right (though further investigation will reveal that it somewhat less clear than one might expect).<sup>6</sup> However, slavery in America has frustrated many rights, and its long shadow continues to disrupt others. Because of the nature of this property interest, today in Charlottesville, the cemetery rights of the descendants of those slaves interred to the northeast of the University Cemetery are arguably extinguished, or at best unclear. The owner of the cemetery, the University of Virginia, has made no attempt to exclude or to sell the land, nor likely would they, but it is unclear that they *could not* should they so desire. There are likely other slave cemeteries, on public and private land, that find themselves in a similar situation: specifically, slave cemeteries and African American burial grounds that, because of systemic oppression and discrimination, are rendered unprotected and abandoned—descendants' rights vanished into nothing.

In exploration of this problem, this paper lays out the historical legal landscape of cemeteries, the special issues that arise in slave cemeteries generally, and the application of these doctrines to the African American burial ground in Charlottesville. Additionally, it presents a suggested legal treatment of this special type of property interest: namely, that there should be legislative reform that, in the case of abandoned slave cemeteries, creates both a public easement allowing access and broad statutory standing so that communities can work together to maintain these sacred sites and police against desecration. Further, the development of the rights of sepulture in American common law and the accompanying legal solicitude would allow judges to read this regime into existence, even in absence of formal legislative measures.

## II. GRAVE LAW

Respect for hallowed ground can be a strong motivator. As one scholar noted, the land underlying the former World Trade Center, some of the most valuable real estate in the world, was set aside after the events of September 11, 2001 as consecrated and no longer appropriate for commercial development or even private ownership.<sup>7</sup> In its place stands the National September 11th Memorial and Museum, a testament to the

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5. See *infra* Part II.

6. See *infra* Part II.

7. Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487, 489-490 (2005).

widespread agreement that memorial property stands apart.<sup>8</sup> Many authors have remarked on the seemingly unusual treatment of memorial spaces generally and burial grounds in particular. As one wrote, “. . . at the outset it must be emphasized that a cemetery lot is treated for most purposes as being unlike any other piece of real or personal property.”<sup>9</sup> The motivation for this unusual treatment is not surprising. Death and mourning are part of the human experience and necessarily implicate the management of the cadaver. Funeral custom can take many forms, and in some societies (including our own), burial in the earth is not uncommon. As expected, the weight of tradition and ritual is bound up with the body in the land, and as one court explained: “our reverence . . . creates a strong natural desire that it shall never be disturbed or desecrated, and that the place where it rests shall be regarded as consecrated ground, and its beauty preserved until the end of time.”<sup>10</sup>

This compelling dictum, if vague, alludes to a number of rights contained in a cemetery lot. There appears to be some protection against desecration; but also, unsurprisingly, a right to access the graveyard to mourn and maintain, and often a right to bury other relatives on the property.<sup>11</sup> Mary L. Clark describes an even broader series of legal protections that cut across the breadth of property law, special treatment she calls “solicitude.”<sup>12</sup> Under her analysis, legal protection granted to parcels of land associated with human death and burial include a protection against adverse possession, an inability to be partitioned or mortgaged, and an immunity from taxation.<sup>13</sup> The shifting bundle of rights related to the burial of the dead can be referred to, somewhat archaically, as the “right of sepulture.”<sup>14</sup>

What is unusual then is not that jurists should feel motivated to grant special protections to burial grounds, but rather that these protections were constructed—somewhat inconsistently—out of the seemingly inadequate building blocks of Anglo-American property law. Indeed, throughout the Middle Ages and even into the mid-19th century, the Christian Church maintained exclusive control over the regulation of in-

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8. *Id.* at 490.

9. R.S., Note, *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378, 378 (1961).

10. Clark, *supra* note 7, at 507.

11. Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469, 1479 (2006).

12. Clark, *supra* note 7, at 496-505.

13. *Id.*

14. PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* 27 (2d ed. 1950). Alternatively, “sepulcher.” However, some sources maintain that the right of sepulture refers only to the right, before burial, to be buried and, after burial, not to be dug up. *Id.*

terment in England, and canon law was exclusively applied.<sup>15</sup> Crucial to this system was the fact that the Church of England was the one and only church and that it largely owned all burial places.<sup>16</sup> Because of this, cemetery law at the time of the American Revolution was contained in ecclesiastical law.<sup>17</sup> When the United States rejected the establishment of a single state church, it created a sizable legal void regarding burial places.<sup>18</sup> Since Congress and state legislatures mostly ignored the issue, most “disputes in the 18th and 19th centuries were litigated . . . and early American jurists were charged with resolving them under common law rules.”<sup>19</sup> In the 21<sup>st</sup> century, state statutory law gives some guidance, but much of the shape of the law of burial places still derives from U.S. common law developed after the American Revolution.

One primary issue is the difficulty in determining exactly what kind of property interest these rights stem from. Courts have most frequently construed it as either some kind of easement or license; but as one scholar noted, courts have even read a cemetery lot deed as a security to prevent speculation.<sup>20</sup> Occasionally, jurisdictions have described the right as a qualified fee,<sup>21</sup> but often even deeds purporting to convey a fee have been held to convey an easement only.<sup>22</sup> All things considered, it might be more useful to look at the treatment of the right of sepulture generally. As described in a law review article from the 1960s:

Inasmuch as courts rarely reach divergent results merely on the basis of the label attached to the interest, it is more realistic to acknowledge the unique way in which cemetery lots are treated; otherwise the true issues are confused and concealed by arbitrarily assigning real property tags which have the characteristics desired for the resolution of a particular case conso-

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15. Jackson, *supra* note 14, at 21–22. That is, until the English Burial Acts in 1855. *Id.*

16. Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, 30(2) PROB. & PROP. MAG. March/April 2016.

