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Abstract

By treating spatial conflict as one way communities wrestle with the memory and legacy of slavery, this article unites critical landscape analysis, a tool of legal geography, with legal and cultural analysis and recent scholarship on African American reparations. A slave cemetery lay beneath a parking lot in Shockoe Bottom, a neighborhood of downtown Richmond that was once a major slave-trading hub. In recent years, controversy arose over the site’s use, generating racially charged local debate and two failed lawsuits seeking to preserve the site. This article examines the significance of the African Burial Ground controversy by analyzing its symbolic, discursive, spatial, and legal dimensions. Although the law ostensibly protects ancestral graves from desecration, it demands that a plaintiff demonstrate biological descent from the interred in order to make a claim; as this case demonstrates, standing is denied to those whose family histories were obliterated by slavery. I argue that the plaintiff’s lack of standing before the law, which is rooted in slavery, cannot be separated from other, social and political forms of illegitimacy historically inscribed upon African Americans. Here, claims of desecration were relegated to the political arena, where redress was possible but subject to the vagaries of local, state, and national racial politics. Community activists, unable to protect the Burial Ground through the force of the law, instead mobilized the spectacle of the law, and achieved a surprising out-of-court resolution to the conflict.

Keywords

Slavery, memory, reparations, race, African American, cemetery, legal geography, land use

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“Rights have to be exercised *somewhere*, and sometimes that ‘where’ has itself to be actively produced”

—Don Mitchell¹

I. Introduction

As the 150th anniversary of the start of the Civil War approached, communities throughout the South sifted through the discursive remnants of a violent racial past, attempting to construct an ethically acceptable (or, failing that, politically useful) narrative of Southern history. There were, inevitably, missteps. In April 2010, Virginia Governor Bob McDonnell reinstated Confederate History Month, a tradition two previous governors had allowed to lapse,² by issuing a proclamation that failed to mention slavery, but that urged Virginians “to understand the sacrifices of the Confederate leaders, soldiers and citizens during the period of the Civil War, and to recognize how our history has led to our present.”³ A state Republican leader called the move “courageous,” while prominent critics called McDonnell’s omission “mind-boggling” and “offensive.”⁴ In response to criticism, McDonnell explained that he was trying to focus on aspects of the “conflict between the states” that he “thought were most important for Virginia,”⁵ a statement that only further angered some. McDonnell’s “Virginia,” in which a sanitized Confederate history ran its course independently of the history of slavery and Jim Crow, denied the central role racial oppression has played, and continues to play, in American society. The proclamation privileged Virginians who identify with “our” white, Confederate history, implicitly excluding those who are unlikely to, such as the one-fifth of Virginians who call themselves African American.⁶ Only after a political backlash publicly shamed him did the governor amend his proclamation, adding a new paragraph condemning slavery.

McDonnell’s denial of African American history and political belonging are not, of course, only symbolic; they help produce, and are in turn naturalized by, a wide range of material inequities that preserve white supremacy in many areas of American life. This article seeks to connect the omissions and redirections in racial discourse, particularly discourse relating to the memory and legacy of slavery, to an area of material life that has received significant attention in recent critical legal scholarship: the construction of local

1. Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003), p. 81.
2. *The Washington Post*, “McDonnell’s Confederate History Month Declaration Irks Civil Rights Leaders,” April 7, 2010 [<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604416.html>].
3. *The Washington Post*, “Governor Robert F. McDonnell’s Original Confederate History Month Proclamation,” April 7, 2010 [<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/07/AR2010040704411.html>].
4. *The Washington Post*, “Declaration Irks Civil Rights Leaders.”
5. *Op. cit.*
6. U.S. Census Bureau, *State & County Quick Facts: Virginia* (2010) [<http://quickfacts.census.gov/qfd/states/51000.html>].

landscapes and the power relations that shape and are shaped by them. I am especially interested in understanding the symbolic and discursive aspects of what Don Mitchell calls “locational conflict”—the fight over “the legitimacy of various uses of space”—and how those aspects work with and against the role of law.⁷

The subject of my analysis is the controversy that arose over a 1.6-acre parcel of land in downtown Richmond. Between 2008 and the spring of 2011, the land was owned by the state and used as a parking lot by Virginia Commonwealth University (“VCU”). Some community members believed that beneath the asphalt lay an old cemetery for slaves and free blacks, the Burial Ground for Negroes, now commonly called the African Burial Ground (“Burial Ground”). The Burial Ground, whose location and even existence were disputed, became a flashpoint in Richmond’s already fractious racial politics. Activists (mostly African American) considered the site sacred, the final resting place of hundreds, maybe thousands, of enslaved or formerly enslaved African men and women. They argued that parking on the land was a desecration and demanded the lot’s closure. But for some other Richmond residents (mostly white), the controversy represented an overstated assertion of victimhood by African Americans and a demand for unwarranted concessions. The university, meanwhile, insisted that it meant no disrespect, but needed a parking lot.

In 2010, Sa’ad El-Amin, a former Richmond City Councilman and a claimed “likely” descendant of the interred, filed two lawsuits seeking to close the parking lot.⁸ Both lawsuits failed, but were important and instructive because they demonstrated the legal obstacles that descendants of slaves can face when seeking recognition and protection of ancestral graves. In both cases, 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 that the court demanded. Because the law did not offer redress for the alleged desecration of the Burial Ground, the issue was relegated to the more volatile political arena. There, stakeholders reached a resolution that will result in the creation of a memorial at the Burial Ground site. Not surprisingly, however, this outcome depended as much on the interests of the powerful as on the claims of the weak.

In this article, I seek to answer two questions. First, what individual and societal stakes drove this highly emotional debate and shaped its conclusion? And second, why has the law been unable to recognize and redress the harm claimed by African American community members? My analysis proceeds in three parts. First, I offer a critical reading of the landscape of Shockoe Bottom, the historic area of downtown Richmond where the Burial Ground lies, to illuminate the site’s deep cultural significance and the nature of the harm caused by parking on it. Next, I analyze El-Amin’s two lawsuits and the public discourse surrounding them to argue that, in this case, an African American man’s lack of standing under the law reflects and reinforces a common presumption in the political sphere that allegations of racial harm lack merit. Ultimately, the struggle over the Burial

7. Mitchell, *Right to the City*, p. 81.

8. *El-Amin v. Kilpatrick*, No. CL1-67-00, slip op., (Va. Cir. Ct. Oct. 19, 2010) [hereinafter, “*El-Amin v. Kilpatrick*”]; *El-Amin v. Virginia Commonwealth University et al.*, No. CL10-4130, slip op. (Va. Cir. Ct. Mar. 24, 2011) [hereinafter, “*El-Amin v. VCU*”].

Ground site reveals the extent to which African Americans are still viewed as illegitimate agents in mainstream civic life, lacking “standing” in both courtroom and public opinion to describe, let alone obtain redress for, harms associated with slavery. In the concluding section, I draw together the spatial, legal, and discursive aspects of this controversy and situate the reclamation of the Burial Ground within current debates about African American reparations.

II. Landscape Analysis: Fencing off the Past in Shockoe Bottom

1. The Past and Present Landscape

The “spatial turn”⁹ in law is illuminating the many ways that law infuses space with meaning, especially law’s important role in sustaining the power asymmetries that express themselves in the built environment. Central to this work is the critical landscape analysis of legal geographers such as Nicholas Blomley and Irus Braverman, both of whom have demonstrated how the law legitimates some claims of attachment to particular spaces while rejecting others, as well as scholars like Alfred L. Brophy and Mary L. Clark, who view property law through the lens of critical race theory.¹⁰ Treating locational conflict as one way that communities wrestle with the memory and legacy of slavery, this article also draws from the increasingly dynamic and wide-ranging scholarship on African American reparations. Lawrie Balfour’s “language of reparations,”¹¹ for example, invites us to consider discourse and rhetoric among the cultural formations that shape Americans’ understanding of their racial past. Such scholarship offers fruitful ways to discuss not only economic atonement for the wide-reaching societal harms of slavery and Jim Crow, but also the discrete, but just as fraught and deeply rooted, racially-inflected conflicts over space, property, language, and memory that occur all the time in communities throughout the United States. With this article, I attempt to show, in essence, what it looks like when “reparations talk”¹² becomes both localized and spatialized, that is, inscribed in one neighborhood’s ever-changing landscape.

9. The June 2011 issue of *Law, Culture and the Humanities*, for instance, focused on the “spatial turn” in law, with essays such as Andreas Philippopoulos-Mihalopoulos, “Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space,” *Law, Culture and the Humanities*, 7 (2011), which offers a critical reading of the current literature on law and geography.

10. For example, see Nicholas Blomley, “Landscapes of Property,” *Law and Society Review*, 32 (1998); Mary L. Clark, “Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial,” *Kentucky Law Journal*, 94 (2005); Alfred Brophy et al., *Integrating Spaces: Property Law & Race* (New York: Aspen, 2011); Nicholas Blomley, “Cuts, Flows, and the Geographies of Property,” *Law, Culture and the Humanities*, 7 (2011); Irus Braverman, “Hidden in Plain View: Legal Geography from a Visual Perspective,” *Law, Culture and the Humanities*, 7 (2011).

11. Lawrie Balfour, *Democracy’s Reconstruction: Thinking Politically with W. E. B. Du Bois* (New York: Oxford University Press, 2011), p. 43.

12. Alfred L. Brophy, “Reparations Talk: Reparations for Slavery and the Tort Law Analogy,” *Boston College Third World Law Journal*, 24 (2004).

Blomley, in his study of a Vancouver community's resistance to redevelopment, treats "landscape" as a way of framing the ideological contestations that shape people's understanding of a place. The term refers simultaneously to both the objective "morphology" of a given area (its physical features, natural and built) and the subjective "representation of the world" that constitutes a particular subject's perspective on that area.¹³ Landscape is dynamic, "continually in a state of contestatory becoming."¹⁴ The historical landscape, therefore, encompasses changes in the uses and meanings of the built environment and in the dominant and resistive forces that shape them. Kenrick Ian Grandison helpfully describes landscape as an "ecosystem" whose "historical meaning resides not so much in autonomous objects or 'things' but rather in how spatial relationships change over time."¹⁵ Following Blomley and Grandison, I read the historical landscape of Shockoe Bottom, a palimpsest-like environment in which racial oppression and contestation are perpetually coming into and out of view.

Established around 1750, the Burial Ground was Richmond's first municipal cemetery for enslaved and free people of color.¹⁶ It initially occupied one acre of land in the part of downtown Richmond known as Shockoe Bottom.¹⁷ Like most "black bottom" land, the low-lying parcel adjacent to Shockoe Creek was among the least desirable in the city; cramped and flood-prone, it was from the beginning an abject space, no more than a disposal ground for brown bodies. In an 1810 letter, Christopher McPherson, a free black man, described the "ghastly" cemetery as lying

uninclosed, very much confined as to space, under a steep hill, on the margin of Shockoe Creek, where every heavy rain commits ravages upon some one grave or another, and some coffins have already been washed away . . . ; added to this, many graves are on private property adjoining, liable to be taken up and thrown away, whenever the ground is wanted by its owners¹⁸

In 1811, McPherson drafted a petition to the city on behalf of Richmond's free people of color asking for space for a new cemetery, the old one having reached capacity.¹⁹ City officials closed the cemetery to new burials sometime between 1810 and 1816, after it

13. Blomley, "Landscapes of Property," p. 574.

14. *Op. cit.*, pp. 574–6.

15. Kenrick Ian Grandison, "Negotiated Space: The Black College Campus as a Cultural Record of Postbellum America," *American Quarterly*, 59 (1999).

16. Veronica A. Davis, *Here I Lay My Burdens Down: A History of the Black Cemeteries of Richmond, Virginia* (Richmond, VA: Dietz Press, 2003), p. 11. There is also evidence that slave burials on Burial Ground land predated the cemetery's official opening and perhaps predated the establishment of the Town of Richmond in 1742. See Jeffrey Ruggles, *The Burial Ground: An Early African-American Site in Richmond* (unpublished paper, 2009), p. 6 [<http://www.scribd.com/doc/42051809/Burial-Ground-Ruggles-12-09>].

17. Davis, *Black Cemeteries of Richmond*, p. 11.

18. Christopher McPherson, *A Short History of the Life of Christopher McPherson* (Lynchburg, VA: The Virginian Job Office, 1855), pp. 21–2.

19. *Op. cit.*, p. 29.

reached capacity.²⁰ It is unknown whether or how much the cemetery expanded in size while it was active, though given the large size of Richmond's black population and the high volume of slave trade activity in the vicinity, the initial one-acre allocation was likely insufficient to account for the active time period.²¹

The Burial Ground appears on only one extant historical map, drawn in 1809 or early 1810 by Richmond's city surveyor, Richard Young ("Young map").²² While the Young map, which is shown in relevant portion in Figure 1, indicates the cemetery's approximate location, the map's lack of definite boundaries for the Burial Ground has fed controversy about the cemetery's extent. The Young map shows a space marked with the words "Burial Ground for Negroes," apparently bounded on the east by Shockoe Creek and on the south by an unlabeled road that is today a main thoroughfare, Broad Street.²³ A tear in the map bisects the Burial Ground label; the label surrounds a letter N, which corresponds to "Gallows" in the map legend; the nearby letter M corresponds to "Magazine." The map does not indicate a northern or western boundary for the cemetery. Adding to confusion regarding the Burial Ground's extent, the Young map shows both existing and planned structures; the portion of Broad Street adjacent to the Burial Ground, for instance, had not yet opened at the time of the map, so it is possible that graves exist under and south of Broad Street.²⁴ By the time the cemetery closed in the 1810s, the area was more developed and the land's value had increased. No effort was made to keep the space undisturbed for the nameless dead; a city plat dated 1817 shows the land already subdivided for other uses.²⁵

When the cemetery closed, Shockoe Bottom was developing into a critical center of economic and cultural activity, and it continued to grow in importance until the Civil War. Situated near the James River loading docks, it was "ground zero of the slave trade

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20. Estimates vary; see T. Tyler Potterfield, *Nonesuch Place: A History of the Richmond Landscape* (Charleston, SC: History Press, 2009), pp. 81–2; Ruggles, *The Burial Ground*, p. 9; Shawn O. Utsey, dir., *Meet Me in the Bottom: The Struggle to Reclaim Richmond's African Burial Ground* [film] (Burn Baby Burn Productions, 2009).
21. Michael L. Blakey, *Review of the Virginia Department of Historic Resources (DHR) Validation and Assessment Report on the Burial Ground for Negroes, Richmond, Virginia by C. M. Stephenson, 25 June 2008* (Institute for Historical Biology, 2008), p. 4. Blakey compares the Burial Ground's size to New York's well-known African Burial Ground, for which Blakey served as the head archaeologist.
22. Richard Young, *A Plan of the City of Richmond* [map] (c. 1809), Library of Virginia, viewed June 22, 2011. In Figure 1, the scan of the Young map provided by the Library of Virginia has been altered for clarity and rotated so that the upper edge is oriented northward. An undated, handwritten notation elsewhere on the map reads, "Certain references to ownership of properties on this map clearly show that it was constructed in 1809 or early 1810." The notation is signed "Jos. J. Pleasants," perhaps an early curator. Two physical maps exist showing the Burial Ground, but the other is a copy of the map produced by Young.
23. Although this portion of the still unnamed Broad Street runs roughly northwest/southeast, in its totality the road runs west/east. For simplicity, I will treat the map as if this street runs west/east.
24. Ruggles, *The Burial Ground*, p. 9.
25. Christopher M. Stevenson, Department of Historic Resources, *Burial Ground for Negroes, Richmond, Virginia: Validation and Assessment 7–8* (2008).