17. *Id.*

18. *Id.* at 2.

19. *Id.*

20. R.S., *supra* note 9, at 379. “Cemetery lots have a pronounced tendency to rise in price over a period of time as a result of two factors: additional improvements which enhance the appearance of the cemetery, and the constant depletion of available burial space . . . In an attempt to exploit this commercial truth, unscrupulous promoters have promised huge profits on resale to encourage purchases of large quantities of lots of investment purposes.” *Id.* at 395.

21. *Id.* at 380.

22. Jackson, *supra* note 14, at 358.

nant with an appropriate though enunciated theory of cemetery law.<sup>23</sup>

A leading treatise on the topic, contemporary to the law review article, muses on proposed property designations before capitulating: “in any event, an interest in real property.”<sup>24</sup> That being said, the property interest is most commonly described as an easement in gross held by the relatives of the buried person, and it descends by operation of law but is neither devisable nor alienable.<sup>25</sup> This construction will be used to analyze the right of sepulture generally, and later when dealing with the wrinkles that arise in slave cemeteries.

The existence of this easement is evaluated based on three main components: some kind of dedication, a determination that the cemetery has not been abandoned, and some type of connection between those buried and those seeking access.<sup>26</sup> The standard for dedication appears to be rather low. As one commentator puts it, “the presence of a headstone seems to be sufficient to establish dedication, but less may be sufficient.”<sup>27</sup> In its most straightforward form, dedication can result from a determination that the landowner initially consented to the burial. However, some small acknowledgement by the owner that people were being openly buried in the cemetery is certainly enough.<sup>28</sup> Interestingly, this process of dedication appears to express legal solicitude—the special treatment described by Clark—since dedication in the form of the conveyance of an express easement does not seem to have to satisfy the statute of frauds as would be typically required.<sup>29</sup> Indeed, “the common law of *implied* dedication emphasized that no particular act or ceremony was required to accomplish a dedication,” but many states (including Arizona, California, Hawaii, Indiana, Montana, Oregon, Texas, and Washington) now for-

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23. R.S., *supra* note 9, at 380.

24. Jackson, *supra* note 14, at 359.

25. Brophy, *supra* note 12, at 1479. Some cases refer to “heirs” instead of “relatives” which would apply strictly to those who succeed in intestate succession. “Presumably the term is intended to include named individuals ( devisees and legatees) intestate succession as well; succeeding generations of descendants become problematic.” RICHARD B. CUNNINGHAM, *ARCHAEOLOGY, RELICS, AND THE LAW* 582 n.51 (2d ed. 2005). There is a marked departure here from ecclesiastical law in England, since the easement was based on a doctrine of “temporary appropriation of soil.” The right generated by the burial would terminate with the dissolution of the body. Jackson, *supra* note 15, at 354. This is not the regime in the United States, where permanent appropriation is the rule. *Id.* at 356.

26. Brophy, *supra* note 11, at 1490-92.

27. *Id.* at 1491.

28. *See id.*

29. *See* Jackson, *supra* note 14, at 221.

malize dedication by statute, requiring a map of the cemetery boundaries and some kind of written instrument.<sup>30</sup>

Additionally, courts are very willing to accept that the easement can be established without the landowner's consent, by prescription.<sup>31</sup> Further solicitude is demonstrated in the prescriptive easement process since the law of property typically requires continued use for a period specified by state statute, but it seems that this kind of easement can be established as soon as the body is buried. As one old treatise puts it, "in truth, whether or not the body has been interred for a prescriptive period should be of little moment, except that the reasons are graver that abhor the disturbance of the dead while the wounds of separation are fresh in the hearts of the living."<sup>32</sup> In other words, even as a practical concern, the ten or twenty year period required by statute is the period during which a family would fight most passionately to protect the grave and during which judges seem typically reluctant to disturb the dead.<sup>33</sup> While still a member of the New York Court of Appeals, Justice Cardozo explained that "[t]he dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."<sup>34</sup>

The second basis for the property interest is the determination that the cemetery has not been abandoned. In general, courts require "continuing use of the cemetery or at least some continuing recognition that bodies are buried there."<sup>35</sup> This is true even in cases where the cemetery is no longer maintained because the location was lost for good reason, an issue that will be explored *infra* as it relates to slave cemeteries. As one court noted, even in a case where abandonment occurs because a persecuted sect chose not to advertise their gravesites through the erection of markers for fear of desecration, the easement is lost.<sup>36</sup> In another instance, a court failed to stop a zoning variance which would allow construction over a cemetery in which there had been no new burials in a hundred years.<sup>37</sup> However, in a minority of cases there may be some rights retained even in an abandoned cemetery.<sup>38</sup>

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30. Cunningham, *supra* note 25, at 580-81 (2d ed. 2005).

31. Brophy, *supra* note 11, at 1489-90.

32. Jackson, *supra* note 14, at 230.

33. *See id.*

34. Marsh, *supra* note 16, at 5 (quoting *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926)).

35. Brophy, *supra* note 11, at 1491.

36. Cunningham, *supra* note 25, at 590-91.

37. Brophy, *supra* note 11, at 1491.

38. *See* FLA. STAT. § 704.08 (2000) (noting a Florida statute allows family access to an abandoned cemetery).

Finally, there is a requirement of connection between the dead and those attempting to assert their rights. As emphasized by Alfred L. Brophy:

. . . [T]here likely must be a connection between those buried and those seeking access. No case articulates a requirement that those seeking access actually knew the people they are visiting. But it is possible that the people who are no longer able to trace a specific connection may have no greater right of access than members of the public.<sup>39</sup>

When an easement fails because no connection is established, the individual attempting to assert their rights may have rights no greater than the public generally—which in many instances is no right at all.<sup>40</sup> As discussed below, this requirement too creates special problems in the context of historical African American cemeteries.

There is disagreement about the nature of the rights contained in burial grounds.<sup>41</sup> The predominant view is, as mentioned, to treat a grave and the corresponding right as an affirmative easement in gross across surrounding land to access the gravesite owned by the relatives of the deceased, and often a right to additional burials by family members.<sup>42</sup> To this, Brophy adds a restriction on the desecration of the graves and on the right of the owner of the graveyard to “sell or mortgage the property or use it in ways inconsistent with cemetery purposes.”<sup>43</sup>

The right of access is the most essential part of cemetery rights held by relatives of the interred. As Brophy puts it, “At base, [it] is an easement in gross to cross private property to access a cemetery.”<sup>44</sup> Some state law provides for this right explicitly, but in other jurisdictions it is presumed by common law.<sup>45</sup> Generally, this right is understood to be held by the relatives of the deceased, but some states have expanded the right statutorily. In West Virginia, for instance, a statute extends a right of access to friends of the deceased; and in Virginia a statute provides access even to genealogical researchers.<sup>46</sup> Some states require that a permit be obtained for access, but there is general agreement that there must be some amount of reasonable access.<sup>47</sup> Exactly what counts as reasonable—in

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39. Brophy, *supra* note 11, at 1492.

40. Cunningham, *supra* note 25, at 596.

41. *Id.* at 582.

42. *Id.* See also Brophy, *supra* note 11, at 1479.

43. Brophy, *supra* note 11, at 1479.

44. *Id.*

45. *Id.* at 1479.

46. *Id.*

47. *Id.* at 1489.



terms of frequency, time of day, and length of visits—has stirred up some debate, with one court holding that a single four-hour visit per month is sufficient.<sup>48</sup>

Next is the right to bury more relatives in the cemetery, presuming there is sufficient space.<sup>49</sup> Though one article is quick to admit that, as a general matter, “permission to bury one person does not automatically give that person’s spouse a right of burial as well,”<sup>50</sup> some states have gone so far as to give the spouse a vested right if there is at least one burial space remaining.<sup>51</sup> However, even in the absence of a statute some courts nevertheless presume its existence. In the 1911 case, *Hines v. State*, the Tennessee Supreme Court stated: “The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.”<sup>52</sup> Further, in 1980, the Florida District Court of Appeals found the easement “for future burial in unused grave sites to the extent that they are available.”<sup>53</sup> In the absence of a statute designating the classes of persons entitled to burial, courts have usually attempted to allocate remaining spaces determined by order of death.<sup>54</sup> Brophy points out that the lack of commentary by courts renders the scope of this right unclear.<sup>55</sup>

There is also a right against desecration—necessitated by the right of access—if the owner of the plot (or a third party) destroys the grave because there will be nothing left to visit.<sup>56</sup> Most straightforwardly, desecration is damage to the grave.<sup>57</sup> As one court noted in 1933, “whoso disturbs a dead body merely to suit his own convenience does so at his own risk.”<sup>58</sup> Desecration often arises in circumstances where, against relatives’ wishes, a monument is defaced or decorative plants are removed.<sup>59</sup> In the

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48. *Id.*

49. Brophy, *supra* note 11, at 1489. See also Cunningham, *supra* note 26 (“... and perhaps even additional burial rights for successive members of the family.”).

50. R.S., *supra* note 9, at 396.

51. *Id.* at 398.

52. Brophy, *supra* note 11, at 1498 n.118.

53. Cunningham, *supra* note 25, at 580.

54. R.S., *supra* note 9, at 397 (“In the absence of such a statute, courts have attempted to allocate the remaining spaces, usually by applying the general rule that as between equal owners priority is determined by order of death.”).

55. Brophy, *supra* note 11, at 1498 n.118.

56. *Id.* at 1494.

57. Jackson, *supra* note 15, at 169.

58. *Id.* at 173.