Figure 1. Partial image of Richard Young's map, *Plan of the City of Richmond* (c. 1809), showing the Burial Ground for Negroes and surrounding area. The image's upper edge faces northward. Scan of map provided by the Library of Virginia, Richmond, Va.

in Richmond,” and Richmond was second only to New Orleans in volume of slave trade activity.²⁶ Fifty slave traders and nearly all of Richmond's slave auction houses operated in Shockoe Bottom.²⁷ The concentration of activity was such that the area became a tourist stop for visitors curious to see the inner workings of the slave trade.²⁸ Slaves were “employed” throughout the neighborhood as well as traded: the James River was crucial to the city's lucrative tobacco industry, which by the mid-1800s relied on captive labor not just for growing and harvesting tobacco, but also for processing, packing, and shipping tobacco from factories and warehouses located near the river.²⁹

Beginning in the 1830s, a notorious slave “jail” and auction facility known to slaves as “the Devil's Half-Acre” operated just south of the Burial Ground. Acquired by Robert Lumpkin in the 1840s, it was the largest of five slave jails (where slaves were confined

26. Utsey, *Meet Me in the Bottom*.

27. Selden Richardson et al., *Built by Blacks: African American Architecture and Neighborhoods in Richmond* (Charleston, SC: History Press, 2008), pp. 34–40.

28. Op. cit.

29. Maurie D. McInnis, *Slaves Waiting for Sale: Abolitionist Art and the American Slave Trade* (Chicago, IL: University of Chicago Press, 2011), p. 60.

and inspected prior to sale) located in the short road known as Lumpkin's Alley.³⁰ In the mid-1850s, Anthony Burns, a runaway slave whose recapture famously tested the Fugitive Slave Law, was held and tortured for months in Lumpkin's Jail. Burns' predicament had galvanized northern abolitionists, who picketed his Boston trial by the thousands; once returned to Richmond, he was displayed in wretched condition to the public as a sign of the Fugitive Slave Law's triumph.³¹

The Burial Ground itself holds the memory of another important event in the history of slavery: the gallows on the cemetery grounds (indicated by "N" in Figure 1) was where the leader of Gabriel's Insurrection was executed in 1800. Following the failed slave rebellion, which was vast in plan, "General Gabriel" and dozens of co-conspirators were captured and killed at various sites around the city.³² Like Anthony Burns' torture, Gabriel's execution by hanging was one of many public spectacles produced by the law to deter slaves from either rebelling or running away; these violent scenes are preserved in cultural memory and hinted at by the landscape. Gabriel, who was informally pardoned by Governor Tim Kaine in 2007, is likely interred in the Burial Ground, a fact that has been publicized by activists pushing to preserve the site.³³ The cemetery's other occupants, however, remain anonymous since they were buried without record, probably in unmarked graves; even Gabriel's exact burial location is unknown.

Today, few of the slavery-related structures remain, but the landscape's contemporary built and natural features continue to tell of the Burial Ground's significance—and of its disavowal by the city. As shown in Figure 2, the Burial Ground is situated at the intersection of the city's two main axes, Interstate 95 (running roughly north-south) and Broad Street (east-west), so the racialized struggle over the site's use is located at the heart of the city's circulatory system. The construction of Interstate 95 in the 1950s transformed the area around Shockoe Creek into a series of utilitarian highway ramps, buttress walls, and commuter parking lots. Shockoe Creek is now underground, though train tracks and the highway echo its winding path.

Despite the seemingly clear grid pattern of the streets, the experience of actually navigating the hilly area has long been "much more disorderly and chaotic," as art historian Maurie D. McInnis observes.³⁴ Elevation is crucial to this experience and also reveals

30. On the Young map in Figure 1, the future site of "Lumpkin's Jail" appears as a blank space south of Broad Street and west of 17th Street. The James River Institute for Archaeology, which is involved in the ongoing excavation of Lumpkin's Jail, reports findings at the site that date back to the 1830s; see James River Institute for Archaeology, *Lumpkin's Jail Project*, <http://www.jriarchaeology.com/pages/lumpkin.htm> (viewed June 28, 2011). For a history of Lumpkin's Jail and other slave jails in the vicinity, see McInnis, *Slaves Waiting for Sale*, pp. 99–104.

31. McInnis, *Slaves Waiting for Sale*, pp. 111–14. An anonymous reviewer called my attention to Anthony Burns' connection to Shockoe Bottom, for which I give thanks.

32. Joshua Coffin, *An Account of Some of the Principal Slave Insurrections, and Others, Which Have Occurred, or Been Attempted, in the United States and Elsewhere, During the Last Two Centuries* (New York: The American Anti-Slavery Society, 1860), pp. 24–7.

33. *Associated Press*, Aug. 31, 2007; *The Va. Defender*, Autumn/Winter 2010, p. 6; <http://defendersfje.tripod.com/id34.html> Defenders for Freedom, Justice & Equality, "Sacred Ground Project: Original Statement of Purpose" (accessed June 17, 2011).

34. McInnis, *Slaves Waiting for Sale*, p. 57.

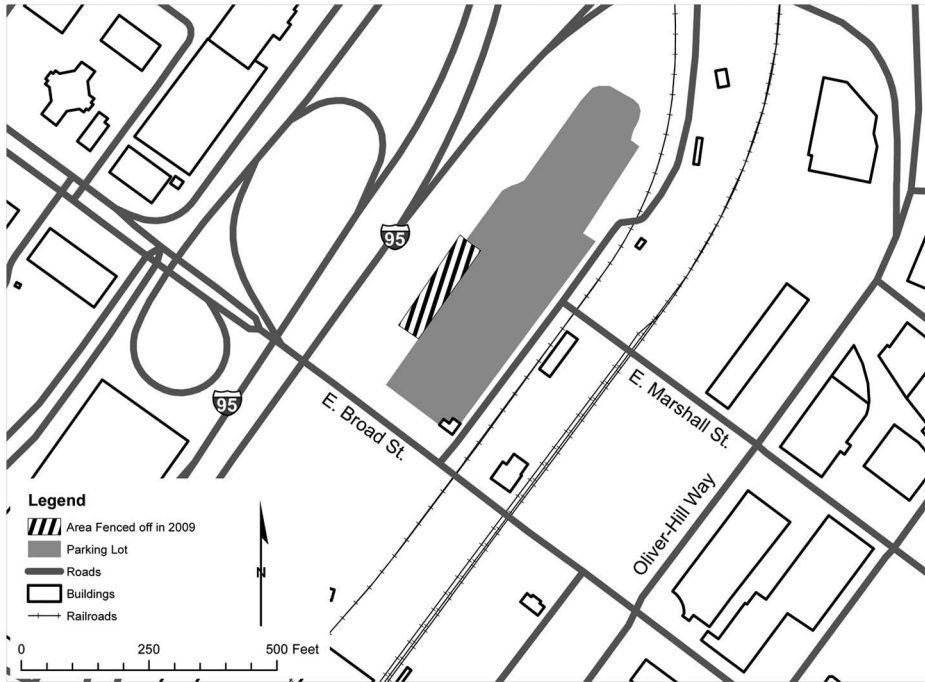


Figure 2. The African Burial Ground and Virginia Commonwealth University's 16th Street parking lot in 2010. The parking lot was removed in 2011. Map created by Chris Gist, University of Virginia Library Scholars' Lab, using base data from the City of Richmond. © U.Va. Rector and Board of Visitors.

much about the neighborhood's social hierarchy. The Burial Ground lies at the base of a steep hill that rises westward along Broad Street. At the top of the hill sit the State Capitol with its panoramic views, courthouses, the governor's office, and other seats of power—all within a half-mile of the final resting place of the dispossessed, but onerous to reach because of a climb of as much as 145 feet, the height of a fourteen-story building.³⁵ Although the valley floor has been lifted somewhat by fill dirt over the years, the neighborhood is still vulnerable to flooding: after Hurricane Gaston in 2004, the buried, but still potent, creek devastated homes and businesses.³⁶

Some traces of slavery are now becoming more visible through historic preservation. Seventeen newly installed informational signs lead visitors along the Richmond Slave Trail, a walking tour of slavery-related sites in Shockoe Bottom, including the Burial Ground and Lumpkin's Jail. But the landscape is discordant. The Slave Trail sites

35. This figure is calculated by constructing an elevation profile of Broad Street using Google Earth software.

36. See, e.g., <http://www.palmbeachpost.com/storm/content/weather/special/storm/2004/atlantic/gaston/news.html> (accessed June 1, 2011).

currently include an assortment of odd, fenced-off corners of parking lots, unoccupied buildings, and signs on walls. Lumpkin's Jail, which is undergoing archaeological excavation, is in a parking lot across Broad Street from the Burial Ground; there is no crosswalk, so Slave Trail visitors jaywalk from one to the other. The constant traffic noise and looming highway ramps remind visitors of the other historic sites and the black-owned homes and businesses that were destroyed when "urban renewal" swept the area *almost* clean of its past.

2. *The Visual Politics of Preservation*³⁷

For most of two centuries, the Burial Ground's lack of extant above-ground markers rendered it invisible in the landscape, which helps explain its status as a cultural cipher. Irus Braverman has written eloquently of the ideological functions of visibility and concealment in an embattled landscape, noting that "it is through their enactment in space that technologies of power are hidden."³⁸ In Richmond, a city that takes pride in (and expends copious resources on) its tall, lavish Confederate monuments and well-kept Confederate cemeteries, the above-ground landscape narrates a noble history that generally elides the degradation and cruelties of slavery—parts of the Old South that today are literally buried beneath nondescript infrastructure. The contemporary landscape also conceals the crucial role black labor played in the construction of Richmond's edifice.³⁹ Still, the presence of so many parking lots in such a central location suggests the area is in a transitional state; as economic "redevelopment" progresses, surface parking will likely give way to offices, restaurants, and condominiums. Simultaneously, the push for historic preservation will bring the neighborhood's past into view through archaeological study, historic preservation, and signage. Under a political deal struck between the city, the state, and the university, the Burial Ground parking lot has now been closed and turned over to the Richmond Slave Trail Commission, an arm of the City Council. Plans are underway to memorialize the Burial Ground, a development that will be discussed later in this article.

Katherine Walker, in a fascinating analysis of Richmond's subterranean landscape, including the Burial Ground, paints a picture of the underground as a sort of local unconscious storing the city's painful racial past, out of which dark tales (such as vampire legends) occasionally seep to challenge prevailing social hierarchies.⁴⁰ While Braverman's work demonstrates that visibility and concealment are crucial in shaping social hierarchies, Walker reminds us to look for the interplay between the visual and narrative: the semiotics of visual images matter, particularly in an environment of spatialized inequality. The narrative one person reads in the landscape may contrast sharply with that of another who is differently situated in society. The Burial Ground's recent history validates these ideas.

37. Apologies to Elizabeth Abel, *Signs of the Times: The Visual Politics of Jim Crow* (Berkeley, CA: University of California Press, 2010).

38. Braverman, "Hidden in Plain View," p. 175.

39. See generally Richardson, *Built by Blacks*.

40. See Katherine Walker, "Buried in Unremissive Ground: Reading Richmond's Subterranean Signs," *Social Semiotics*, 427 (2009).

In response to protests, the state's Department of Historic Resources ("DHR") conducted a site study, ostensibly to determine whether the cemetery existed and its exact location. Relying on historic map analysis and "informant interviews," a DHR-employed archaeologist concluded that the Burial Ground probably existed, but that it likely lay almost entirely under the highway adjacent to the parking lot.⁴¹ The study's methodology involved georeferencing a later redrawing of the Young map to a 2009 satellite image of the area—a far from precise, but the least expensive, way to pursue the study's objectives.⁴² The DHR report has been thoroughly criticized by Michael L. Blakey, head of the Institute for Historical Biology, and others.⁴³ Among the criticisms are that its author hypothesized without basis that the area of the Burial Ground was limited to the area covered by the words "Burial Ground for Negroes" on the Young map. He therefore drew a close rectangle around the words and georeferenced it to a contemporary satellite image—a method almost certain to produce an underestimate of the Burial Ground's area.

Rejecting the DHR report, some Burial Ground activists maintained that the cemetery lay under most, if not all, of the parking lot. Nevertheless, based on the report, VCU officials decided to close a small section of the lot, approximately 50 by 110 feet (highlighted in Figure 2), that bordered the highway, saying that this piece represented the extent of overlap.⁴⁴ VCU then erected a waist-high, black, wrought iron fence to separate the purported cemetery area from the parking area, and repaved the remaining portion of the lot. For the next year and a half, the university made out well: it retained use of the vast majority of the parking lot while claiming it had taken steps to prevent further desecration of graves.

However, the university's marking of a specific boundary—a boundary that made the cemetery look much smaller than historical evidence would suggest—only intensified debate over where exactly graves lay.⁴⁵ Although perhaps intended as a respectful gesture, the visual effect of the fence defeated that purpose: now consisting of faded, chipped

41. Christopher M. Stevenson, *Burial Ground for Negroes, Richmond, Virginia: Validation and Assessment*, Virginia Department of Historic Resources (Richmond, VA: Department of Historic Resources, 2008), pp. 1, 6.

42. The main alternatives to Stevenson's archival approach would have been archaeological excavation or use of ground-penetrating radar to map the graves. Both would have required resources beyond just the state-employed archaeologist's time and industry standard software necessary for historic map analysis.

43. Michael Blakey and Jeffrey Ruggles, in their reports cited earlier, point out many reasons why Stevenson's hypothesis was unlikely to yield accurate results. Blakey, who headed the excavation of the African Burial Ground in lower Manhattan, submitted his report to the court as part of El-Amin's first lawsuit. My own analysis using industry standard software shows that, even if one were to accept Stevenson's methodology, his georeferencing was imprecise. Moreover, he did not disclose in his report that he was using a redrawn map, not the 1809 original. When I compared his version to the original map, held at the Library of Virginia, it was clear that the Burial Ground label on the redrawn map was not the same size as the one on the 1809 map.

44. *The Grio*, January 6, 2010 [<http://www.thegrio.com/black-history/black-history-1/groups-claim-state-failed-to-protect-va-slave-burial-site.php>].

45. *Media General News Service*, October 11, 2010 [<http://www2.starexponent.com/news/2010/oct/11/activists-continue-fight-over-slave-burial-ground--ar-555705>].

pavement set apart by the fence's dark metal bars, the "cemetery" faintly recalled the slave holding pens and the separate-and-unequal public spaces that used to define the Richmond landscape. Moreover, the pedestrian entrance to the permit-only parking lot retained its "No Trespassing" sign, so visitors had to park elsewhere (not easy in Shockoe Bottom). In the eyes of some, the iron fence amounted to a unilateral move by the university intended only to corral the political problem of the Burial Ground by limiting the physical space it could occupy.

Reluctant to let the university's fence speak for the Burial Ground, some community members installed a painted wooden mural at the site depicting numerous skeletons crammed into open coffins. The image of a metal chain runs across the lower edge of the painting. Prodding viewers' selective memories, which might otherwise obscure the full horror of slavery, the mural brings into view the bodies whose labor had been extracted and whose personalities had been discarded in bondage. The struggle over the Burial Ground continued.