59. R.S., *supra* note 9, at 394. Further examples can include the drilling of oil wells in an existing cemetery, plowing over graves, or the burial of a dog in an adjoining lot. See also Jackson, *supra* note 14, at 170. It is worth noting that there are two dogs buried in the University Cemetery, former University of Virginia mascots.

case of intentional desecration, the full range of legal and equitable relief, from damages to injunction, are typically available to relatives and descendants.<sup>60</sup>

Finally, burial grounds are accompanied by restraints on alienation and restrictions on inconsistent use, which could be construed as rights or, in some instances, burdens.<sup>61</sup> These restrictions are broad and affect both the owner of the servient estate and the owners of the easement. For example, courts have held it is likely not possible to sell or encumber a public cemetery.<sup>62</sup> Other statutes make the cemetery lots indivisible.<sup>63</sup> Further, once land is dedicated as a cemetery and a body has been buried, the owner of the servient estate cannot take back the dedication nor can anyone use the land inconsistently with this dedication.<sup>64</sup>

It is probably unfair to present this conflict in terms of a clash between the rights of the living and the rights of the dead. More clearly, “cemeteries pose a conflict between the rights of the living to have a memorial for the dead and the rights of other living people to use the land in (what to them is) a more productive fashion.”<sup>65</sup> The doctrine of abandonment pushes back against dead hand control: “. . . when the names of the dead are no longer heard in the ears of men, and not even a trace of their memory remains . . . to perpetually preserve the soil as sacred and hallowed ground, under such circumstances, does honor to neither the living nor the dead.”<sup>66</sup>

### III. SLAVE CEMETERIES

As a general matter and as a matter of outcomes, African American burial grounds have not received the same legal solicitude as White burial grounds.<sup>67</sup> As Clark describes it:

[I]n contrast with law’s solicitous treatment of cemeteries generally . . . the history of legal treatment of slave and other long-standing African-American burial grounds has been one

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60. Brophy, *supra* note 11, at 1496.

61. *Id.* at 1498-99.

62. *Id.* at 1498.

63. R.S., *supra* note 9, at 399.

64. Clark, *supra* note 7, at 499. The true breadth of the lacuna in American cemetery law post-revolution is demonstrated by the origin of this doctrine. Courts looked back to Roman law where even one burial set the land apart as divine, dedicated to sacred purposes.

65. Brophy, *supra* note 11, at 1501.

66. Clark, *supra* note 7, at 497.

67. *Id.* at 514.

of neglect or outright disregard. These burial sites have not typically benefited from solicitous application of adverse possession, dedication, eminent domain, trespass, criminal desecration and other legal principles. Rather, they have been permitted to be alternatively overlooked or destroyed.<sup>68</sup>

Indeed, the recent successful treatment of the African Burial Ground National Monument in Lower Manhattan in the 1990s represents a departure from the *status quo* achieved only through “substantial lobbying and organizing efforts.”<sup>69</sup> In this example, 15,000 graves were discovered in downtown Manhattan during the construction of a federal building.<sup>70</sup> The US General Service Administration strategy was to “plough forward with construction while holding required public meetings and expediting the archaeology excavation,” and cessation of this project through the securing of National Historic Landmark was possible only through mass protests of development.<sup>71</sup>

This is of course only one small part of the story since cemeteries, like other real property, are affected by historical policies of racial segregation that applied in both life and death. In 1950, an author presented as factual matters that “in parts of the country where racial feeling is as strong as religious feeling, one finds a ready tendency to prevent the introduction of bodies of members of the colored race in cemeteries used by the whites,” and that racially discriminatory covenants were permitted.<sup>72</sup> Until recently, cemeteries routinely denied burial plot purchase opportunities to African Americans through different types of racially restrictive covenants. As late as the 1930s, around 90% of cemeteries contained some sort of racially restrictive covenant.<sup>73</sup> Moreover, integration attempts were protested by threats of some form of postmortem White flight: “so great is the opposition . . . to the interment of colored persons . . . large numbers of the dead already interred therein would be removed . . .”<sup>74</sup> In other cases cemetery officials threatened: “if the colored people did buy lots it would only make the neighbors angry and kick and remove to some other part of the cemetery or possibly to some

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68. *Id.*

69. *Id.* at 514 n.98.

70. Michael L. Blakey, *African Burial Ground Project: Paradigm for Cooperation*, UNESCO 61 (2010).

71. Clark, *supra* note 7, at 514. *See also id.*

72. Jackson, *supra* note 14, at 380.

73. Kitty Rogers, *Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900-1969*, 56 ALA. L. REV. 1153, 1156 (2005).

74. *Id.* at 1157.

other cemetery.”<sup>75</sup> Ultimately, courts applied the landmark civil rights decision in *Jones v. Alfred H. Mayer Co.* to cemeteries, barring “all racial discrimination, private as well as public, in the sale or rental of property . . .”<sup>76</sup>—though misconceptions about this fact have been recorded as late as the 2000 edition of *American Jurisprudence*, which stated that “regulations of cemetery association restricting the right of burial members of a particular ethnic group or race will be upheld.”<sup>77</sup>

In an earlier case, in 1955, though concurring with an opinion upholding a racially discriminatory policy, Justice Dooling of the Supreme Court of California stated: “The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter.”<sup>78</sup> Despite this move for equality, in many cases the damage may already be done. Lawsuits by African American purported rightsholders have often failed.<sup>79</sup> These cases demonstrate legal obstacles particular to this situation. Most importantly, they reveal how the institution of slavery and further systemic oppression have confounded the regime of abandonment and the requirement of connection or standing.