The next section of this article discusses two attempts by a Richmond resident to settle the conflict through lawsuits. The courts, it turned out, were even less receptive than the social or political arenas to claims of Burial Ground descendants.

III. Legal Analysis: The African Burial Ground Lawsuits

1. Law's Respect for the Dead and the Problem of Standing

Property law has ways of showing "solicitude" for the important role the dead continue to play in the lives of their relatives and descendants.⁴⁶ Although no one "owns" the remains of the dead, their relatives have long had "quasi-property" rights, such as the right to decide how to dispose of the remains.⁴⁷ After burial, the law recognizes a right of access that allows descendants to visit their relatives' graves, even if someone else owns the land in which the graves are located.⁴⁸ In Virginia, this right of access is codified with perhaps the most detailed statute of its kind in the country, which contains provisions not just for cemetery plot owners and "family members and descendants" of the interred, but also for "any person engaging in genealogical research."⁴⁹ The common law also recognizes tort

46. Alfred Brophy, "Grave Matters: The Ancient Rites of the Graveyard," *Brigham Young University Law Journal*, 2006 (2006), pp. 1478–99; Clark, "Hallowed Ground," pp. 496–506. Clark uses the term "solicitude" to refer to the exceptions to property law that protect descendants' rights to access and protect their ancestors' graves.

47. 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," *Rutgers Law Review*, 58 (2005), pp. 48–50.

48. Brophy, "Grave Matters," pp. 1480, 1490–91 (describing key steps required to establish a right of access to a cemetery on another person's private property: initial landowner's consent for the burial to take place, also called "dedication"; determination that the graves have not been abandoned; and some connection between the person seeking access and the interred).

49. Va. Code Ann. § 57-27.1; cf. W. Va. Code § 37-13A-1 (conferring the right of access on "close friends" of the interred, in addition to the people specified in Virginia's statute); Brophy, "Grave Matters," pp. 1482–3.

claims by descendants for desecration of family members' and ancestors' graves and, under some circumstances, courts will enjoin development of land if such development would disturb graves.⁵⁰ Through these abridgements of normal property rights, the law intervenes in the real property market to protect individuals' access to "their" dead, preserving the continuity of family histories and helping to cultivate individuals' senses of social and geographic rootedness.

But the law does not intervene equally on everyone's behalf. Mary L. Clark has observed that the law treats burial sites associated with white and non-white people differently, with the latter receiving less solicitude. Her study includes a handful of cases involving slavery-era African American burial sites in which plaintiffs were unsuccessful, for various legal reasons, in preventing development or commercialization of the land.⁵¹ Clark's research, which draws on critical race theory, provides a suggestive context for the two African Burial Ground lawsuits I discuss below.

In 2010, Sa'ad El-Amin, a former Richmond City Councilman and a claimed "likely" descendant of slaves interred in the Burial Ground, filed two lawsuits in state court seeking to stop what he alleged was desecration of his ancestors' graves: parking on top of the Burial Ground.⁵² The first lawsuit was a petition for a writ of mandamus filed in February 2010 against Kathleen Kilpatrick, Director of the state's Department of Historic Resources, asking the court to compel Kilpatrick to protect the Burial Ground. *El-Amin v. Kilpatrick* was dismissed on October 19, 2010 when the court found the stringent requirements for mandamus were not met; the court skirted the issue of standing that also arose.⁵³ The second, filed in September 2010, was a demand for declaratory and injunctive relief directed at VCU and its president, Michael Rao. *El-Amin v. VCU* was dismissed on March 24, 2011 due to lack of standing.⁵⁴

These lawsuits demonstrate that individuals who cannot prove biological descent from those interred in slavery-era African American cemeteries can be denied the ability to sue for injunctive or other relief from desecration of the graves. For many African Americans, circumstances arising from slavery have obscured family histories: for example, separation of slave families through sale; laws that prevented recognition of slaves' patrilineal descent; and the mass migrations that followed Emancipation. (It should be noted that many white Americans also have gaps in their family histories because of slavery; just ask the descendants of Thomas Jefferson.) As a result, it is not

50. Clark, "Hallowed Ground," p. 497.

51. *Op. cit.*, p. 516. The cited cases included, among others, a Virginia Supreme Court case, *Dove v. May*, 201 Va. 761 (1960), in which the plaintiff was unsuccessful in preventing the removal of an old family cemetery that contained remains of "an unknown number of slaves" in addition to recognized family members. The Court enforced an order allowing a highway to be built over the site.

52. El-Amin filed a third lawsuit in February 2011 that concerns several historic sites including the Burial Ground, *El-Amin v. Virginia Commonwealth University et al.*, No. CL11-663-1 (Va. Cir. Ct. 2011). However, since the Burial Ground is a relatively minor part of the claims, I will discuss only the first two lawsuits, which concern only the Burial Ground.

53. See *El-Amin v. Kilpatrick*.

54. See *El-Amin v. VCU*.

uncommon for a descendant of slaves today to identify with slave “ancestors” through shared history and cultural heritage, rather than through documentable biological descent. Although legislative measures have been taken to protect unidentified Native American graves, such measures do not cover African American graves, leaving many slave cemeteries without legal protection from desecration.⁵⁵ Moreover, because access to the cemetery was not at issue in either of El-Amin’s lawsuits, Virginia’s grave access statute, which extends to certain non-relatives, did not apply. El-Amin’s two lawsuits targeted different respondents, employed different legal strategies, and were decided on different grounds. However, the issue at the heart of both cases was the legitimacy of the plaintiff’s claim to ancestry, upon which his assertion of legal standing depended.

Mandamus at first appears an unusual choice of strategy in the first lawsuit, since it is a legal mechanism rarely seen outside of certain administrative law contexts. A writ of mandamus is a court order directing a government official to perform a mandatory, purely ministerial task that he or she has failed to perform; it is “an extraordinary remedy” that will not lie if the task in question is discretionary.⁵⁶ El-Amin’s mandamus petition asked the court to order the DHR Director to employ archaeological methods to find the Burial Ground’s exact boundaries so that the site could be properly preserved, which he alleged was Director Kilpatrick’s duty under Virginia Code § 10.1-2301.⁵⁷ That statute sets forth duties for the Director with respect to historic sites and objects on state-controlled land: she is required to “[i]dentify, evaluate, preserve and protect sites and objects of antiquity which have historic, scientific, archaeological or educational value”; “[p]rotect [such sites] from neglect, desecration, damage and destruction”; and “[e]nsure that [such sites] are identified, evaluated and properly explored so that adequate records may be made.”⁵⁸ Director Kilpatrick, represented by Assistant Attorney General Paul Kugelman, Jr., made two legal arguments in response to the complaint: first, that El-Amin had no standing to pursue the suit; and second, that the Director’s statutory duties with regard to the Burial Ground were discretionary, not ministerial, in nature.⁵⁹ Finding that the Director’s duties were indeed discretionary, the court denied the petition. The issue

55. See Steve Russell, “Sacred Ground: Unmarked Graves Protection in Texas Law,” *Texas Journal on Civil Liberties and Civil Rights*, 4 (1998). Along similar lines to Clark’s article, Russell has shown that the Native American Graves Protection and Repatriation Act of 1990 (“NAGPRA”), which was passed with the intention of curtailing widespread desecration of old Native American graves, has had some success but nevertheless still reflects the subjugation of Native Americans that led to the problem in the first place.

56. See, e.g., *Moreau v. Fuller*, 661 S.E.2d 841, 846 (Va. 2008). Mandamus petitions are commonly seen, for example, in immigration cases where US Immigration and Customs Enforcement has failed to acknowledge or respond to a filing by a statutorily mandated deadline; since the response time is mandatory and purely ministerial in nature, mandamus may be used to compel the agency to respond in some way. Mandamus will not, however, compel the agency to respond in any particular way, since the substantive response is within the agency’s discretion.

57. Amended Petition for Writ of Mandamus at 6, *El-Amin v. Kilpatrick*.

58. Va. Code Ann. § 10.1-2301.

59. Demurrer and Motion to Dismiss, *El-Amin v. Kilpatrick*.

of standing, though skirted by the court in its decision, played a prominent role in oral argument and in the pleadings, which I discuss below, and also returned to haunt the second case.

In the second case, filed shortly before the first was dismissed, El-Amin alleged that he had suffered “unquantifiable” injury from the desecration of the graves, that his and others’ efforts to convince VCU to cease parking cars on the Burial Ground had “proven futile,” and that he “likely has ancestors interred in the Burial Ground, which gives him a declared, cognizable interest” in protecting the Burial Ground from desecration.⁶⁰ El-Amin asked the court to declare that parking on the VCU lot constituted “damage, destruction and desecration of a historic site,” and to order the defendants to cease parking cars on the lot and remove the asphalt. Although VCU and Rao, represented by the same Assistant Attorney General as Kilpatrick, made several arguments—that there was no legal controversy because El-Amin had no right in the Burial Ground; that El-Amin had no standing; that the claim was barred by laches; and that the university and Rao were protected by sovereign immunity—the lawsuit boiled down to the question of standing.⁶¹ In their Motion to Dismiss, VCU and Rao argued that since El-Amin “cannot claim that his ancestors are buried within the Burial Ground, much less that they are buried within the boundaries of the parking lot in question, this allegation is too attenuated to give rise to a substantial legal right.”⁶² El-Amin argued he had standing either through collateral estoppel, since the prior case, *El-Amin v. Kilpatrick*, had been allowed to proceed; or because his alleged “likely” ancestry was sufficient to establish his personal interest.

While the court stated that it was aware of the “unique legal difficulties associated with slave burial grounds,” it nevertheless rejected both of El-Amin’s arguments.⁶³ The court first determined that standing was a preliminary jurisdictional issue that could not be collaterally estopped.⁶⁴ As to the second argument, the court gingerly parsed its words, stating that although El-Amin’s “interest in this action is assuredly ‘personal’ in a subjective sense . . . Petitioner does not show ‘a personal stake in the outcome of the controversy as to assure that concrete adverseness’” required under Virginia law, citing *Cupp v. Board of Supervisors*, 227 Va. 580 (Va. 1984).⁶⁵ The court writes further that standing requires only “‘an identifiable trifle’ of legal interest . . . but Petitioner’s alleged legal interest is not sufficient even under the *Crutchfield* standard,” citing *State Water Control Bd. v. Crutchfield*, 265 Va. 416 (Va. 2003).⁶⁶

60. Pet.’s Complaint 5-7.

61. Whether or not a plaintiff has standing to sue in state court is a question of state law, insofar as state courts may confer standing where federal courts might not. See *Tileston v. Ullman*, 318 U.S. 44 (1943) (holding that a Connecticut doctor who had challenged in state court a law against contraceptives had no standing in federal court to appeal the trial court’s decision). In Virginia, the law of standing consists of a hodge-podge of generalized pronouncements, some based on Article III standing requirements and some seemingly idiosyncratic.

62. Resp.’s Mot. Dismiss 3 (citations omitted).

63. *El-Amin v. VCU* at 4.

64. Op. cit., p. 3.

65. Op. cit., p. 4.

66. Op. cit.

Thus, after conceding that El-Amin “assuredly” had a personal interest—echoing the *Cupp* standard’s language of assurance—the court called that personal interest “subjective” and then determined it was “precisely ‘unidentifiable’” under *Crutchfield*.⁶⁷ However, the court specified no criteria for establishing an objective personal interest (as opposed to a subjective one), if such a distinction exists.⁶⁸ Instead, it chose a very narrow reading of the case law that was neither necessary nor equitable under the circumstances. If El-Amin’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.

2. The Discourse of Legitimacy

El-Amin, a lively rhetorician, restated his claim to reporters while standing on the steps of the courthouse in Richmond: “Get your *ass-phalt* off my ancestors!”⁶⁹ His *double entendre*, which might have earned him a fine for contempt inside the courtroom, highlighted the fact that a political conversation on race weaves through the legal one. In pleadings and oral arguments, the question of legal standing seemed at times a proxy for a different, but related, question: should “subjective” complaints of racial harm be taken seriously anywhere?

The two lawsuits should be read as part of a larger societal conversation on race and legitimacy—that is, on who may speak credibly about racial harm and whose personal interests the law will recognize and protect. El-Amin’s own legitimacy was tested in multiple senses. The state repeatedly emphasized both the uncertainty of the plaintiff’s origins and his lack of a law license, calling to mind El-Amin’s spotty reputation in the Richmond legal community. El-Amin’s law license was suspended in 1999 after clients complained of ethical violations, and he surrendered his license in 2002 while still under investigation.⁷⁰ In 2003, he was convicted of tax fraud conspiracy and went to federal prison until 2006, when he was released on probation.⁷¹ El-Amin is seen by many as a divisive figure in Richmond politics, known for speaking out about what he sees as local examples of racial injustice.⁷² In one pleading in *Kilpatrick*, Kugelman

67. Op. cit.

68. El-Amin filed a Notice of Appeal on May 2, 2011 in order to appeal *El-Amin v. VCU* to the Supreme Court of Virginia; however, given subsequent out-of-court developments in the case, it is unclear if the appeal would still address a live controversy. If heard, it could be the first appellate case in the country to address the issue of whether descendants of slaves who are unable to prove ancestry have standing to protect slave cemeteries.

69. *Style Weekly*, September 29, 2010 [<http://www.styleweekly.com/richmond/el-amin-vcu-odesecrating-ancestors/Content?oid=1379058>].

70. *Style Weekly*, July 21, 2010 [<http://www.styleweekly.com/richmond/satadts-return/Content?oid=1364780>].

71. Op. cit.

72. Op. cit.; see also *Richmond Times-Dispatch*, June 16, 2009, [http://www2.timesdispatch.com/news/2009/jun/16/ball16_20090615-220803-ar-40098]; Sa’ad El-Amin, “El-Amin’s Letter to Richmond Council on Harvey Memorial Bridge,” no date [<http://www.wtvr.com/news/wtvr-saad-elamin-letter-to-richmond-01042011,0,7260778.story>]; marfdrat, “Sa’ad El-Amin is a Race-Baiting Asshat of the First Order,” January 5, 2011 [<http://www.marfdrat.net/2011/01/05/saad-el-amin-is-a-race-baiting-asshat-of-the-first-order>]

stated in a footnote that El-Amin was “born in New York City, attended college in California and holds masters’ and law degrees from Yale University,” and that he moved to Richmond in 1969, seeming to suggest that because El-Amin was not native to Richmond, he could not have descended from anyone buried in Shockoe Bottom.⁷³ (Because Shockoe Bottom was a slave trading hub, the Burial Ground’s interred almost certainly have descendants all over the country.) Since details about El-Amin’s origins and *pro se* status were irrelevant to his legal standing or ability to file suit on his own behalf, their inclusion suggests an effort to discredit El-Amin politically, rather than to advance a legal argument.

El-Amin’s inability to assert definite ancestry was debated at hearings for both lawsuits, with El-Amin both times attempting to give the court a history lesson on slavery. At the October 13, 2010 hearing for *Kilpatrick*, he stated,

[D]uring the period of the enslavement of African people in America, we had the status of chattel property, so we were like horses or chickens. Now . . . when a chicken is born, there’s no birth certificate for the chicken. And when the chicken dies and goes to Kentucky Fried, there is no death certificate. So where are the remains of the chicken? No one can tell.