#### IV. ABANDONMENT APPLIED

As mentioned above, courts typically require that a cemetery not be abandoned if burial ground rights holders are to have rights at all.<sup>80</sup> This turns on evidence that the cemetery has continued to be used, or at the least that there is some continued recognition of its status as a cemetery.<sup>81</sup> One court stated that “as long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves or as long as it is known and recognized by the public as a graveyard, it is not abandoned.” (alteration in original).<sup>82</sup> Even in lieu of formal recognition, tombstones or markers should be enough.<sup>83</sup>

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75. *Id.*

76. *Id.* at 1163.

77. *Id.* at 1166.

78. *Id.* at 1161.

79. Clark, *supra* note 7, at 516; Mai-Linh K. Hong, “Get Your Asphalt Off My Ancestors!”: Reclaiming Richmond’s African Burial Ground, 13(1) LAW, CULTURE AND THE HUMANITIES 81, 83 (2013).

80. Brophy, *supra* note 11, at 1491 nn.89-90.

81. *Id.*

82. C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. L. REV 479, 489 (2004) (quoting *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959)).

83. *Id.*

If the cemetery is determined to be abandoned, the easement is at worst entirely extinguished and at best, severely restricted.<sup>84</sup> After disinterment and reinterment of the bodies elsewhere, the land where the easement attached, i.e. the servient estate, can be returned to trade and commercial use.<sup>85</sup> It appears not to matter that the location of the cemetery was lost for good reason. In one case, a cemetery was considered abandoned because no markers were found, even though the graves weren't marked because the interred—the persecuted religious sect of Quakers—purposely failed to erect tombstones out of fear of desecration.<sup>86</sup>

This line of argumentation has been successfully applied to slave cemeteries. In *Dove v. May*, the Virginia Supreme Court allowed the Virginia State Highway Commission to build a road over a slave burial site that was found to be abandoned (after moving the graves to another site).<sup>87</sup> In application to the University of Virginia's own African American burial ground, the lack of grave markers speaks to an oppressive reality of slavery and Jim Crow era policies.

At the University of Virginia cemetery, it is likely that slaves may have chosen not to mark their graves out of a fear of grave robbing. The School of Medicine and Anatomy required cadavers for dissection and to this end, the bodies of slaves, free Blacks, and poor Whites were targeted.<sup>88</sup> In addition, grave robbing was not illegal until 1848, well after the establishment of the University Cemetery in 1828.<sup>89</sup> At least one medical student was verified as having been involved with grave robbing in 1834.<sup>90</sup> In this case, the student was shot while attempting to steal the body of a dead African American.<sup>91</sup> The student survived and the man who shot him was “sent to the [p]enitentiary.”<sup>92</sup> It was not until 1851 that the University of Virginia began to send for cadavers from Richmond, and even later, in 1884, that the Generally Assembly of Virginia made it easier to acquire cadavers legally.<sup>93</sup> It is not surprising then that the enslaved and free African American communities at the University of Virginia would employ strategies to avoid the depraved attention of the grave robbers. According to one account, “it was then said that many of

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84. Cunningham, *supra* note 25, at 597.

85. *Id.*

86. *Id.* at 590.

87. Clark, *supra* note 7, at 516.

88. RIVANNA ARCHAEOLOGICAL SERVICES, LLC, *supra* note 1, at 25.

89. *Id.*

90. *Id.*

91. *Id.* at 26.

92. *Id.*

93. *Id.* at 28.

the bodies were only logs of wood or stones, for the fear of having their dead taken up by the medical class . . . caused the negroes to inter their dead secretly, and hold the usual ceremonies over the dummy.”<sup>94</sup> It seems shocking that the court would find abandonment where the indecent institution of grave robbing pressed community members to choose between memorializing the grave of their loved one and losing the rights bound up in burial.

In addition, the current legal regime tends to favor Eurocentric burial practices and devalue potential historical African American preferences for different forms of memorialization.<sup>95</sup> African American burial practices often differed from those of the White community; however, at the Charlottesville cemetery, the east-west orientation of nearly all of the graves suggests the introduction of a Christian idiom, though it is unclear if this was the choice of the slave or the slave owner. As one scholar notes, “[s]urface decoration of graves with ceramic and glass containers as well as other material culture and plantings, often perceived by Whites as abandoned trash, in reality conveyed significant meanings to both the living and the dead and contributed to the creation of a unique landscape. Unfortunately, this unique landscape does not clearly protect a cemetery against abandonment in the same way more traditionally European headstones might.”

Finally, even when memorials were constructed, there may have been preferences for non-permanent markers which, compounded with the potential destruction of monuments by early 20th century Whites, leaves little to be found today.<sup>96</sup> During archaeological excavation, eight of the sixty-seven grave shafts were found to contain a stone marker.<sup>97</sup> Six of these were apparently unworked local stone, and no markings or inscriptions could be found.<sup>98</sup> The remaining two, interpreted as headstones, were white quartzite tabular stone that had been broken at their base.<sup>99</sup> No inscriptions or markings could be found on these either.<sup>100</sup> Evidence shows that the 1915 cemetery expansion was, in part, “an intentional covering, or erasure, of a pre-existing African American burial ground,” but it is unclear if at the time local African Americans attempted to speak out or to resist this encroachment.<sup>101</sup> One author remarks that “the ability to [erase the cemetery] and the racial overtones of such a de-

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94. *Id.* (emphasis in original omitted).