. . . [W]e know there are people out there [in the Burial Ground], but who is out there? How do you prove who is out there? The only way you could prove it is for me to go find somebody that’s 200 years old and say, oh, yeah, Papa is up in there. That’s impossible.⁷⁴

Conceding that he could not “prove” his blood kinship to anyone interred in the Burial Ground, El-Amin points out the impossibility of *anyone else* doing so, either. In the process, he exposes a structural inequality in the law. Because slaves were considered chattel property, many were born and died without official notice; black cemeteries of the era were not required to keep records, either. As a result, few records have survived to document slaves’ lives and relationships, making ancestry more difficult to prove for people who descended from slaves than for those who did not.

On a symbolic level, mandamus was not an inappropriate route for El-Amin to take. Mandamus is, after all, a mechanism for making representative government do what it is supposed to for constituents. Unable to formulate a legally cognizable individual interest in the Burial Ground, El-Amin sought to compel the state to take action on his behalf. But DHR had apparently rejected the notion that the Burial Ground was part of Virginia’s collective history and therefore within its sphere of responsibility. The Assistant Attorney General made this attitude clear at one of the hearings:

[T]here is no question that this is an important historical site; there is no question that the site should be properly protected and preserved. . . . But this [mandamus petition] is not the vehicle by which this descendant community can force the Virginia government to come in and pay for the excavation and take care of this.⁷⁵

73. Resp.’s Reply to Pet.’s Resp. to Mot. Dismiss 2.

74. Hr’g Tr. 18, Oct. 13, 2010.

75. Op. cit., p. 7.

After paying lip service to the Burial Ground's importance, Kugelman sets "this descendant community" in opposition to "the Virginia government," disregarding the fact that this descendant community pays taxes and lives in Virginia. The Burial Ground is depicted as a sort of special interest concerning only African Americans, who are painted as interlopers seeking money from *real* Virginians, not contributing members of the Commonwealth themselves.

3. Whose Money, Whose Problems?

The implicit racial narratives that appeared in the Burial Ground lawsuits are deeply familiar, drawing on prevalent myths about race and resource distribution. These myths have a long history. Patricia J. Williams has written that after the Civil War, slaves were simultaneously "unowned"—not emancipated—and "disowned":

they were thrust out of the market and into a nowhere land that was not quite the mainstream labor market, and very much outside the marketplace of rights. They were placed beyond the bounds of valuation [T]hey became like all those who cannot express themselves in the language of power and assertion and staked claims⁷⁶

The "nowhere land" of the unowned was a position from which there could be no legitimate participation in the mainstream market or political process—even though black labor *in fact* continued to sustain both economy and government, often through new forms of slavery.⁷⁷ Having no property, the unowned were also understood to have no legal interests, or "staked claims." And having no claims, Williams writes, they were "consign[ed] to some collective public state of mind, known alternatively as 'menace' or 'burden'" ⁷⁸ Unspoken narratives that depict African Americans as menace or as burden are never far beneath the surface of today's racial politics; public and political discourse are laced with insinuations of, for instance, black criminality and welfare reliance.

Along with unowning, disowning was a crucial legal and historical dynamic during and after slavery. Patrilineal inheritance was the central rule of property transmission for whites, but the law recognized only matrilineal descent for slaves. As a result, the many who were born of slave mothers and white fathers were consigned to slave status and could not inherit property even if freed, though they increased the white family's wealth through their labor or sale. Adrienne Davis has incisively analyzed the "sexual economy" of slave reproduction, demonstrating that rape of slave women by white men, along with forced "breeding" of slaves, was not just a deplorable practice by some bad apple slave

76. Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991), p. 21. Thanks to Marlon Ross and K. Ian Grandison for pointing me to Williams' essay.

77. For an intricately researched history of black labor after Emancipation, see Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Doubleday, 2008).

78. Williams, *Race and Rights*, p. 22.

owners; it was actually central to sustaining the slave-based society, which could not otherwise grow its captive labor force quickly enough to meet demand.⁷⁹ This sexual economy was supported by a legal apparatus that systematically reserved all wealth to slave owners' white descendants, making it likely that many generations of disinheritance have helped produce today's distribution of wealth.

Williams' and Davis' analyses of property and race help explain why El-Amin has been portrayed in certain ways both in and out of the courtroom. Mark Holmberg, a television reporter with Richmond CBS affiliate WVTR, has been one of El-Amin's most vocal critics, providing occasional commentary on the local evening news. Holmberg, who is white, projects a rugged, "Everyman" image, often wearing jeans and sporting a blond ponytail. In September 2010, shortly after El-Amin filed his second lawsuit, WVTR aired a segment in which Holmberg declares his skepticism of the Burial Ground's existence. He questions not the evidence but El-Amin's motives⁸⁰:

So what is Sa'ad El-Amin trying to achieve here? When he got here, he was Jeroyd X. Green. He was in the thick of every racial controversy, fanning the flames. . . . But when it comes to taking care of his people, the living, he failed. He was jailed for not paying alimony and child support.⁸¹

Holmberg then recounts the familiar list of El-Amin's past legal troubles, ending with, "And now he's back trying to reinsert himself as a political player." Although he attacks El-Amin for excessively racializing local issues, Holmberg himself is making a career of stoking *ressentiment*⁸² among whites who are predisposed to doubt claims of racism made by blacks, but who readily accept the mantle of white victimhood. Holmberg oscillates between the burden and menace narratives. In the online article that accompanies the video, he reprints in its entirety the column he wrote in 2003 when El-Amin was headed to prison. It begins, "No doubt many of you are thinking 'Free at last!'," comparing El-Amin's presence on the City Council to a kind of enslavement for his constituents.⁸³ Later in the column, Holmberg refers to El-Amin as a "black tornado" with a Yale law degree—someone who destroys his valuable assets rather than converting them to wealth or social capital.

Perhaps even more telling is Holmberg's commentary on the Richmond Slave Trail markers that were unveiled in April 2011. He specifically attacks the markers' cost, reported to total \$220,000 for seventeen porcelain-coated informational signs designed to withstand

79. Adrienne Davis, "'Don't Let Nobody Bother Yo' Principle': The Sexual Economy of American Slavery," in Sharon Harley & The Black Women and Work Collective, *Sister Circle: Black Women and Work* (New Brunswick, NJ: Rutgers University Press, 2002), pp. 103–27.

80. WVTR, "Mark on VCU Parking Lot Controversy" [television broadcast], September 29, 2010 [<http://www.wtvr.com/news/wtvr-mark-vcu-parking-lot-092810,0,5927002.story>].

81. Op. cit. El-Amin's former middle initial was not X but W; the slipped X seems a disparaging reference to the radical politics of Malcolm X.

82. The term is borrowed from Lawrie Balfour, "Reparations After Identity Politics," *Political Theory*, 33 (2005), 793–4.

83. WVTR, "Parking Lot Controversy."

the elements.⁸⁴ In the video, Holmberg asks a black female passerby what she thinks one of the signs cost; she guesses \$200 and he tells her \$13,000. The commentary proceeds to point out small flaws with the signs, which he acknowledges are temporary draft signs, installed while the permanent ones were being prepared. One sign has a misplaced nail; another has a spelling error. By choosing a black woman to express a common person's view that the signs cost too much, he preemptively denies racial bias. Nevertheless, the flaws he highlights are chosen to evoke deeply rooted racial stereotypes, suggesting that those responsible for the signs are incompetent, even illiterate, and wasteful spenders.

The Burial Ground debate was most contentious when it approached questions of what is "owed" to the black community in Richmond and who owes it. It was, in this regard, enmeshed in the much larger, multifaceted debate about reparations for slavery and Jim Crow, which I explore in the concluding section.