95. *Id.* at 57-58.

96. *Id.* at 43.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. RIVANNA ARCHAEOLOGICAL SERVICES, LLC, *supra* note 1, at 66.

cision are grounded in the context of institutionalized racism<sup>102</sup> . . . .” This seems especially unjust considering that the Department of Veterans Affairs has spent millions of dollars to produce and ship headstones to mark the graves of Confederate dead.<sup>103</sup> While it seems proper to establish national cemeteries and honor veterans of any conflict, since the government also provides headstones for veterans buried in private cemeteries, this—as a practical matter—creates a system in which slave cemeteries fall into abandonment first because their markers were maliciously destroyed and then because society has chosen not to preserve them.<sup>104</sup>

These realities result in a legal regime where, because of the institutions of slavery and Jim Crow and a general devaluation of African American burial practices, cemeteries like the one at the University of Virginia could be determined to be abandoned. Once this determination is made, any easement is likely extinguished and disinterment becomes a possibility. Thankfully, due to the recent rededication of the cemetery (and reinstallation of a fence, signs, and other markers), it is extremely unlikely that a court would find that the cemetery is abandoned.<sup>105</sup>

However, there remains the possibility that the original easement was extinguished and that the new dedication creates a new easement in gross in the public. This is relevant because it changes who holds the right. Where the original easement was likely held by the descendants of the interred—which is to say the descendants of the University’s slaves—the new easement would be held by the public generally. This outcome is arguably still problematic since the exclusivity of the right will have been lost. Whereas the University previously could have excluded anyone except for the descendants due to the right of access, now the University would not be able to exclude anyone. Equally, the other rights in the easement would be implicated. Suddenly, there may be a public right for anyone to be buried in the cemetery, and a more general right against desecration.

## V. ISSUES OF STANDING

As mentioned above, one element of the easement is a connection between the person buried and those seeking to enforce access or another right. The institution of slavery has made it difficult or even impossible for the descendants of slaves to show the kind of connection required for

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102. *Id.* at 67.

103. Steven I. Weiss, *You Won’t Believe What the Government Spends on Confederate Graves*, THE ATLANTIC (Jul. 19, 2013), <https://www.theatlantic.com/politics/archive/2013/07/government-spending-confederate-graves/277931/>.

104. *Id.*

105. Bromley, *supra* note 4.

the right of access or the kind of standing required to sue for desecration.<sup>106</sup> Slavery promoted the separation of families by sale and engendered laws that forbid recognition of slaves' patrilineal descent. Post-emancipation, mass migrations north muddled the record even more.<sup>107</sup>

In an instance where an alleged relative was trying to sue for desecration, one scholar noted, "the legal requirement of standing was confounded by slavery itself, which obscured the lineages of many African American families, making impossible the evidence of biological descent the court demanded."<sup>108</sup> In general, lawsuits have demonstrated that only individuals who can prove biological descent from those interred in slave cemeteries have the ability to sue for injunctive or other relief if those graves are desecrated.<sup>109</sup> In this situation, "if [the plaintiff's] interest was unidentifiable—and in effect, unrecognizable before the law—that is 'precisely' because his enslaved ancestors were stripped of identity by the same state that now insisted a descendant be able to identify them."<sup>110</sup>

The solution here is not clear. Better science could allow proof in the form of some kind of DNA analysis or genetic testing, but a difficulty arises when trying to "identify the plurality of African groups that comprise the diaspora. Because these individuals were not culturally homogeneous but came from a wide range of environments, the genetic variation must have been diverse as well."<sup>111</sup> So, rather than try and get better evidence, the standard could be modified.

For starters, the federal or state governments could create statutory standing. In 1990 the Native American Graves Protection and Repatriation Act (NAGPRA) solved a parallel problem in the Native American context.<sup>112</sup> NAGPRA provides for the return from federal custody of Native American mortal remains, funerary objects, sacred objects, and objects of cultural patrimony to the lineal descendants and culturally affiliated tribes.<sup>113</sup> As one scholar observed, "[t]he stipulations of NAGPRA simply accommodate cultural reality in allowing Indian tribes to claim the same next-of-kin status that Catholics might claim if a Spanish mission cemetery were disturbed or that African Americans might claim if a slave

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106. Hong, *supra* note 79, at 93.

107. *Id.*

108. *Id.* at 83.

109. *Id.* at 93.

110. *Id.* at 96.

111. Mark P. Leone, *The Archaeology of Black Americans in Recent Times*, 34 ANN. REV. ANTHROPOLOGY. 575, 582 (2005).

112. Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 TEX. F. ON C. L. & C. R. 3, 4 (1998).

113. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58:1 RUTGERS L. REV. 45, 74 (2005).



cemetery were disturbed. . . .”<sup>114</sup> To some, “NAGPRA is seen by Native American activities as the culmination of a civil rights movement on behalf of the dead.”<sup>115</sup> Of course, there is no legal reality for the equivalent African American claim.

Further, even this scheme is not without its own problems and limitations. Under NAGPRA, an Indian tribe must show a cultural or geographical relationship to the material to lay claim.<sup>116</sup> NAGPRA makes the federal government into the gatekeeper of tribal identity since they can choose which groups they are willing to recognize as a tribe.<sup>117</sup> Moreover, in instances of dispute, the federal government always maintains authority—such as in the case of the Kennewick Man when the remains of a man at least 8,000 years old were discovered and the government could not attribute the remains to any particular tribe.<sup>118</sup>

It can be an empirical problem as well as a formal one. NAGPRA has been construed to apply only to a presently existing people.<sup>119</sup> Because of this, it is unclear how any individual remains found without artifacts could be Native American and therefore subject to NAGPRA. As one observer puts it “bones without associated artifacts cannot be connected to a particular tribe except by geography and oral traditions.”<sup>120</sup>

Some of these similar issues might arise with the slave cemetery in Charlottesville. As an initial matter, it is not certain that the cemetery under analysis actually is a slave cemetery at all. One possibility is that it is an older White cemetery that merely predates the University Cemetery,<sup>121</sup> but in the end, the evidence suggests it is in fact a slave cemetery. For one, almost all of the burials in the University Cemetery have been positively identified, and there are no other known sites of likely African American burial.<sup>122</sup> Further, in some 19<sup>th</sup> century sources the site’s use as a slave cemetery was mentioned.<sup>123</sup> One researcher compiled a list of enslaved African Americans who died at the University of Virginia between

114. Steve Russell, *Law and Bones: Religion, Science, and the Discourse of Empire*, 99 RADICAL HIST. REV. 214, 218 (2007).

115. Russell, *supra* note 112, at 4.

116. *Id.* at 8. To set up the issue, even in the case of the African American Burial Ground National Monument, “[t]he African-Americans who had persistently lobbied to protect the site needed a group-rights category such as the ‘culturally affiliated group’ moniker used in NAGPRA legislation.” One term, “descendant community,” seems useful, but its boundaries are hard to define. *Id.*

117. Clark, *supra* note 113, at 77-78.

118. *Id.* at 75-76.

119. Russell, *supra* note 112, at 221.

120. *Id.* at 221.

121. RIVANNA ARCHAEOLOGICAL SERVICES, LLC, *supra* note 2, at 61.

122. *Id.* at 62.

123. *Id.* at 61-62.

1853–61, and this list could be used to inform as to who the occupants of the graves are and who might be their descendants.<sup>124</sup> But as University Landscape Architect Mary Hughes, who worked on the project, stated: “I’m sure they will look as hard as they can to find definitive information, but it may be that we will never have a definitive answer.”<sup>125</sup>

Currently, any descendants of the enslaved African Americans in the Charlottesville cemetery would have a difficult time proving: (1) it is a slave cemetery, (2) the identity of the buried person, and (3) a relation to the buried person. Statutory standing could relieve some of this pressure, either by deferring to a descendant community or by creating standing for the public more generally.

## VI. SLAVE CEMETERIES AS PUBLIC SITES

Ideally, slave cemeteries should be construed as easements in gross held by the public and composed of a right to access, a right against desecration, and a right against alienation or inconsistent use. The right to further burial, which is often spoken of as a component of burial rights, is first, not spoken of universally, and second, probably too problematic to apply under this construction. If the easement in gross held by the public allowed anyone to be buried there—assuming sufficient space—this would surely frustrate the reasons slave cemeteries should receive special treatment in the first place (e.g. a reparations theory or as a memorial to historical segregation and oppressive practices). This construction helps eliminate wrinkles created by the abandonment and standing issues.

As far as the abandonment issue is concerned, this construction helps eliminate the need to prove that the easement was not abandoned. While it is true the exclusive right may (or may not) have vanished, that right is not greater than what would be vested in the public generally. This is to say that everyone would have a right to access the cemetery. In a world where the easement is only held by the relatives, the owner of the servient estate cannot exclude the relatives from the land. But in a world where the easement is held by everyone, the owner of the servient estate cannot exclude anyone. If a slave grave were discovered in a private cemetery, the effect of this policy is that the landowner would not be able to exclude anyone from visiting the cemetery.<sup>126</sup> The exclusive

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124. *Id.* at 64.

125. The Daily Progress, Charlottesville, Va., *UVA Forgotten Cemetery: Archaeological Survey Uncovers 67 Graves, Likely Black Slaves*, HUFFPOST: BLACK VOICES (Dec. 04, 2012), [http://www.huffingtonpost.com/2012/12/04/uva-forgotten-cemetery-67-graves-likely-slaves\\_n\\_2237112.html](http://www.huffingtonpost.com/2012/12/04/uva-forgotten-cemetery-67-graves-likely-slaves_n_2237112.html).

126. Though as mentioned before this would not have to be an unlimited right. They choose to have visiting hours or otherwise limit the right.

right does have its appeal: “it also offers the descendants of slaves a piece of property—an easement for access—however small, that their ancestors left for them.”<sup>127</sup> However, the benefit of construing the right as a public easement is that helps ensure that the cemetery, as a memorial, keeps the history of slavery visible – rather than built over or hidden away on private estates.<sup>128</sup> Under a reparations theory, there are two benefits: (1) taking the property interest off the market shows respect, and (2) the descendants of slaves are offered a piece of property.<sup>129</sup> As one commentator noted, “[i]n the end, preservation of land associated with death and burial of non-Whites can be a powerful form (among others) of repatriation for histories of racial oppression.”<sup>130</sup> Property is valuable, even an easement, and its donation to the public would not be meaningless. She argues that “[t]he decision to use property to preserve off-market land associated with the death and burial of historically subordinated peoples can be an important step in redress and rebuilding of trust. . . .”<sup>131</sup> To the second point, while this interest would not be going directly and exclusively to the descendants of the slave, it would be going to everyone, and so the descendants would all be accounted for among those benefitting. It is important to notice that because of the institution of slavery, most or even all servient estates would have been the land of the original slave owner.