IV. Conclusion: Paying Respects

In recent years, much of the academic reparations discussion has moved beyond reparations in a conventional sense—monetary compensation to an individual or group achieved through litigation or legislation—toward the more diffuse work of memorialization, restorative justice, apology, and community development, types of measures that are usually outside the competency of the courtroom.⁸⁵ Some of these newer lines of inquiry overlap with the burgeoning international human rights discourse surrounding reparations for war crimes and other mass atrocities. But the shift also reflects an acknowledgment by some scholars and activists that public support for monetary reparations is low, that lawsuits are unlikely to succeed, and that future reparations victories will more likely take the form of settlements and limited legislative deals.⁸⁶ Even as our understanding of *forms* of reparations broadens, however, the debate in the United States remains—and should remain—fundamentally connected to questions of resource distribution; they are, in that way, distinct from more general debates over public memory or historical truth.

84. WVTR, "Mark on Slave Trail Markers" [television broadcast], April 14, 2011 [<http://www.wtvr.com/wtvr-slave-trail-bought-by-city-of-richmond-20110413,0,3094068.story>]. The accompanying online article is titled "Is \$220,000 Too Much to Pay for 17 Slave Trail Markers?"

85. For a good history and analysis of African American reparations lawsuits, see Alfred L. Brophy, *Reparations Pro & Con* (New York: Oxford University Press, 2006), pp. 117–40. On the need for remedies outside of the litigation model, see, e.g., Balfour, *Democracy's Reconstruction*, pp. 23–46; Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley, CA: University of California Press, 2006); Balfour, "Reparations After Identity Politics"; Alfred L. Brophy, "Reconsidering Reparations," *Indiana Law Journal*, 81 (2006); Kaimipono David Wenger, "'Too Big To Remedy?' Rethinking Mass Restitution for Slavery and Jim Crow," *Loyola of Los Angeles Law Review*, 44 (2010). Additionally, Kaimipono David Wenger provides a helpful "intellectual history" of African American reparations in his article "From Radical to Practical (And Back Again?): Reparations, Rhetoric, and Revolution," *Journal of Civil Rights and Economic Development*, 25 (2011).

86. Wenger, "From Radical to Practical," pp. 697, 717.

The struggle over Richmond's African Burial Ground is one of many instances in which local communities have had to reckon in concrete ways with a racist past that some would rather forget. It presents as a question of land use, but it represents a struggle for equal rights more broadly writ—rights to property, to democratic participation, to respect and dignity, and to some portion of collective resources. Don Mitchell has written of locational conflict that “[r]ights have to be exercised *somewhere*, and sometimes that ‘where’ has itself to be actively produced by taking, by wresting, some space and transforming both its meaning and its use—by *producing* a space in which rights can exist and be exercised.”⁸⁷ In the case of the Burial Ground, dedication of space to the memory of the buried slaves will give the community a place to go to pay their respects, help educate visitors about Richmond history, and visibly signal the community's willingness to face at least this small piece of the past.

The Burial Ground's potential as a vehicle of reparation, however, is only beginning to emerge. It came as a surprise to many when Governor McDonnell, just months after his Confederate History Month controversy, stepped in to broker a legislative solution to the Burial Ground conflict. In late December 2010, a budget amendment was proposed in which the Commonwealth of Virginia would reimburse VCU \$3.3 million, the amount the school had paid in 2008 for the parking lot, and the land would be transferred to the Richmond Slave Trail Commission to be turned into a memorial.⁸⁸ El-Amin himself predicted the measure would fail: “given the state of the economy in Virginia, I can't see any Republican signing up to spend \$3 million to buy an African burial ground,” he told WVTR.⁸⁹ Nevertheless, the measure passed and the land was transferred. The parking lot closed on May 21, 2011, and three days later was handed over to the Slave Trail Commission in a televised ceremony. Five local contractors volunteered their services and removed the asphalt shortly thereafter.⁹⁰

The handover of the parking lot did not occur seamlessly and was nearly two decades—or, arguably, two centuries—in coming. In April 2011, some community members, frustrated with the fact that cars were still being parked on the Burial Ground despite passage of the legislative measure, staged a protest that shut down the lot for an hour. Four people were arrested, though their charges were withdrawn at a hearing on May 25, the day after the parking lot handover.⁹¹ At the May 24 ceremony, Sa'ad El-Amin and King Salim Khalfani, head of the Virginia National Association for the Advancement of Colored People, were present but stood to the side holding protest signs; both made comments to the media indicating their dissatisfaction that figures who they felt had long obstructed the site's proper treatment were now taking credit for the memorial plan.⁹² Still, the future appears somewhat hopeful for the Richmond Slave Trail sites. Today, the

87. Mitchell, *Right to the City*, p. 81.

88. WVTR, December 23, 2010 [<http://www.wtvr.com/news/wtvr-mixed-reaction-to-governors-pl-122310,0,4807293.story>].

89. Op. cit.

90. *The Final Call*, June 21, 2011 [http://www.finalcall.com/artman/publish/National_News_2/article_7912.shtml].

91. *Workers World*, June 11, 2011 [http://www.workers.org/2011/us/african_burial_ground_0616].

92. *The Final Call*, June 21, 2011.

Burial Ground is a field of grass awaiting improvements to be funded by a \$1 million appropriation in the 2012 transportation budget.⁹³ It seemed likely that many Richmond residents (perhaps Virginians generally, given the media coverage) would be unhappy with the plan, which so far is set to cost \$4.3 million of state money; but if they are, they have been quiet about it.

The story of the Burial Ground is not over: the location's meaning and visual politics continue to evolve along with the rest of the Shockoe Bottom landscape. No one can tell how long the Burial Ground memorial, once completed, will remain in place. Nevertheless, a few observations can be made about the conflict as it has unfolded to date. The lawsuits filed over the Burial Ground demonstrated the law's failure to recognize some continuing harms that are rooted in slavery. Many generations ago, slave owners, abetted by the law, systematically dismantled African American families as a strategy of subjugation; today, the law's inability to assimilate that truth manifests in a controversy over a descendant's "standing" to protect the graves of his possible ancestors. Sa'ad El-Amin's illegitimacy before the law cannot be separated from the other forms of illegitimacy imposed upon African Americans under slavery—illegitimacy of birth, political participation, and property ownership, to name a few.

However, while the legal failure foreclosed one avenue of redress, publicity and political pressure from the lawsuits may have contributed to the development of another. By (at least appearing to) admit the story of the Burial Ground into Richmond's collective history, by giving it a place in the landscape, the political arena made "space" for a social possibility that had long been circumscribed: a public paying of respects to the Burial Ground's interred and to the many who descended from them, whether through blood or through collective memory. A memorial will help ensure that the history of slavery remains "visible," and therefore remembered, in the city. In doing so, it may spur some progress toward acknowledging and accepting the past, and perhaps toward a better future. The lawsuits, though legal failures, played a role in the drama of social legitimation that surrounded the Burial Ground's reclamation.

It is important, however, that the reclamation was made easier—and quite likely made possible—by circumstances having little to do with racial reconciliation. These included Governor McDonnell's Confederate History Month misstep, which might have marred his political profile enough to inspire some performance of cross-racial empathy (important for possible entry into national politics down the road). Additionally, the Burial Ground, as part of the Richmond Slave Trail, furthered the city's interest in cultivating heritage tourism as a strategy for economic growth. Thus, although a memorial could not have come about without years of work by dedicated activists, and perhaps would not have occurred without the attention El-Amin's lawsuits brought to the case, such pressure does not fully explain the "victory." In the end, the deal happened when it did not because Virginia legislators became convinced by arguments for memorialization, but because memorialization finally suited the interests of those in power.

93. *Richmond Times-Dispatch*, June 25, 2011 [<http://www2.timesdispatch.com/news/2011/jun/25/tdmet01-burial-ground-site-lands-1-million-for-imp-ar-1132161>]. Aquam, si albus,

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