Finally, the standing problem that arises in desecration cases can be partially resolved through thinking of the easement as public. One court described an easement, when abandoned, along the lines of this outcome: “The rights of the descendants, in this situation, become merged with the right of the public generally to insist that due respect be paid to the sanctity of human remains and human burial grounds if they should be uncovered inadvertently.”<sup>132</sup> As a policy matter, if everyone had standing to sue for desecration—either statutorily or through other means—cemetaries would receive the protection they deserve. If *anyone* saw the owner of the land destroying monuments by driving a tractor across the graves, they would be able to sue for desecration. Because the full scope of legal and equitable relief is available, people would be motivated to go to court to enforce these rights. The cemetery would be protected if construction were enjoined, but people would be vigilant in search of damages (maybe even punitive damages) that would go to the litigant.<sup>133</sup>

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127. Brophy, *supra* note 11, at 1515.

128. Hong, *supra* note 79, at 102.

129. Brophy, *supra* note 11, at 1515.

130. Clark, *supra* note 7, at 530.

131. *Id.*

132. Cunningham, *supra* note 25, at 596.

133. They could be divided some other way: part going to the litigant and part going to a maintenance fund.

Just as with *qui tam*, the hope of compensation motivates people to do the right thing.

As a practical matter, legislators should come together at a state and federal level in order to pass statutes codifying a public easement in abandoned slave cemeteries and to create broad statutory standing. There is at least one state statute in Oklahoma that does, in fact, appear to use eminent domain to create an easement with a right to access abandoned cemeteries on private property.<sup>134</sup> It states: “any relative of the deceased who wishes to visit an abandoned cemetery which is completely surrounded by privately owned land . . . shall have the right to reasonable ingress or egress for the purpose of visiting such cemetery.”<sup>135</sup> However, as Brophy notes, the statute also specifically claims that “this section shall not be interpreted to allow the creation of an easement or claim of easement . . . .”<sup>136</sup>

However, even in absence of formal legislative action, courts could potentially apply the flexible and powerful doctrine of solicitude and develop this regime on their own. Indeed, as mentioned above, cemetery law was created seemingly *ex nihilo* by American jurists in the wake of the Revolution. Despite some regulatory development in the 20<sup>th</sup> century, courts have often applied solicitude to modify property doctrine when dealing with sites associated with death and burial. It is not impossible that judges could continue to find, through solicitude, new exceptions buried in this sacred legal space.

In either case, the use of eminent domain in this context raises several problems. If the slave cemetery has been found to be abandoned and the easement extinguished, the creation of a new public right will probably require compensation of the landowner. As a primary matter, the land needs to be taken for legitimate public use. In 1954, “the Supreme Court in *Berman v. Parker* recognized ‘fostering spirituality’ as a valid public use for purposes of exercising public domain authority,” and this rationale was used to create Gettysburg and Antietam.<sup>137</sup> Accordingly, it seems it would be a legitimate public interest to foster spirituality through preserving these abandoned slave cemeteries, not to mention the importance of preserving history or a under reparations theory. Payment of the landowners could be unpopular as a matter of public policy. Certainly, the fair market value of a cemetery could not be terribly high, as inconsistent use is already constrained, but in the case of an abandoned cemetery the landowner may be free to disinter the bodies, reinter them elsewhere,

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134. OKLA STAT. tit. 8, §§ 186–187 (1998).

135. OKLA STAT. tit. 8, § 187 (1998).

136. OKLA STAT. tit. 8, § 187 (1998).

137. Clark, *supra* note 7, at 502.

and then return it to the typical course of trade and commerce.<sup>138</sup> Should the landowner dare to disturb the dead, the fair market value in this case could be considerably higher.

## VII. CONCLUSION

In Charlottesville, it may never come to all this. The University of Virginia is an agent of the government and may be protected by sovereign immunity. Moreover, the University has taken great care in its analysis and moved forward with sensitivity, and indeed, rededicated the cemetery to the public. Because of this, they likely would no longer be able to exclude the public—not that they would want to. Thankfully, the community was consciously involved, and there are ongoing efforts to further study and interpret this sacred space. However, as the story unfolds, it is not clear that even this degree of delicacy is enough. The descendants of slaves deserve something more than a decision not to redevelop or exclude. The issue of standing has not been resolved, and likely there would be no liability in the case of desecration. Slavery was exploited to build Jefferson's University brick by brick, and now it is clear that slavery's long shadow must be dismantled the same way, a piece at a time. It does not take much to make the mental leap: to construe the property interest of all abandoned slave cemeteries as a public easement in gross with a right of access, rights against desecration, and restrictions on alienation. It seems this show of solicitude is sorely needed to give these sixty-seven dead the same respect seen in the stately University Cemetery, right next door. In any event, it is a start.

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138. Cunningham, *supra* note 25, at 580.